

**STATE CONSTITUTIONAL LAW—DUE PROCESS—FLORIDA
SUPREME COURT PROTECTS WORKERS’ COMPENSATION
CLAIMANTS BY STRIKING DOWN THE LEGISLATURE’S
RESTRICTIVE ATTORNEY’S FEE SCHEDULE. *CASTELLANOS
V. NEXT DOOR CO.*, 192 So. 3D 431
(FLA. 2016).**

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I. INTRODUCTION

An April 2016 Florida Supreme Court decision emphatically stands as a bulwark against the rising tide of state legislatures seeking to chip away at claimants’ rights under workers’ compensation statutes. In *Castellanos v. Next Door Co.*,¹ the court held that the mandatory fee

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schedule governing the award of attorney's fees to successful workers' compensation claimants was unconstitutional under both the Florida and the U.S. Constitutions as a violation of due process. The court determined that a state statute² created a conclusive, irrebuttable presumption against consideration of whether an attorney's fee award is reasonable because the formulaic, restrictive fee schedule did not always yield an adequate result.³ As evidence, the court cited to the patently unreasonable attorney's fee awarded in this case. Since every injured worker is statutorily precluded from challenging his or her attorney's fee award, the majority held that the conclusive, irrebuttable presumption was facially unconstitutional as a violation of due process.⁴

This Comment will first present the pertinent facts of *Castellanos*, and then provide a history of how attorney's fees have been awarded in workers' compensation claims under Florida law. Next, it will thoroughly examine the court's reasoning, including the majority opinion as well as a concurrence and two dissenting opinions. Then it will discuss how this case fits in with the larger, ongoing effort by other state legislatures to erode the Grand Bargain and workers' compensation benefits—otherwise known as the “race to the bottom.”⁵

II. STATEMENT OF THE CASE

In 2009, the petitioner, Marvin Castellanos, was injured while operating a piece of machinery for the respondent, the Next Door Company (“Next Door”). Next Door manufactures metal doors and door frames and is located in Miami, Florida.⁶ Next Door directed Castellanos to the Physician's Health Clinic in Hialeah, Florida, where he received medical treatment for his injuries.⁷ This particular clinic is designated by Next Door's workers' compensation insurance carrier, Amerisure Insurance Company, to provide medical diagnoses to Next Door's employees.⁸ The clinic subsequently diagnosed Castellanos “with multiple contusions to his head, neck, and right shoulder.”⁹ As such, the

wife Meriah, and our three Shakespearean muses—Miranda, Cordelia, and Rosalind—all of whom made publication of this Comment possible.

1. 192 So. 3d 431, 449 (Fla. 2016).

2. FLA. STAT. § 440.34 (2018).

3. *Castellanos*, 192 So. 3d at 432.

4. *Id.*

5. Robert F. Williams, *Can State Constitutions Block the Workers' Compensation Race to the Bottom?*, 69 RUTGERS U. L. REV. 1081, 1082 (2017).

6. *Castellanos*, 192 So. 3d at 435.

7. *Id.*

8. *Id.*

9. *Id.*

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attending doctor “requested authorization of medically necessary treatment, including x-rays, medications, and physical therapy.”¹⁰ But both Next Door and Amerisure, as Castellanos’s employer and Next Door’s insurance carrier respectively (collectively, the “E/C”), refused to authorize the doctor’s recommendations.¹¹

As a result of the E/C’s refusal, Castellanos filed a petition for benefits with the Office of the Judges of Compensation Claims (“OJCC”),¹² “seeking a compensability determination for temporary total or partial disability benefits, along with costs and attorney’s fees.”¹³ The E/C responded to the petition by denying the claim, essentially arguing that Castellanos knowingly and intentionally engaged in a fraudulent act by reporting his injuries for the purpose of securing workers’ compensation benefits.¹⁴ Both parties filed a stipulation prior to the final hearing, in which the E/C raised twelve defenses.¹⁵ At the final hearing before the judge of compensation claims (“JCC”), “numerous depositions, exhibits, and live testimony were submitted for consideration.”¹⁶ The JCC determined that Castellanos should have been compensated by the E/C for his injuries and as a result was “entitled to recover his attorney’s fees and costs from the E/C.”¹⁷ In his Final Compensation Order, “[t]he JCC explicitly found that Castellanos’ attorney was successful in securing compensability and defeating all of the E/C’s defenses, and retained jurisdiction to determine the amount of the attorney’s fee award.”¹⁸

10. *Id.*

11. *Id.*

12. *Id.* Florida’s OJCC “is responsible for the mediation and adjudication of disputes over workers’ compensation benefits.” Its mission is to decide, efficiently and impartially, disputes in which the E/C has refused to provide benefits to an injured worker. *Represent Yourself*, OFFICE OF JUDGES OF COMP. CLAIMS, <https://www.jcc.state.fl.us/JCC/RepresentYourself.asp> (last visited Feb. 19, 2018).

13. *Castellanos*, 192 So. 3d at 435.

14. *Id.* The E/C’s denial of the claim was based on sections 440.09 and 440.105 of Florida’s workers’ compensation statutes. *Id.* “An employee shall not be entitled to compensation or benefits under this chapter if any judge of compensation claims . . . determines that the employee has knowingly or intentionally engaged in any of the acts described in s. 440.105 . . . for the purpose of securing workers’ compensation benefits.” FLA. STAT. § 440.09(4)(a) (2017). The denial of the claim specifically cited section 440.105(4)(b)(9), which states that “[i]t shall be unlawful for any employer . . . [t]o knowingly present . . . any false, fraudulent, or misleading oral or written statement to any person . . . for the purpose of . . . supporting a claim for workers’ compensation benefits.” FLA. STAT. § 440.105(4)(b)(9) (2017).

15. *Castellanos*, 192 So. 3d at 435.

16. *Id.*

17. *Id.*

18. *Id.*

Shortly thereafter, Castellanos, as the successful claimant, filed a motion with the JCC for attorney's fees, requesting an hourly rate of \$350 for his attorney's services.¹⁹ Section 440.34, however, restricted an award of attorney's fees to a mandatory schedule that is "calculated in conformance with the amount of the benefits obtained"²⁰:

Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first \$5,000 of the amount of the benefits secured, 15 percent of the next \$5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years. The judge of compensation claims *shall not* approve a compensation order . . . which provides for an attorney's fee in excess of the amount permitted by this section.²¹

Notably, in 2009—just seven years prior to the Florida Supreme Court's review of Castellanos's claim—the Legislature amended section 440.34 by striking the longstanding requirement that the attorney's fee be reasonable.²² As a result, when the JCC applied the mandatory fee schedule to the amount of Castellanos's secured benefits of \$822.70, it limited his attorney's fee award to \$164.54.²³ This result left Castellanos's attorney, who claimed 107.2 hours of billable time,²⁴ with an unreasonably low statutory fee of only \$1.53 per hour.²⁵

Even though one of Castellanos's expert witnesses testified that there was "no way on this planet" that the injured worker could have prevailed "without the skilled and tenacious representation' of an attorney"

19. *Id.*

20. *Id.* at 435–36.

21. FLA. STAT. § 440.34(1) (2016) (emphasis added), *declared unconstitutional* by *Castellanos v. Next Door Co.*, 192 So. 3d 431 (Fla. 2016).

22. The amended statute leaves no question as to whether an award of attorney's fees is subject to a review of reasonableness: "If any party should prevail in any proceedings before a [JCC] or court, there shall be taxed against the nonprevailing party the reasonable costs of such proceedings, *not to include attorney's fees.*" FLA. STAT. § 440.34(3) (2017) (emphasis added).

23. *Castellanos*, 192 So. 3d at 437.

24. "In support of his motion for attorney's fees . . . Castellanos presented expert testimony from [two local workers' compensation attorneys]." *Id.* at 436. One of these witnesses testified that the 107.2 hours claimed by Castellanos's attorney was "reasonable and necessary and an exceedingly efficient use of time given that this was a very difficult case." *Id.* (internal quotation marks omitted). Even more persuasive was the fact that the E/C's counsel billed a strikingly similar amount of 115.2 hours. *Id.* at 437.

25. *Id.* at 436.

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because of “the onslaught of defenses that were asserted[,]”²⁶ and even though Castellanos argued that an award limited to the statutory fee would be unreasonable, “manifestly unjust,” and an “absurd” result,²⁷ the JCC’s hands were tied by the Legislature’s decision to eliminate the reasonableness requirement from the statute and leave only the mandatory fee schedule.²⁸ As such, the JCC had no choice but to award an attorney’s fee of \$164.54.²⁹ However, in his order, the JCC conceded that “[l]awyers can’t work for \$1.30 [sic] an hour” and noted that the 107.2 hours expended by Castellanos’s “exceptionally skilled, highly respected” attorney were both “reasonable and necessary.”³⁰ But in the end, the JCC lamented that he was powerless as an executive branch official “to address Castellanos’ claim that section 440.34, and the resulting \$1.53 hourly fee, was unconstitutional.”³¹

Castellanos subsequently appealed the JCC’s decision to the First District Court of Appeal of Florida, challenging the constitutionality of section 440.34 on several grounds, among them due process and access to courts.³² The First District, however, confirmed the JCC’s fee award, determining that the statute “required this result” and that the court was “bound by precedent to uphold the award, however inadequate it may be as a practical matter.”³³ Even though the court affirmed the award, it certified to the Florida Supreme Court, “as a question of great public importance[,]” whether the attorney’s fees awarded in the case were “adequate[] and consistent” with the Florida Constitution.³⁴

The Florida Supreme Court granted review to evaluate the constitutionality of the mandatory fee schedule in section 440.34.³⁵ Two specific issues arose from this inquiry: (1) whether the statute’s mandatory fee schedule creates a conclusive irrebuttable presumption;

26. *Id.*

27. *Id.*

28. *Id.* at 437.

29. *Id.*

30. *Id.*

31. *Id.* (“A JCC clearly does not have jurisdiction to declare a state statute unconstitutional or violative of federal law.” (quoting *Ariston v. Allied Bldg. Crafts*, 825 So. 2d 435, 438 (Fla. Dist. Ct. App. 2002)) (internal quotation marks omitted)).

32. *Id.* at 432 n.1. On appeal, Castellanos argued that the statute violates the Florida Constitution’s guaranteed right of access to the courts, separation of powers doctrine, due process, equal protection, the right to contract and speak freely, and the right to be rewarded for industry; he also argued that the statute works an unconstitutional taking of property. *Id.* Ultimately, the Florida Supreme Court decided the constitutional issue on the basis of due process and did not address Castellanos’s other constitutional claims. *Id.*

33. *Castellanos v. Next Door Co./Amerisure Ins.*, 124 So. 3d 392, 393 (Fla. Dist. Ct. App. 2013), *decision quashed sub. nom.* *Castellanos v. Next Door Co.*, 192 So. 3d 431 (Fla. 2016).

34. *Id.* at 394.

35. *Castellanos*, 192 So. 3d at 432–33.

and (2) if so, whether such a presumption is a violation of due process under article I, section 9 of the Florida Constitution, and the Fourteenth Amendment of the U.S. Constitution.³⁶ The majority, consisting of five justices, determined that the statute does create a conclusive irrebuttable presumption because it presumes that an adequate attorney's fee will be awarded in every case by applying the mandatory schedule.³⁷ Citing the "absurdly low amount"³⁸ in this case, the majority noted that "[t]his is clearly not true."³⁹ Since any injured worker is statutorily prohibited from challenging the reasonableness of the fee award in his or her individual case, the majority determined that the presumption is facially unconstitutional under both the Florida Constitution and the U.S. Constitution as a violation of due process.⁴⁰ The two dissenting justices each authored their own opinion, while one member of the majority wrote a concurring opinion.

III. HISTORY OF THE AREA

A. *Introduction*

As an initial matter, it is important to establish the context in which the Florida Supreme Court reviewed Castellanos's challenge to the mandatory fee schedule in section 440.34. It is no accident that the author of the majority opinion, Justice Pariente, provided an extremely detailed, chronological history of the awarding of attorney's fees to successful workers' compensation claimants under Florida law.⁴¹ This history not only demonstrates the interplay between the Legislature and the judiciary with respect to Florida's workers' compensation laws over the past eighty years, but it also serves as a necessary foundation to a complete understanding of this particular case and where it fits in with the larger, ongoing effort by other state legislatures to erode workers' compensation benefits—otherwise known as the "race to the bottom."⁴²

36. *Id.* at 437.

37. *Id.* at 443.

38. *Id.* at 448.

39. *Id.* at 443.

40. *Id.* at 432, 435. Even though the court struck down the mandatory fee schedule on the basis of both the Florida Constitution and the U.S. Constitution, the court's analysis is restricted to Florida's due process provision. This "puzzling" decision leaves open the possibility—albeit a very remote one—that the case could be reviewed and reversed by the U.S. Supreme Court. Williams, *supra* note 5, at 1103 n.109.

41. *See Castellanos*, 192 So. 3d at 437–43.

42. *See generally* U.S. DEP'T OF LABOR, DOES THE WORKERS' COMPENSATION SYSTEM FULFILL ITS OBLIGATIONS TO INJURED WORKERS? 2, 13, <https://www.dol.gov/asp/>

2018] *RESTRICTIVE ATTORNEY'S FEE SCHEDULE* 1041*B. History of Awarding Attorney's Fees Under Florida's Workers' Compensation Law*

When the Florida Legislature initially adopted the “Workmen’s Compensation Act” in 1935, its primary purpose was to be “simple, expeditious, and inexpensive so that the injured employee, his family, or society generally, would be relieved of the economic stress resulting from work-connected injuries, and place the burden on the industry which caused the injury.”⁴³ The original theory underlying the Act was that a claimant could litigate his or her own cause because “relief would be immediately forthcoming” as a substitute for the lost wages of the injured worker.⁴⁴ Under this initial theory, if a claimant needed to retain counsel, he or she would be responsible for paying the attorney’s fee.⁴⁵ But the Legislature was concerned that this would result in the bulk of a successful claimant’s compensation benefit going to his or her attorney rather than staying with the injured worker.⁴⁶ As such, the Legislature granted the JCC oversight of “the amount a claimant paid to his attorney” in order to protect the compensation award.⁴⁷

Six years later, in 1941, it became clear to the Legislature that an injured worker may “need[] the assistance of an attorney to navigate the workers’ compensation system.”⁴⁸ Therefore, it significantly revised the law to require that, in some instances, the E/C should pay the claimant’s reasonable attorney fee separate from the award of compensation benefits:

If the [E/C] shall file notice of controversy . . . or shall decline to pay a claim on or before the 21st day after they have notice of same, or shall otherwise resist unsuccessfully the payment of compensation, and the injured person shall have employed an attorney at law in the successful prosecution of his claim, there shall, in addition to the award for compensation, be awarded [a]

WorkersCompensationSystem/WorkersCompensationSystemReport.pdf (last visited Apr. 17, 2018); see also Williams, *supra* note 5, at 1085–86.

43. Lee Eng’g & Constr. Co. v. Fellows, 209 So. 2d 454, 456 (Fla. 1968) (citing J. J. Murphy & Son, Inc. v. Gibbs, 137 So. 2d 553 (Fla. 1962); Port Everglades Terminal Co. v. Canty, 120 So. 2d 596 (Fla. 1960)).

44. *Id.*

45. Murray v. Mariner Health, 994 So. 2d 1051, 1057 (Fla. 2008).

46. *Id.*

47. *Id.*

48. Castellanos v. Next Door Co., 192 So. 3d 431, 438 (Fla. 2016).

reasonable attorney's fee, to be approved by the [JCC] which may be paid direct to the attorney for the claimant in a lump sum.⁴⁹

Notably, the 1941 amendment reflected a public policy decision on the part of the Legislature that claimants are entitled to and are in need of counsel when any of the conditions enumerated in the statute are satisfied.⁵⁰

Inevitably, the 1941 provision led to numerous disputes regarding the question of reasonableness and what standard the JCC should employ when approving an award of an attorney's fee. In *Florida Silica Sand Co. v. Parker*,⁵¹ the Florida Supreme Court announced that the provisions of Canon 12 of the Rules of Ethics Governing Attorneys⁵² should be used by the JCC as "[a] safe guide [for] fixing the amount of attorney's fees."⁵³ Furthermore, that court recognized the importance of striking a balance between setting fees too low, which would result in a lack of "capable and experienced lawyers [willing] to represent workmen's compensation claimants[,] and setting fees too high, which would adversely reflect on the profession and threaten the cost effectiveness of the entire workers' compensation program."⁵⁴

Eight years after *Florida Silica Sand* was decided, the question of excessive attorney's fees was raised once again in *Lee Engineering & Construction Co. v. Fellows*.⁵⁵ The court in that case explicitly rejected the strict application of a fee schedule tied to the amount of the claimant's benefit award, determining that a mandatory fee schedule could prove to be "helpful" but ultimately would be "unreliable" and "less sensitive to the changing needs of the [workers' compensation] program."⁵⁶ The court remanded the attorney's fee award under its review for a further determination of its reasonableness, holding that the JCC must review

49. *Murray*, 994 So. 2d at 1057–58 (second alteration in original).

50. *Id.* at 1058. In *Ohio Casualty Group v. Parrish*, the Florida Supreme Court articulated the policy considerations behind awarding a reasonable attorney's fee. 350 So. 2d 466, 470 (Fla. 1977). The opinion notes that the reasonable fee feature was designed "to enable an injured employee who ha[d] not received an equitable compensation award to engage competent legal assistance and . . . to penalize a recalcitrant employer." *Id.* "[I]n adding attorney's fees to the injured worker's compensation award, [the E/C is] discourage[d] . . . from unnecessarily resisting claims in an attempt to force a settlement." *Id.* "In addition, if the worker has a meritorious case, an attorney will be inclined to represent him, realizing that a reasonable fee will be paid for his labor . . ." *Id.*

51. 118 So. 2d 2 (Fla. 1960).

52. *Id.* at 4. Canon 12 was the predecessor to what is currently Rule 4-1/5 of the Rules regulating the Florida Bar. *Castellanos*, 192 So. 3d at 439.

53. *Fla. Silica Sand*, 118 So. 2d at 4.

54. *Id.*

55. 209 So. 2d 454, 456 (Fla. 1968).

56. *Id.* at 458.

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the award in light of the factors previously announced in *Florida Silica Sand*.⁵⁷ A full analysis of these reasonable fee factors—which would come to be known as the “*Lee Engineering* factors”—is beyond the scope of this Comment; however, it is important to note that the factors granted the JCC significant discretionary authority in his or her review of the attorney’s fee award.⁵⁸

In 1977, the Legislature overhauled section 440.34 in response to the court’s decision in *Lee Engineering*.⁵⁹ The aforementioned factors were codified into law, and the JCC was now required to follow them when considering an increase or decrease in the fee award.⁶⁰ However, for the first time since the workers’ compensation statutory scheme was enacted in 1935, the Legislature adopted a mandatory fee schedule “to be used as the starting point for determining a reasonable attorney’s fee award for a successful claimant.”⁶¹ As a result of the 1977 amendments, the JCC was first required to apply the statutory formula, and then increase or decrease that amount after considering the *Lee Engineering* factors in order to determine a reasonable fee.⁶²

Over the following sixteen years, from 1977 to 1993, the Legislature passed a number of amendments to section 440.34, all of which sought to limit either the discretion of the JCC in his or her reasonableness inquiry⁶³ or the actual amount of the attorney’s fee award.⁶⁴ This gradual chipping away at the attorney’s fee provision came to a head in 2003 after the Governor’s Commission on Workers’ Compensation Reform.⁶⁵ As a result of that commission’s findings, the Legislature made many changes to the entire workers’ compensation system, but the Legislature specifically targeted section 440.34 by deleting any reference to the consideration of the *Lee Engineering* factors in determining whether the fee award was reasonable.⁶⁶ As a result, section 440.34(1) now required the JCC to apply only the fee schedule and required that any attorney’s fee “must equal” the statutory formula.⁶⁷ However, section 440.34(3) still

57. *Id.* at 458–59.

58. *See* *Castellanos v. Next Door Co.*, 192 So. 3d 431, 440–41 (Fla. 2016).

59. *Id.* at 440.

60. *Id.*

61. *Id.*

62. *Id.* at 440–41.

63. *Id.* at 441. For example, in 1980, the Legislature revised section 440.34(2) to state that the JCC “shall consider only those benefits to the claimant the attorney is responsible for securing.” *Id.* at 441.

64. *Id.* In 1993, the Legislature reduced all of the percentage amounts across the board for attorney’s fees in the sliding schedule. *Id.*

65. *Id.* at 441–42.

66. *Id.* at 442.

67. *Id.*

entitled the claimant to a “reasonable attorney fee.”⁶⁸ The 2003 amendments, when read together, created a statutory ambiguity, leaving the reviewing JCC in the dark as to whether he or she was afforded any discretion in the review of the attorney’s fee award.⁶⁹

Review of this statutory ambiguity reached the Florida Supreme Court in 2008 in *Murray v. Mariner Health*, a case involving an extraordinarily low attorney’s fee award.⁷⁰ The JCC in that case applied the mandatory fee schedule as per section 440.34(1), which resulted in an hourly fee award of only \$8.11, even though the claimant’s counsel expended eighty hours of reasonable and necessary time on the case.⁷¹ On appeal, the claimant argued that the JCC erred as a matter of law when it reviewed her attorney’s fee award based solely on the fee schedule in section 440.34(1) rather than utilizing the discretion granted in section 440.34(3) to determine whether the amount of the award was reasonable.⁷² The court resolved the statutory ambiguity in favor of the claimant, concluding that she was entitled to recover a reasonable attorney’s fee and that the fee should be determined using the *Lee Engineering* factors rather than just the statutory formula set forth in section 440.34(1).⁷³

Unsurprisingly, only one year after *Murray* was decided, the Legislature amended the statute one final time in 2009, deleting the word “reasonable” from the attorney’s fees clause in section 440.34(3).⁷⁴ As such, the Legislature “eliminated any consideration of reasonableness” from the entirety of the statute, removing any lingering doubt as to whether the JCC had authority to review or alter an attorney’s fee award in situations where the result is either “clearly inadequate” or “clearly excessive.”⁷⁵ The stage was now set for the Florida Supreme Court to go beyond statutory interpretation and reach the constitutional questions set forth in Castellanos’s challenge.

68. *Id.*

69. *See id.*

70. 994 So. 2d 1051, 1055–56 (Fla. 2008).

71. *Id.*

72. *Id.* at 1056. Interestingly, Emma Murray also argued that even if the JCC did not err as a matter of law when it applied the mandated fee schedule, the statute violated her constitutional right to due process (among other claims). *Id.* Ultimately, the Florida Supreme Court never reached her constitutional challenge and based its decision solely on statutory interpretation grounds. *Id.* at 1062.

73. *Id.* at 1053, 1062.

74. *Castellanos*, 192 So. 3d at 443; see discussion *supra* notes 21–22.

75. *Castellanos*, 192 So. 3d at 443.

IV. THE COURT'S REASONING

The Florida Supreme Court issued its long-awaited decision in *Castellanos* on April 28, 2016.⁷⁶ The court held that section 440.34 and its mandatory fee schedule governing the award of attorney's fees to successful workers' compensation claimants creates a conclusive irrebuttable presumption.⁷⁷ That presumption, the court determined, "precludes any consideration of whether the fee award is reasonable to compensate the attorney" and, as such, violates the requirements of due process under both article I, section 9 of the Florida Constitution and the Fourteenth Amendment of the U.S. Constitution.⁷⁸ Having struck down the mandatory fee schedule as unconstitutional, the court returned the statute to its pre-2009 condition, prior to the Legislature's removal of the JCC's discretion to review awards for reasonableness.⁷⁹ The court quashed the First District's decision, which upheld the "patently unreasonable fee award" to Castellanos's attorney and "remanded [the case] to the JCC for entry of a reasonable attorney's fee."⁸⁰

The following sections of this Comment will thoroughly examine the reasoning of the majority opinion and briefly present the arguments of the concurring opinion and two dissenting opinions.

A. *The Majority Opinion*

Justice Pariente, writing for four other justices, established the foundation of the majority's argument by noting that "[t]he right of a [successful] claimant to obtain a reasonable attorney's fee . . . has [always] been considered a critical feature of [Florida's] workers' compensation law since 1941."⁸¹ Citing the law's current legislative statement of purpose, the majority indicated that the primary objective of the law is "the quick and efficient delivery of disability and medical

76. Robert J. Grace, Jr., *Florida Workers' Compensation: The Great Wait*, LEXISNEXIS: LEXISNEXIS LEGAL NEWSROOM WORKERS COMPENSATION L. (June 25, 2015, 3:01 PM), <https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2015/06/25/florida-workers-compensation-the-great-wait.aspx>; Judge David Langham, *Castellanos is Decided by Supreme Court*, FLA. WORKERS' COMP ADJUDICATION (Apr. 28, 2016, 12:16 PM), <http://fjojcc.blogspot.com/2016/04/castellanos-is-decided-by-supreme-court.html>.

77. *Castellanos*, 192 So. 3d at 432.

78. *Id.*

79. *Id.* at 448–49.

80. *Id.* at 449.

81. *Id.* at 433–34 (citing *Murray v. Mariner Health*, 994 So. 2d 1051, 1057–58 (Fla. 2008)).

benefits to an injured worker.”⁸² However, even though the Legislature “continue[s] to enunciate this purpose,” the court pointed out that, “in reality, the workers’ compensation system has become increasingly complex to the detriment of the [injured worker].”⁸³ In order to overcome these obstacles that have been placed before the claimant, the court highlighted the critical need for competent attorneys to “navigate the thicket.”⁸⁴

The court then presented a detailed, chronological history of how attorney’s fees have been awarded to successful claimants under Florida’s workers’ compensation law. As previously discussed above in Section III.B, the majority provided this critical background to demonstrate the extensive interplay between the Legislature and the judiciary over the role of the JCC and its discretion in reviewing attorney’s fee awards for reasonableness. Most notably, the court discussed its prior 2008 decision in *Murray*—a case with an almost identical fact pattern as this matter—and used it as a springboard into its analysis of Castellanos’s due process challenge.⁸⁵ In *Murray*, the court held—based on statutory interpretation grounds—that a successful claimant is entitled to recover a reasonable attorney’s fee that is subject to a discretionary review by the JCC.⁸⁶ Only one year later, the Legislature deleted the term “reasonable” from the statute, which eliminated any discretionary review and forced the JCC to apply the sliding fee schedule in every case.⁸⁷ According to the *Castellanos* majority, this act by the Legislature represented a “complete frustration of the entire workers’ compensation scheme” because it established a conclusive irrebuttable presumption that the formula will always

82. *Id.* at 434 (quoting FLA. STAT. § 440.015 (2017)). Notably, the statement of purpose also requires that workers’ compensation law be interpreted so as “to facilitate the worker’s return to gainful reemployment at a reasonable cost to the employer.” § 440.015.

83. *Castellanos*, 192 So. 3d at 434. The majority provides a number of specific examples of how workers’ compensation law has become much more difficult to navigate without the assistance of counsel. *Id.* at 434 n.3. Some of these changes are: (1) “the elimination of the provision that the workers’ compensation law be liberally construed in favor of the injured worker”; (2) “reductions in the duration of temporary benefits”; and (3) “a heightened standard of ‘major contributing cause’ that applies in a majority of cases rather than the less stringent ‘proximate cause’ standard in civil cases.” *Id.* (citing §§ 440.015, 440.15(2)(a), 440.09(1)).

84. *Id.* at 434; *see also* *Davis v. Keeto, Inc.*, 463 So. 2d 368, 371 (Fla. Dist. Ct. App. 1985) (“[W]ithout the aid of competent counsel in [a] lengthy and expensive contest . . . the [claimant] would [be] helpless as a turtle on its back.” (quoting *Neylon v. Ford Motor Co.*, 99 A.2d 664, 665 (N.J. Super. Ct. App. Div. 1953))).

85. *Castellanos*, 192 So. 3d at 441–42.

86. *Id.* at 442–43.

87. *Id.* at 443.

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produce an adequate attorney's fee award.⁸⁸ The court noted that applying the formula clearly does not produce an adequate result in every case, and it held the claimant's lack of opportunity to rebut the fee award is a violation of his or her due process rights.⁸⁹

The court quickly dispatched the E/C's standing argument and moved to the merits of Castellanos's constitutional claim.⁹⁰ Once the majority determined that the mandatory fee formula does indeed establish a conclusive statutory presumption, it analyzed the constitutionality of the presumption under the following precedential three-part test:

- (1) [W]hether the concern of the Legislature was "reasonably aroused by the possibility of an abuse which it legitimately desired to avoid";
- (2) whether there was a "reasonable basis for a conclusion that the statute would protect against its occurrence";
- and (3) whether "the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption."⁹¹

The court then analyzed the mandatory fee schedule and its conclusive statutory presumption under each of the three prongs of its due process test.

With respect to the test's first prong, the court noted that the Legislature justified implementation of the mandatory fee schedule for the following two reasons: (1) to standardize attorney's fee awards, and (2) to avoid excessive fee awards.⁹² The court conceded that the Legislature's asserted concerns were legitimate; however, it heavily criticized the manner in which the mandatory fee schedule and its statutory presumption addressed those concerns.⁹³ For example, the court agreed that the fee schedule standardizes attorney's fees but noted that it does so in a manner lacking any relationship to the amount of time

88. *Id.*

89. *Id.* at 443–44; *see also* Pilon v. Okeelanta Corp., 574 So. 2d 1200, 1201 (Fla. Dist. Ct. App. 1991) (“[A] barrier to review a decision to award a fee . . . could ultimately result in a net loss of attorneys willing to represent workers’ compensation claimants.”).

90. *Castellanos*, 192 So. 3d at 443–44. The E/C argued that Castellanos lacked standing to challenge the mandatory fee schedule because his rights as the claimant were unaffected, but rather his attorney's rights were. *Id.* at 443. The court gave short shrift to this argument, emphasizing that the true party in interest is the injured worker and not the attorney, who can always choose to decline representation in matters that may be complex but low-value. *Id.*

91. *Id.* at 444 (citing *Recchi Am. Inc. v. Hall*, 692 So. 2d 153, 154 (Fla. 1997)).

92. *Id.*

93. *Id.* at 444–45.

and effort put forth by the claimant's attorney.⁹⁴ In addition, the court also noted that the Legislature's worry regarding excessive fee awards was unwarranted, because the application of the *Lee Engineering* factors was designed to prevent them.⁹⁵ In sum, the majority concluded that the Legislature's concerns, while legitimate, did not justify the unyielding, formulaic fee schedule, primarily because there were already mechanisms in place to prevent excessive fees; therefore, the court held that the first prong of the test was not satisfied.

Moreover, the court determined that the Legislature had no reasonable basis to believe that the mandatory fee schedule would actually succeed at putting a stop to excessive attorney's fee awards.⁹⁶ In its analysis of the second prong of its due process test, the court presented the very likely prospect of arriving at an excessively high fee award, even with application of the conclusive fee schedule.⁹⁷ In *Murray*, for example, the court raised the possibility of an attorney earning a windfall in a simple and straightforward case requiring little effort but involving a high dollar amount of benefits.⁹⁸ The application of the fee schedule under those conditions would assure the claimant's attorney a significant payday, since the JCC would be powerless to adjust the fees downward as a result of the conclusive presumption of reasonableness.⁹⁹ The court concluded that regardless of whether the resulting fee award is excessively high or inadequately low, as was the case in *Castellanos*, the Legislature had no reasonable basis to conclude that the formulaic fee schedule would succeed at putting a stop to excessive or disproportionate attorney's fee awards.¹⁰⁰ In fact, as demonstrated by its hypothetical high-value, low-effort example, the court proved that the conclusive statutory presumption virtually guarantees the result that it was purportedly designed to stop.

Nevertheless, even if the mandatory fee schedule were to satisfy prongs one and two of the three-part due process test, the court held that the analysis under the third prong unquestionably weighs heavily against the constitutionality of the conclusive irrebuttable

94. *See id.*

95. *Id.* at 444. Interestingly, the court cited to the OJCC's mandatory annual reporting of all attorney's fees, which indicated a steadily growing discrepancy between the percentage of fee amounts awarded to claimants' counsel and the percentage of fee amounts paid to E/Cs' counsel from 2002 through 2013. *Id.* at 445. This discrepancy reached its zenith during fiscal year 2012–2013, when E/Cs' counsel received 63.73% of the total fees awarded, while claimants' counsel only received 36.27%—a stark disparity of 27.46%. *Id.*

96. *Id.* at 445–46.

97. *Id.* at 446.

98. *Murray v. Mariner Health*, 994 So. 2d 1051, 1057 n.4 (Fla. 2008).

99. *Castellanos*, 192 So. 3d at 446.

100. *Id.* at 445–46.

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presumption.¹⁰¹ The third prong asks the court to balance whether the expense and other administrative difficulties of individual reasonableness determinations justify the inherent imprecision of a conclusive statutory presumption.¹⁰² The majority concluded that the fee schedule's inherent imprecision cannot be justified, primarily because the risk is too great that a claimant's fee award "will be entirely arbitrary, unjust, and grossly inadequate."¹⁰³ First, the majority emphasized the fact that both the JCC and the appellate court in this case determined that the fee award for Castellanos's attorney was patently unreasonable, and both reached that conclusion without any undue expense or difficult burden.¹⁰⁴ In fact, the court noted that since 1941, when the reasonable attorney's fee provision was added to the statute, the judiciary has long operated under the view that the formula was merely a starting point and that a JCC could review a fee award without undue expense or difficulty to avoid unfairness and arbitrariness.¹⁰⁵ In sum, the insignificant administrative burden of reviewing an attorney's fee award and making an individual reasonableness determination cannot justify the complete removal of all discretion from the judiciary, which is exactly what the conclusive statutory presumption did.¹⁰⁶

After determining that the conclusive fee schedule was unconstitutional, the majority returned the statute to its pre-2009 condition, prior to the Legislature's removal of the JCC's discretion to review awards for reasonableness.¹⁰⁷ The court held that "a JCC must allow for a claimant to present evidence to show that application of the statutory fee schedule will result in an unreasonable fee."¹⁰⁸ However, the court emphasized that the fee schedule must act as a starting point and that there can be no deviation from that amount unless the claimant

101. *Id.* at 446.

102. *Id.*

103. *Id.* at 448.

104. *See id.* at 446.

105. *Id.*

106. *Id.* at 446, 448. Not only did the court find that the third prong's balancing test weighed heavily against the inherent imprecision of the conclusive presumption, but it also argued that the irrebuttable presumption frustrates the entire purpose of Florida's workers' compensation law by unfairly favoring the E/C. *Id.* at 447–48. By eliminating any requirement that the attorney's fee be reasonable, the court indicated that there is little disincentive for the E/C to deny benefits or raise multiple defenses in an attempt to force a settlement upon an injured worker. In essence, without the likelihood of an adequate attorney's fee award, there is no reason for the E/C not to resist or delay claims, which is in contravention to the stated purpose of the law. *Id.* at 448.

107. *Id.*

108. *Id.* at 448–49.

can successfully demonstrate that the application of the formula would result in an unreasonable award.¹⁰⁹

B. Justice Lewis's Concurring Opinion

In addition to agreeing with the majority's holding that section 440.34 was unconstitutional on due process grounds, Justice Lewis determined that the mandatory fee schedule was unconstitutional because it denies Florida workers access to the state's courts.¹¹⁰ As noted by the majority, Florida's workers' compensation statutory scheme is based upon a "mutual renunciation of common-law rights and defenses by employers and employees alike."¹¹¹ As such, injured workers have only the exclusive remedy of the state's workers' compensation laws available to them.¹¹² Justice Lewis reasoned that when injured workers are denied the ability to secure competent counsel because of the "totally unreasonable attorney fees provision," the mandatory fee schedule works an unconstitutional harm on them because it prevents them from gaining access to the courts.¹¹³

C. Justice Canady's Dissenting Opinion

In his dissent, Justice Canady took issue with the majority's decision to strike down the mandatory fee schedule as a violation of due process without addressing the legislative policy of the statute.¹¹⁴ He contended that the mandatory fee schedule represented "a policy determination by the Legislature that there should be a reasonable relationship between the value of the benefits obtained in litigating a workers' compensation claim and the amount of attorney's fees the [E/C] is required to pay to the claimant."¹¹⁵ While he agreed that this policy decision of preventing disproportionate attorney's fees could certainly be criticized, he

109. *Id.* at 449. Essentially, the court here is reaffirming its holding from *Lee Engineering*, where it held that the formula must serve as the starting point and the JCC may deviate from that amount by considering the discretionary factors when determining a reasonable attorney's fee. *Id.*

110. *Id.* at 450 (Lewis, J., concurring). Article 1, section 21 of the Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." FLA. CONST. art. 1, § 21.

111. FLA. STAT. § 440.015 (2017); see also *Castellanos*, 192 So. 2d at 449 (Lewis, J., concurring) (describing the Florida workers' compensation system as a "system once designed and intended to fairly distribute and allocate risk and economic burdens with reduced conflict and confrontation.").

112. *Castellanos*, 192 So. 2d at 450 (Lewis, J., concurring).

113. *Id.*

114. *Id.* (Canady, J., dissenting).

115. *Id.*

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emphatically asserted that the court had no basis to declare it unconstitutional.¹¹⁶

Not only did Justice Canady criticize the majority for failing to address the actual policy of the statute, but he also disapproved of the majority's assumption that due process requires a particular definition of reasonableness in the context of awarding statutory attorney's fees.¹¹⁷ In particular, he took issue with the majority's assertion that "a reasonable attorney's fee [is] the linchpin to the constitutionality of the workers' compensation law."¹¹⁸ According to Justice Canady, this assertion—"that due process . . . requires that statutory fee awards fully compensate for the effective litigation of all claims"—is not supported by any of the court's precedents, nor is it supported by any constitutional requirement.¹¹⁹ He believed the majority overstepped its boundaries when it read the reasonableness requirement into the statute.¹²⁰ For his part, the inquiry into the constitutionality of section 440.34 would have ceased once he determined that the mandatory fee schedule was reasonably related to the Legislature's legitimate and permissible policy goal of preventing disproportionate attorney's fees.¹²¹

In addition, Justice Canady took issue with the majority's reliance on the three-part due process test it used to find the statute's irrebuttable presumption unconstitutional.¹²² He claimed that the majority misunderstood the test and misapplied it in the context of *Castellanos*.¹²³ He viewed the three-part test as elements to consider when determining whether a challenged provision comported with "standards of legislative reasonableness" and not as a mechanism to invalidate legislative judgments previously thought to be constitutional.¹²⁴ He went on to argue that prior courts' use of the three-part test involved reasoning that was "highly deferential to the legislative judgment underlying the challenged statutory provision."¹²⁵ Justice Canady noted that this was not the case here.¹²⁶ In sum, he expressed fear that the line of reasoning adopted by

116. *Id.*

117. *Id.*

118. *Id.* (quoting *id.* at 435 (majority opinion)).

119. *Id.* at 450–51.

120. *See id.* at 450 ("[T]he question for this Court is not which side of this policy debate has the best argument, but whether the policy adopted by the Legislature violates some constitutional requirement.").

121. *Id.* at 451.

122. *Id.*

123. *Id.*

124. *Id.* (quoting *Weinberger v. Salfi*, 422 U.S. 749, 776–77 (1975)).

125. *Id.*

126. *Id.* at 452.

the majority had the potential to become “a virtual engine of destruction for countless legislative judgments.”¹²⁷

D. Justice Polston’s Dissenting Opinion

Unlike Justice Canady, who primarily challenged the majority’s reliance on the three-part due process test, Justice Polston attacked the majority’s initial determination that the statute’s mandatory fee schedule created a conclusive irrebuttable presumption. The first sentence of his dissent effectively sums up the main thrust of his argument: “There is no conclusive presumption.”¹²⁸ First, he recognized the recent statutory history of section 440.34, noting that “the Legislature eliminated all references to reasonableness” after the court’s holding in *Murray*.¹²⁹ As such, he argued that the majority effectively rewrote the law with its decision by reading a reasonableness requirement into the statute, even though the plain language of the statute contains no such reference.¹³⁰ He conceded that the mandatory fee schedule may be vulnerable to an as-applied challenge based upon an access to courts claim, but since Castellanos only raised a facial challenge, that avenue was closed.¹³¹ Since a plain reading of the statute demonstrated that it did not contain any facial infirmity, Justice Polston concluded that the majority created the conclusive presumption of reasonableness to avoid having to apply the court’s tougher precedential standards governing facial challenges.¹³²

Justice Polston cited the court’s well-established facial challenge standard, which states that in order for a statute to be held facially unconstitutional, the challenger must demonstrate that the law cannot be constitutionally applied under any set of circumstances.¹³³ He then went on to establish that the mandatory fee schedule fails this standard because there are circumstances where the application of the formula can be constitutionally applied. For example, he specifically noted claims involving high benefits with little to no effort as situations where the attorney’s fee formula can be applied without violating a constitutional right.¹³⁴ In sum, Justice Polston argued that the majority ignored the

127. *Id.* at 452–53.

128. *Id.* at 453 (Polston, J., dissenting).

129. *Id.*

130. *Id.* at 453–54.

131. *Id.* at 454.

132. *Id.* at 454–55.

133. *Id.* at 454 (citing *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014)). In addition, Justice Polston noted that in a facial challenge, the court’s review is limited, and it may only consider the text of the statute. *Id.*

134. *Id.*

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court's established precedent regarding facial challenges and created the conclusive presumption of reasonableness so it could simply "declare[]" that the mandatory fee schedule was facially unconstitutional.¹³⁵

V. ANALYSIS

The Florida Supreme Court's decision to strike down section 440.34 and its mandatory fee schedule governing the award of attorney's fees to successful workers' compensation claimants was a critical one, especially given the current national trend among state legislatures of rolling back claimants' rights in the name of reform.¹³⁶ By finding that a successful claimant is constitutionally guaranteed a reasonable attorney's fee under Florida's due process protections, the court demonstrated the importance of state constitutional law in combatting the ongoing efforts by state lawmakers to erode workers' compensation benefits—otherwise known as the "race to the bottom."¹³⁷

As noted in the majority opinion, the legislative intent behind Florida's workers' compensation program states that the entire system "is based on a mutual renunciation of common-law rights and defenses by employers and employees alike."¹³⁸ This statutory language echoes the principles behind the Grand Bargain, the deal struck between U.S. industry and labor in the early twentieth century that led to the enactment of workers' compensation laws throughout the country.¹³⁹ Under the Grand Bargain, employers renounced their common-law defenses, such as contributory negligence and assumption of the risk, while employees surrendered their common-law tort remedies, such as money damages, and accepted more certain but reduced compensation.¹⁴⁰ As such, "work accident cases would 'no longer get bogged down in litigating thorny questions of fault,'" and damages would no longer be at the discretion of a judge or jury but rather "scheduled at one-half or two-thirds the injured [claimant's] lost wages, plus medical costs."¹⁴¹ As

135. *Id.* at 454–55.

136. *See* U.S. DEP'T OF LABOR, *supra* note 42, at 13.

137. *Id.* *See generally* Williams, *supra* note 5.

138. *Castellanos*, 192 So. 3d at 438 (emphasis omitted) (quoting FLA. STAT. § 440.015 (2017)).

139. *See* Williams, *supra* note 5, at 1082; Alison Morantz et al., *Economic Incentives in Workers' Compensation: A Holistic, International Perspective*, 69 RUTGERS U. L. REV. 1015, 1019–24 (2017) (describing the four "pillars" of the occupational safety and health regime).

140. Williams, *supra* note 5, at 1082.

141. John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1186–87 (2005).

part of the Grand Bargain, workers surrendered their right to sue their employer “in exchange for a presumptively *reasonable* alternative.”¹⁴²

Today, however, that reasonable alternative, the lynchpin to the Grand Bargain, is under attack—not just in Florida, but across the United States.¹⁴³ Recent years have seen significant changes to the workers’ compensation laws, procedures, and policies in a number of states, which have resulted in not just limited benefits, but also a lesser likelihood that an injured worker can even successfully apply for benefits.¹⁴⁴ As each state compared its workers’ compensation laws with those of neighboring states and discovered areas of greater generosity, lawmakers changed those provisions of their laws—it was a race to the bottom, and it continues today.¹⁴⁵

For example, in March of 2016, the Oklahoma Supreme Court reviewed a constitutional challenge to a recently added provision of the state’s workers’ compensation law that barred compensation for “cumulative trauma injuries”¹⁴⁶ for workers who failed to complete at least 180 days of continuous active employment.¹⁴⁷ This type of arbitrary time requirement, which ultimately limits an employee’s ability to use workers’ compensation laws, is illustrative of the type of laws that have been recently enacted in the ongoing race to the bottom.¹⁴⁸ A full analysis of the numerous ways in which other state legislatures are eroding the terms of the Grand Bargain in favor of employers is beyond the scope of this Comment; however, a few are certainly worth noting. Some states have rejected the traditional liberal standard that workers’ compensation laws be construed in favor of the claimant, replacing it with a tougher standard requiring an injured worker to win his or her case by a preponderance of the evidence and, in some limited situations, by clear and convincing evidence.¹⁴⁹ Other states have heightened the standard

142. Emily A. Spieler, *(Re)Assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900–2017*, 69 RUTGERS U. L. REV. 891, 982 (2017).

143. For a comprehensive, state-by-state review of legislative changes that have impacted benefits during 2002–2014, see Michael Grabell & Howard Berkes, *The Demolition of Workers’ Comp*, PROPUBLICA (Mar. 4, 2015), <https://www.propublica.org/article/the-demolition-of-workers-compensation>.

144. U.S. DEP’T OF LABOR, *supra* note 42, at 2.

145. *Id.* at 13, 20.

146. As defined by one of the two statutes under review in *Torres v. Seaboard Foods*, a cumulative trauma injury is “caused by the combined effect of repetitive physical activities extending over a period of time in the course and scope of employment.” 2016 OK 20, ¶ 5, 373 P.3d 1057, 1062 (Okla. 2016).

147. *Id.* ¶¶ 5, 39, 373 P.3d at 1062, 1077.

148. The Oklahoma Supreme Court struck down the 180-day requirement of continuous active employment as a violation of the state constitution’s due process provision. *Id.* ¶¶ 54–55, 373 P.3d at 1081.

149. Spieler, *supra* note 142, at 937.

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governing causation, demanding that the injured worker prove that the accident in question was the “major contributing cause” to the disability.¹⁵⁰ As a result, many claimants suffering from pre-existing injuries cannot satisfy this standard and are excluded from obtaining benefits.¹⁵¹

Florida, however, is considered one of the front lines in the ongoing battle against the erosion of the Grand Bargain through the race to the bottom.¹⁵² Just two months after issuing its opinion in *Castellanos*, the Florida Supreme Court struck down a statutory limitation on wage benefits for workers who are totally disabled but who are eventually expected to recover enough to return to work.¹⁵³ In 1994, after years of slashing the number of weeks a claimant could receive temporary total disability benefits, the Legislature had finally reached its floor: 104 weeks of benefits.¹⁵⁴ The claimant in *Westphal*—a firefighter who suffered a severe lower back injury during the course of fighting a fire—reached the end of his 104-week coverage but remained totally disabled, and he had not reached the maximum medical improvement needed to be eligible for permanent total disability benefits.¹⁵⁵ The Legislature’s repeated cutting of benefits created a statutory gap, which the court determined was an impermissible infringement on the claimant’s right to access the state’s courts.¹⁵⁶ Applying the reasonable alternative test,¹⁵⁷ the court reasoned that the repeated efforts by lawmakers in slashing workers’ compensation benefits resulted in inadequate and insufficient safeguards for the injured worker, leaving the entire statutory scheme as an unreasonable alternative to tort litigation.¹⁵⁸ Notably, the court announced that “there must eventually come a ‘tipping point,’ where the diminution of benefits becomes so

150. *Id.* at 938.

151. *See id.*

152. Williams, *supra* note 5, at 1098–107.

153. *Westphal v. City of St. Petersburg*, 194 So. 3d 311, 313 (Fla. 2016).

154. *Id.* at 318–19.

155. *Id.* at 315–16.

156. *Id.* at 326–27.

157. *Id.* at 331 (Canady, J., dissenting) (“[W]here a right of access to the courts for redress for a particular injury 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 a part of the common law of the State . . . the Legislature is without power to abolish such a 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.” (quoting *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973))).

158. *Id.* at 314–15 (majority opinion).

significant as to constitute a *denial* of benefits—thus creating a constitutional violation.”¹⁵⁹

Even though the court invalidated the Legislature’s statutory limitation in *Westphal* on different constitutional grounds, there are striking similarities between *Westphal* and *Castellanos*, beyond the fact that the two cases were decided within two months of each other and both opinions were written by Justice Pariente. Both decisions made strong use of context to strengthen their holdings—especially the *Castellanos* majority. Justice Pariente’s comprehensive history of how attorney’s fees have been awarded to claimants under Florida’s workers’ compensation statutory scheme provided the necessary framework to review the latest “reform” enacted by the Legislature.¹⁶⁰ These legislative actions cannot be analyzed by the judiciary in a bubble.¹⁶¹ It is critical that the courts view them with a full understanding of the past, as well as an appreciation of how they fit in with the current embattled state of injured workers’ rights across the country. To do otherwise would completely miss the bigger picture—that each of these legislative actions are part of a larger effort to erode workers’ compensation benefits. If state courts are unwilling to enforce the Grand Bargain by interpreting the protections afforded to individuals in state constitutions, then legislatures will overrun the rights of workers’ compensation claimants, leaving them with no other reasonable alternative to seek redress.¹⁶²

Both dissenting justices in *Castellanos* believed that the majority’s decision to strike down the mandatory fee schedule was extreme and an example of gross judicial overreach.¹⁶³ But in many ways, the facts before the court in *Castellanos* were extreme. Most obviously, the \$1.53 per hour statutory fee award to Castellanos’s attorney was ludicrous. Perhaps less noticeable, and arguably just as extreme, was the conduct of the E/C. After refusing to authorize its own doctor’s recommendations, the E/C denied Castellanos’s petition, arguing that he fraudulently reported his injuries for the sole purpose of securing benefits. The E/C’s counsel

159. *Id.* at 323. Interestingly, like in *Castellanos*, the court restored the earlier version of the statute prior to the Legislature’s last amendment, which was 260 weeks. *Id.* at 327.

160. *See supra* Section IV.A.

161. Justice Canady, who, unsurprisingly, also dissented in *Westphal*, called for a traditional, rational basis review of section 440.34 in *Castellanos*. *Castellanos v. Next Door Co.*, 192 So. 3d 431, 450 (Fla. 2016) (Canady, J., dissenting). He believed that the court strayed from its precedents by not being more deferential to the Legislature’s judgment. *Id.* at 451–52. This type of reasoning could result in the complete demise of the Grand Bargain.

162. *See Williams, supra* note 5, at 1085 (“It is clearer than ever that state constitutions may be interpreted to provide *more* protection than the national minimum standards guaranteed in the federal Constitution.”).

163. *See supra* Sections IV.C, IV.D.

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subsequently asserted *twelve defenses* against the claim,¹⁶⁴ and at the final hearing before the JCC, there were numerous depositions, exhibits, and live testimony.¹⁶⁵ The E/C's relentless resistance to the claim resulted in their counsel spending over one hundred hours on a matter that netted Castellanos a grand total of \$822.70.¹⁶⁶ The court recognized that a dispute over such a relatively small amount of money should never have dragged on for so long, but more importantly, the court also recognized that the E/C had no incentive to settle Castellanos's claim.¹⁶⁷ Employers were operating with the knowledge, as a result of the Legislature's 2009 amendments, that JCCs were precluded from conducting reasonableness inquiries; as such, employers were pursuing aggressive litigation strategies over small dollar amounts, which was in complete contravention of the legislative purpose of the entire workers' compensation statutory scheme.

In sum, the court's decision, while acknowledging policy and fairness concerns, was firmly rooted in sound state constitutional analysis. Article I, section 9 of the Florida Constitution guarantees all persons due process of law, and the case law that has developed in this area is generally similar to that developed by the federal courts in interpreting similar language of the U.S. Constitution.¹⁶⁸ Therefore, under due process principles, Florida courts recognize that the state is required to provide procedural protections to its citizens, including notice and an opportunity to be heard.¹⁶⁹

One specific area of due process law that has been developed by Florida case law is the irrebuttable presumption.¹⁷⁰ Notwithstanding Justice Polston's conclusory assertion,¹⁷¹ there was ample evidence for the court to determine that section 440.34 created a conclusive irrebuttable presumption. The statute presumed that applying the fee schedule in every case would yield an adequate attorney's fee. Castellanos's attorney's fee award, along with the eighteen other

164. *Castellanos*, 192 So. 3d at 435 (emphasis added).

165. *Id.*

166. *Id.* at 437.

167. *See id.* at 437, 447.

168. TALBOT D'ALEMBERTE, THE FLORIDA STATE CONSTITUTION 48 (2d ed. 2011).

169. *Id.*

170. *Id.*; *see also* *Recchi Am. Inc. v. Hall*, 692 So. 2d 153, 155 (Fla. 1997) (striking down a statute on due process grounds because it created an irrebuttable presumption that a worker's injury in a drug-free workplace was caused primarily by his own intoxication, as evidenced by a positive drug test shortly after his accident).

171. "There is no conclusive presumption." *Castellanos*, 192 So. 3d at 453 (Polston, J., dissenting).

claimants affected by the very same issue,¹⁷² proved otherwise. As noted in the JCC's order denying his motion for attorney's fees, Castellanos was given no opportunity to present evidence to prove that his attorney's fee award was unreasonable, nor was he given any prior notice that his attorney could receive such a small amount.¹⁷³ As such, his constitutionally protected due process rights were violated.

VI. IMPLICATIONS

Given the long history of the interplay between the Legislature and the Florida courts, the *Castellanos* decision will not be the end of the dispute over attorney's fee awards to successful workers' compensation claimants. The rights of injured workers may have won the day in this particular case, but the race to the bottom shows no signs of letting up. Given the political climate, both at the federal and state level, legislatures will likely search for more ways to roll back the rights of workers' compensation claimants in the name of reform. In fact, one Florida lawmaker, as a result of the *Castellanos* decision, recently introduced a bill that would allow companies in the state to elect not to purchase workers' compensation insurance, or "opt out" of the program altogether.¹⁷⁴ Not surprisingly, the National Council on Compensation Insurance ("NCCI"), a licensed rating organization responsible for making rate filings to Florida's Office of Insurance Regulation ("OIR") on behalf of workers' compensation insurance companies, projected a 15% rate increase for all new and renewing workers' compensation policies because of the *Castellanos* decision.¹⁷⁵ As a result of NCCI's projected rate increases, insurance companies offering workers' compensation policies issued dire warnings to their insured, specifically citing the *Castellanos*

172. The court noted that the First District certified the same question in eighteen other cases while *Castellanos* made its way up to the Florida Supreme Court. *Id.* at 433 n.2 (majority opinion).

173. *Id.* at 437.

174. Louise Esola, *Florida Bill Would Allow Workers Comp Opt Out*, BUS. INS. (Dec. 12, 2016, 10:56 AM), <http://www.businessinsurance.com/article/20161212/NEWS08/912310926/Florida-bill-would-allow-workers-comp-opt-out-employers>.

175. *Press Release: Office Receives Amended NCCI Workers' Compensation Rate Filing*, FLA. OFF. INS. REG. (July 1, 2016), <https://www.flair.com/PressReleases/viewmediarelease.aspx?id=2162>. In addition to the *Castellanos* decision, NCCI also cited the *Westphal v. City of St. Petersburg* decision—discussed in Section V—and updates by the Legislature to the Workers' Compensation Health Care Provider Reimbursement Manual as justification for the projected rate increase. *Id.* All three of these events led NCCI to propose a combined average rate increase of 19.6%—15% of which was directly attributed to the *Castellanos* decision. *Id.*

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decision as the driving force behind the changes.¹⁷⁶ Hopefully, this court's willingness to draw a line in the sand will serve as an example for other state courts considering constitutional challenges to workers' compensation statutes.¹⁷⁷

VII. CONCLUSION

In *Castellanos v. Next Door Co.*, the Florida Supreme Court held that the mandatory fee schedule governing the award of attorney's fees to successful workers' compensation claimants was unconstitutional under both the Florida Constitution and the U.S. Constitution as a violation of due process. The court was correct in ruling that the statute created a conclusive irrebuttable presumption that every fee award will be reasonable and adequate. Presented with the ridiculous attorney's fee award of \$1.53 per hour, the court determined that there were instances when the application of the mandatory fee schedule would result in unreasonable results; therefore, the court struck the law down and restored the statute to its pre-2009 state, which granted discretion to the JCC to review attorney's fee awards for reasonableness. The decision was a critical one, because it represented an emphatic line in the sand in the pushback against state legislatures' assault on workers' compensation claimants' rights.

176. See, e.g., TRAVELERS INDEMNITY CO., IMPACT OF THE FLORIDA SUPREME COURT DECISION IN CASTELLANOS V. NEXT DOOR COMPANY (2016), <https://www.travelers.com/iw-documents/claims/workers-compensation/state/fl/Castellanos.FL.Supreme.Court.Decision.Summary.pdf>.

177. The Supreme Court of Utah recently struck down a restrictive fee schedule adopted by the Labor Commission on separation of powers grounds. *Injured Workers Assoc. of Utah v. Utah*, 2016 UT ¶ 43, 374 P.3d 14, 24 (Utah 2016). Utah's constitution, like many others, gives its highest court exclusive power over the regulation of the practice of law. UTAH CONST. art. VIII, § 4. While not as emphatic as the due process grounds in the *Castellanos* decision, it at least demonstrates that courts are entertaining state constitutional claims regarding workers' compensation statutes.