

Amicus Brief Links Citizens, Workers' Comp Cases

What does workers' compensation have to do with property insurance?

They're cousins with shared interests, according to an amicus brief for Perdido Sun Condominium Association in the Citizens Property Insurance case.

Amicus Florida Workers Advocates, a group of workers' comp lawyers, also befriended the high court petitioner in *Castellanos v. Next Door*, a pending challenge to the workers' comp fee statute.

In the *Citizens* case, the Supreme Court held Florida law shields the state-created insurer of last resort from lawsuits for staving off good claims with bad-faith gamesmanship.

Here the claims date to 2004 when Hurricane Ivan did severe damage to a condominium on Perdido Key, a Pensacola barrier island. The condo association won \$5.6 million from *Citizens* in a breach-of-contract suit and filed a second suit alleging the insurer acted in bad faith by trying to avoid or delay settling claims.

The First District Court of Appeal wanted to let the condo association pursue its bad-faith action. The Florida Supreme Court reversed the First District and told the trial judge to dismiss the complaint.

"The Legislature has not included

CITIZENS PROPERTY INSURANCE, PETITIONER, V. PERDIDO SUN CONDOMINIUM ASSOCIATION, RESPONDENT

Case No.: SC14-185

Date: May 14, 2015

Case type: Insurance

Court: Florida Supreme Court

Author of opinion: Justice Barbara J. Pariente

Lawyers for petitioner: Kara Berard Rockenbach, Methe & Rockenbach, West Palm Beach, and Raoul G. Cantero III, David P. Draigh and Ryan Andrew Ulloa, White & Case, Miami

Lawyers for respondent: Charles S. Liberis Jr. and Thomas F. Condon, Liberis Law Firm, Pensacola

Panel: Pariente, Chief Justice Jorge Labarga and Justices Peggy A. Quince, James E.C. Perry, R. Fred Lewis, Charles T. Canady and Ricky Polston

Originating court: First District Court of Appeal



Miami attorney Mark Zientz filed amicus briefs in two Florida Supreme Court cases, arguing access to courts underlies the otherwise unrelated cases.

statutory first-party bad faith claims among the limited exceptions to *Citizens*' immunity when it could have easily chosen to do so," Justice Barbara Pariente wrote for the court.

Mark Zientz, author of both FWA amicus briefs, said the common issue in the *Citizens* and *Castellanos* cases is the right of access to courts.

"If these test cases go the wrong way, people won't be able to retain counsel," he said.

REASONABLE OR NOT

FWA filed an amicus brief in *Citizens* "to let the court know that nobody should be exempt from being responsible for intentional acts, and now *Citizens* Property Insurance will be," Zientz said.

"Also, in the workers' compensation field, if you give private insurance companies an exemption from responsibility for their intentional acts and the beneficiary has to go to court to enforce the contract, at the very least the attorney should be paid a reasonable fee," he said. "That's what *Castellanos* is all about."

Castellanos asks the high court to determine the constitutionality of fee rules for attorneys representing workers in the no-fault system. Saying it was

"bound by precedent," the First District upheld a fee award of \$1.53 an hour and certified the constitutional issue for its public importance.

Zientz hopes the Supreme Court, which heard the *Castellanos* oral argument Nov. 5, will undo legislative efforts to flatten fees for workers' comp claimant lawyers. The court has insisted on "reasonable" fees; the Legislature excised that word from the fee statute in 2009.

"The Legislature can repeal the word 'reasonable,' but they can't repeal the concept 'reasonable,' which permeates all of the decisions of any court in this state that talk about attorney fees," Zientz said.

ON THE DOCKET

He noted what FWA calls on its website "a flurry of significant activity in the world of workers' compensation." These cases challenging the law in whole or in part are pending in the Supreme Court or possibly heading there.

• The First District certified the *Castellanos* question in at least six other cases and lifted stay orders in three more, allowing the parties to submit briefs.

• The Supreme Court heard oral argument in *Westphal v. City of St. Petersburg* a year ago. This case targets a gap in the workers' comp law between the end of temporary total disability benefits at 104 weeks and the uncertain start of permanent benefits. The First District, sitting en banc, created the new category of "temporary permanent total disability," saying it's a logical extension of the Legislature's design.

• A ruling that condemns the whole workers' compensation law is pending for review before the Third District Court of Appeal, which heard oral argument March 29. The court is considering Miami-Dade Circuit Judge Jorge Cueto's conclusion that the law is "constitutionally infirm and invalid" because it doesn't provide "a reasonable alternative remedy to the tort remedy it supplanted."

FWA, with a membership of about 240 lawyers, has taken an active role in the case by substituting in for the original plaintiff, county government office worker Elsa Padgett. Whatever the outcome in the Third District, Zientz believes the Supreme Court would welcome a chance to examine the entire law.

During oral argument in *Murray v. Mariner Health*, a 2008 fee case, Pariente chided the Legislature for singling out claimants' attorneys for regulation. "They haven't leveled the playing field; they have eviscerated the playing field by creating a situation that allows a carrier to spend unlimited amounts of money," she said.

Zientz said Pariente also acknowledged significant benefit cuts over the years. "They want to resolve what they consider a major problem of the workers' comp law."

The system should be thoroughly reexamined, attorney commentator Thomas A. Robinson wrote in his blog *The Workcomp Writer*.

"Padgett points to an unsettling problem—that steady erosion of injured employees' workers' compensation recovery rights in the Sunshine State has produced a climate in which many injured workers would rather jettison the existing system, in spite of the fact that the alternative would be to reintroduce a fault-based system," he wrote. "Perhaps the Florida Legislature should step to the forefront, do its job, debate the respective rights and remedies of all the constituencies and not require the state courts to legislate from the bench."