IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF PUBLIC HEALTH, DIVISION OF RISK MANAGEMENT, Petitioners, v. MURIEL WILCOX, Respondent,	CASE NO.: 70,498

RESPONDENT'S REPLY BRIEF

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INTRODUCTION

Respondent, through counsel wants to suggest to this Honorable Court, that the whole purpose of the Florida Workers' Compensation Act was for the reason of getting the injured employee **prompt** and **immediate** compensation following industrial injuries so that the workman's family and society would not have to be burdened with the problem of caring for them while the litigation wends its tortuous way through the various courts as in former years. The whole purpose of a workers' compensation proceeding is that the injured employee gives up his common-law right to sue and in return they are supposed to be able to get **prompt** and **early assistance** for their on-the-job injury so that they, their family, the county and the state, are not required to step in and assume the burden of industry.

In the **instant** case, we have a lady that got hurt (Permanent, Total Disability) on the job (uncontroverted) on **August 3, 1978**. The first time she managed to get the first dollar of workers' compensation benefits was in **March of 1986**, when the employer for the first time, paid a part of the monies that were owing her, due to the actions of counsel for the Respondent.

It might be helpful to this Honorable Court to review the manner in which workers' compensation claims are processed, i.e., a claim is made with the Division of Workers' Compensation in Tallahassee describing an injury. Thereafter an Application for Hearing is also filed in writing as required by Workers' Compensation Rule 4.070.

The Application for Hearing sets forth, inter-alia, that the claimant shall state concisely in separate numbered paragraphs the reasons for requesting a hearing and the **questions at issue or in dispute** which the applicant expects the deputy to hear and determine, with sufficient particularity, that the responding or opposing parties may be notified of the purpose of the hearing, including **the issues** to be heard and determined and what specific benefits are due and not paid. (See **Workers' Compensation Rule 4.070**).

In Dade County, Florida, the deputy commissioner schedules a hearing by sending out a notice, which said notice shall state with particularity the questions or **issues which are in dispute**, which the deputy will hear and determine (**Workers' Compensation Rule 4.080**).

There is a **pre-trial procedure** (Ap-1) which is universally held, **before** a hearing as noted in the **Workers' Compensation Rules, 4.100**, and this pre-trial procedure sets forth inter-alia:

> "...on the motion of any party to the action, hold a pre-trial conference, at which the parties shall:
>
> 1. **State and simplify the claims, defenses and issues.**"
> ...
>
> (**Workers' Compensation Rule 4.10(a)(1)**)

In the **instant** case, we had such a pre-trial stipulation which we have attached to our Brief as Appendix 1. (Ap-1). An examination of Appendix 1, will disclose that it was entered into on September 1, 1983 and **nowheres** in this pre-trial stipulation under **paragraph #11** of said pre-trial stipulation, does the

employer state as part of their part of their defenses, that they seek reimbursement per **Florida Statute 440.15(9)** (the Social Security Offset)!

(All Emphasis is Supplied)

STATEMENT OF THE CASE AND FACTS

We do not take umbrage with the Statement of the Case and Facts submitted by the Petitioner, Public Health Division of Risk Management. I note, however, that the Petitioner seems to be aggrieved by the fact that Judge Feder in his Final Judgment of May 8, 1986, ordered the State not only to pay $29,735.44 to the Respondent, but also ordered the State to comply in full with the Order of the Deputy Commissioner dated February 5, 1985.

This is totally compatible and in keeping with the law as promulgated by our legislature under **Florida Statute 440.24.**

> "In case of default by the employer or carrier in the payment of compensation due under any compensation order of a deputy commissioner or other failure by the employer or carrier to comply with such order within ten days after the order becomes final, any circuit court of this state within the jurisdiction of which the employer or carrier resides or transacts business shall, upon application by the division or any beneficiary under such order, have jurisdiction to issue a Rule Nisi directing such employer or carrier to show cause why a Writ of Execution, or such other process as may be necessary to enforce the terms of such order, shall not be issued and unless such cause is shown, **the court shall have jurisdiction to issue a Writ of Execution or such other process or final order as may be necessary to enforce the terms of such Order of the deputy commissioner.**"

In the **instant** case, the Petitioner sees fit to allude to both cases of **Wilcox** from the First District Court of Appeal and cites same so that you would think he was successful in both of

these cases.

Alas, if you read both of the cases in their entirety, you will see that all he got was a temporary respite and in the Final Order of the Deputy Commissioner which was appealed a second time by the employer Petitioner herein, the Order-in-chief by the Deputy Commissioner is substantially affirmed as was the first Order of the Deputy Commissioner substantially affirmed with minor changes which benefited the Petitioner employer herein.

A brief quote from the Order of the Deputy Commissioner dated February 5, 1985, indicated that this case **has been extensively litigated by reason of the negligence and lack of cooperation on the part of the employer**...(See Order of February 5, 1985, paragraph #36).

Petitioner fails to advise the court that they obtained the Social Security information, but failed to furnish any part of it to counsel for the Respondent, although it's required by the Rules of Civil Procedure (**F.R.C.P. 1.351(d)**).

This Respondent has no way of knowing how much money and for what period of time, was set off, to this very date!

When we notified the employer and their counsel after the appellate procedure was concluded with the First District Court of Appeal on the merits of the claim, by our letter of March 18, 1986, (Ap-2,3 & 4) which is part of the record in this case, we got no response -- no facts or figures -- but my client received a letter from Attorney H.B. Yandle dated March 12, 1986 in which he enclosed checks totalling $38,165.98 drawn on the account of Crawford and Company, Atlanta, Georgia, on behalf of the

Department of Health.

The purpose of having these claims, offsets and defenses raised **before trial** of the cause, is so that the parties will each know what the proofs are and whether they are accurate or inaccurate. The purpose of **Florida Statute 440.28**, is that if a mistake is made, the error may be corrected. Modification may be brought by either a deputy commissioner or upon application of any party in interest based on the ground of a change in condition or because of a mistake in a determination of fact.

Is it fair to require Mrs. Wilcox to have to do all this?

We think not, especially when the employer has had all of the Social Security offset information in their hands and possession exclusively, for a number of years now.

The Petitioner in this case is only **now** seeking to modify the Order of the deputy commissioner (Ap-1 & 2 attached to our Brief on Jurisdiction).

The cases that they have cited in support of the conflict between the **Troy** case and **Booth** case are the **Malena** case; **Lister** case; **Harrell** case; **Reeves** case; **Butler** case; **Harrell** case; & **Adkins** cases.

These involves a setoff on the claims or **defenses raised before the deputy commissioner** when he heard the **original** case **on the merits** and thereafter entered an Order. They all involve litigation relative to the **original claims** and the **cases-in-chief** initially and none of them pertain to litigation **after** a **Final Order** was entered, as in the **Troy** case and as in the **Wilcox** and **Booth** cases. An **ancillary action** was taken later before the

Circuit Court Judge to obtain **enforcement** of the deputy's Order under **Florida Statute 440.24**!

The writer does not agree with the Third District Court of Appeal where they indicate that this decision (**Wilcox**) and the **Troy** case is contrary to the **Malena** case for the reasons I have already stated. See also the **Booth** case which supports the **instant** decision of the **Wilcox** and **Troy** cases. **Booth** is a Fourth DCA case from 1979 (**Booth v. Basic Asphalt** 369 So.2d 356).

In the **Phoenix Assurance** case (**Phoenix Assurance Co. of N.Y. v. Merritt** 160 So.2d 552 (2nd DCA, Dec. 1963) the Court held that under a proceeding brought under **Florida Statute 440.24**, the Circuit Judge has no discretion except to see that the Deputy Commissioner's Order was still in force and effect and if it was, to enforce its provisions **Merritt**, supra, 553; in the **McCormick** case (**McCormick v. Messink** 208 So.2d 113 (2nd DCA, Feb. 1968) that Appellate Court held that an employer **can not unilaterally** alter or modify an Order of the Deputy Commissioner until such time as the Order is modified and that the same may be enforced pursuant to **Florida Statute 440.24, Messink**, supra, 116; in the **Booth** case (**Booth v. Basic Asphalt and Construction Co.** 369 So.2d 356 (4th DCA, Feb. 1979), the Claimant filed a Petition for Rule Nisi to enforce an Order of a Judge of industrial claims. At that time, (**before the Circuit Judge**) the Employer/Carrier sought to be relieved of the obligations under the Deputy Commissioner's Order alleging that **Booth** had failed to reveal **receipts of social security benefits** (**Booth**, supra, 357). The Fourth District Court has held, that the proper method to enforce a Workers'

Compensation Order is under **Florida Statutes 440.24** and until modified, such Order of the Deputy Commissioner **remains in full force and effect** (**Booth**, supra, 358).

A Circuit Court proceeding to enforce a final Order of an administrative agency as in the **Wilcox** case, is an **ancillary** proceeding brought under **Florida Statute 440.24** to enforce a **valid outstanding Order**.

Only now, for the first time, is the Petitioner in the **instant** cause, petitioning **the deputy commissioner** in Miami, Florida under **F.S. 440.28** (See our original Appendix to our Reply Brief-on-Jurisdiction) wherein we show this is what they are doing now, finally.

If they have a basis for relief, that basis for relief is found in **Florida Statute 440.28**, which we have long since enumerated, and which they **now** apparently agree. That is precisely what they are doing at the instant time, while this appeal before this Honorable Court is now pending.

SUMMARY OF ARGUMENT

PETITIONER'S POINT 1

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH NUMEROUS DECISIONS OF THE FIRST DISTRICT COURT OF APPEAL. THE FIRST DISTRICT HOLDS THAT AN EMPLOYER/CARRIER IS FREE TO TAKE THE SOCIAL SECURITY OFFSET ALLOWED BY SECTION 440.15(9), FLORIDA STATUTES (1985) AS SOON AS IT RECEIVES THE INFORMATION AS TO WHAT THE SOCIAL SECURITY ADMINISTRATION IS PAYING THE CLAIMANT WITHOUT PETITIONING THE DEPUTY COMMISSIONER PURSUANT TO SECTION 440.28, FLORIDA STATUTES FOR MODIFICATION OF HIS ORDER. THE OFFSET IS SELF EXECUTING AND MEANT BE TAKEN UNILATERALLY. THE POSITION OF THE FIRST DISTRICT IS PREFERABLE AND CORRECT.

The Petitioner merely repeats the same litany that the Petitioner has raised throughout. The offset **is not self-executing** and was not meant to be taken unilaterally as the litigants in all of those other cases heretofore cited (**Troy**, **Booth** & **Wilcox**) well knew, since they too, brought up this issue for hearing before the Circuit Judge and 'shot craps', as the Petitioner did in this case relying upon the Circuit Judge, the Third District Court of appeal and now the Supreme Court of Florida to 'bail them out' because they are an agency of the State of Florida. This is not fair to the Respondent, Mrs. Wilcox, who has been waiting since 1978 to get her compensation case completed and receive her full compensation money.

SUMMARY OF ARGUMENT

PETITIONER'S POINT II

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN CONFLICT WITH DECISIONS OF THIS COURT IN HOLDING THAT THE PROPERTY OF THE STATE OF FLORIDA IS SUBJECT TO LEVY AND EXECUTION BY A JUDGMENT CREDITOR. IN SO HOLDING, THE THIRD DISTRICT IS EXPRESSLY DECLARING SECTION 440.24, VALID AS TO THE STATE OF FLORIDA. THIS EXPRESSLY EFFECTS A CLASS OF CONSTITUTIONAL AND STATUTORY OFFICERS, SINCE THE DECISION GIVES THE JUDICIARY THE POWER TO COERCE THE EXECUTIVE BRANCH OF THE GOVERNMENT IN THIS CASE, THEREBY DECLARING THAT THE LEGISLATIVE AND JUDICIAL BRANCHES OF THE GOVERNMENT CAN EXERCISE POWER OVER THE EXECUTIVE BRANCH VIOLATING THE SEPARATION OF POWERS CLAUSES OF THE FLORIDA CONSTITUTION. THE SOVEREIGN CANNOT BE COERCED BY EXECUTION ON ITS PROPERTY FOR TO ALLOW SUCH WOULD DESTROY THE MEANS OF GOVERNMENT.

The argument under Point II, I find to be specious. If anyone wants to take it seriously, they can, especially that part about the sovereign being coerced by execution on its property which would 'destroy the means of government.' **Garbage**!

In the **Berek** case, which is a Third District Court case, one of the Judges in a dissent to the opinion says that he did not believe that the legislature ever intended such a result as to preclude the collection of a workers' compensation award. We have not cited the **Berek** case verbatum, but that essentially is what was found by one of the Judges in the case, **Berek**, supra, 760.

In the matter of process to enforce a workers' compensation award, we look to **F.S. 440.24(3)** for the only relief that we may obtain to collect or enforce same. (See **Troy**, **Booth** & **Wilcox**)

ARGUMENT ON POINT I

Petitioner's Point I is, as the rest of his brief, out in the ionosphere as it relates to reality.

The Respondent does not know the exact amount of the setoff; what periods of time the Petitioner has taken unilaterally; the Respondent does know that the Federal Government started and stopped for different periods of time, her Social Security disability benefits.

Their 'Pollyannish' remarks in Petitioner's argument under Point I, are unbelievable. Petitioner wants that burden of its setoff put on the claimant so she may incur the expense of a lawyer; the luxury of time to litigate for another five, six seven or eight years, when the legislative intent of the Florida Workers' Compensation Act was to get injured employees their money promptly (see **Booth**, supra, p. 358).

They keep saying the claimant will not be deprived of benefits. **Poppycock**!

The law is as enunciated in the **Troy** case, **Booth** case and as enunciated by the Third District Court in this case, where the Order of the Deputy Commissioner was sought to be enforced by the Circuit Court.

The First District cases cited by Petitioner are all irrelevant to these issues because they all involve **the initial claim litigation** where in the claim-in-chief, the matter of social security setoff was brought up for hearing at the proper time and not waived by the employer sitting back on its 'rights' and waiting until after the Deputy Commissioner has entered his

final order on the merits.

ARGUMENT ON POINT II

It is the considered opinion of the undersigned that the Point II argument in their Brief is specious, & archaic, and has no relevancy in this modern world any more than the inmates of that well-known movie, "One Flew Over The Cuckoo's Nest"!

If the argument is to be sustained, why then the State of Florida and its agencies throughout the state, have no business in furnishing workers' compensation through self-insurance.

The Department of Labor & Employment Security, should revoke the authorization of the State of Florida and the agency involved herein, from operating as a self insurer and said Division should sell such of the securities 'deposited' by such self insurer with the Division as may be necessary to satisfy such Order. (See **Florida Statute 440.24(3)**).

I have examined the paragraph labeled "Public Policy," as noted by the Petitioner in their Brief.

I can't imagine anything so ludicrous and so ridiculous as to suggest that this sovereign State of Florida with billions of dollars in its budget and hundreds of millions of dollars in its treasury, is going to be disrupted and the 'vital instruments of government rent asunder' creating anarchy and chaos!

Can you imagine that Mrs. Wilcox would seize and sell the emergency equipment, & traffic control devices of the Department of Public Health?

That isn't very likely, but what is likely is that the funds on deposit with Crawford & Company in Tallahassee, from whence these blessings flow, would be garnished and attached in order to

satisfy the lawful Order of the Deputy Commissioner awarding Mrs. Wilcox these benefits for which she has struggled to obtain since 1978 -- almost a decade.

CONCLUSION

This Honorable Court should take another look at this claim and render a swift affirmative opinion so that the wheels of justice may halt such spurious appeals as we have in the **instant** case.

The decision of the Deputy Commissioner is still in full force and effect; the decision of the Circuit Judge attempting to effectuate it is correct; the Third District Court of Appeal is correct in their opinion in this case and in following the **Troy & Booth** cases; the Petitioner should be given the short shrift that they deserve.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Reply Brief & Appendix was mailed to: Horace B. Yandle, Esq. of Vernis & Bowling, P.A., Attorneys for Petitioners, 2398 South Dixie Highway, Miami, Florida, 33133 this 5 day of October 1987.

ALFRED D. BIELEY, P.A.