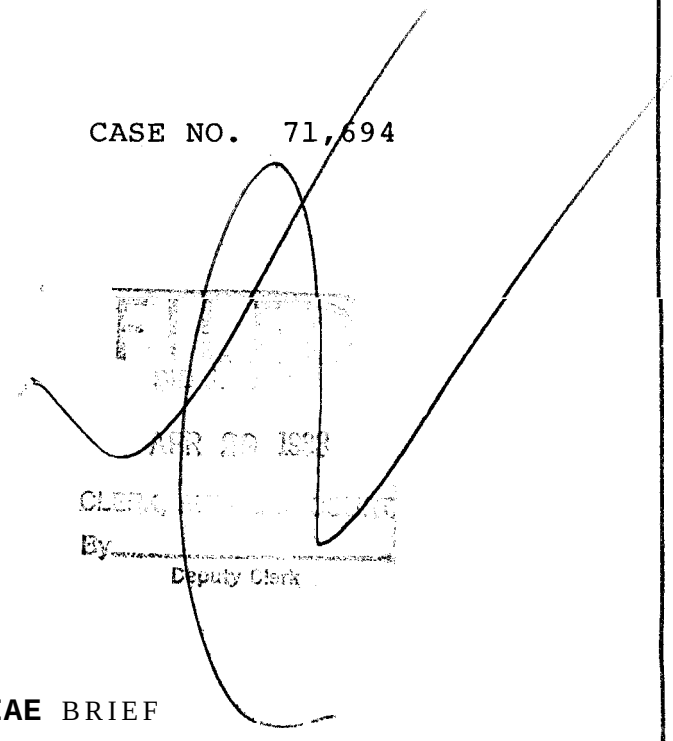
IN THE **SUPREME** COURT OF FLORIDA

LEON COUNTY SCHOOL BOARD and ROYAL INSURANCE COMPANY	*
Petitioners,	*
V.	*
THELMA **J.** GRIMES,	*
Respondent.	*/

CASE NO. 71,694



AMICUS **CURIAE** BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED

FLORIDA STATUTES CITED

SUMMARY OF ARGUMENT

The District Court of Appeal has changed, absent leave of this honorable Court (and of the legislature)--in a significant way--the meaning of a central component to the workers' compensation concept: the "arising out of employment" threshold for compensability.

The purported new meaning for "arising out of" as has been installed by the Court of Appeal effectively renders this key conceptual and statutory component of the act meaningless. The District Court would downgrade the term so that it is nothing more than a synonym for another core concept of a workers' compensation law, namely, "course of employment", thereby expunging it from the statute for all practical purposes.

This honorable Court should quash the Order of the First District Court of Appeal and restore meaning to the statutory concept, "arising out of", in accord with this Court's earlier and controlling pronouncements on the subject. Your Amicus Curiae respectfully submits the rule in such cases, as distilled from the various decisions, is as follows:

> "Where an employee carries a significant personal risk of harm--a risk that remains the same at home or at work, and such employee suffers injury (by accident or otherwise) in the course of employment in some way involving that personal risk of harm--before injury can be said to "arise out of" the employment, there must be a substantial contribution made by the employment to the employee's own risk of harm."

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE DECISION OF THE DEPUTY COMMISSIONER WHEN THE DEPUTY COMMISSIONER'S DECISION WAS BASED ON LONG STANDING SUPREME COURT PRECEDENT.

A. Introduction to Argument--Affirm First: Ask Questions Later

This is one important case. This honorable Court is asked by the First District Court of Appeal to examine the outcome of its unauthorized surgery upon the very face of Florida workers' compensation.

As petitioner argues, it would have been preferable that the District Court first affirm, in accord with this honorable Court's controlling precedent, and then request that this Court, (or more appropriately, the legislature) place the Act upon the examining table for a surgical consultation. Instead, the District Court ''cut'' first and now asks for permission to operate. Procedural deficiencies aside, and at the risk of mixing our metaphors: the consequences of its action, if left undisturbed, are more troubling than the peculiarities of how it came about for truly, the Court has fixed what was not broken.

Your undersigned was involved in the undoing of a similar "adventure" on the part of the former Industrial Relations Commission which sought to change, in one fell swoop, the status quo--also in contravention of this Court's controlling authority on

point.[1] Though the Court did not quarrel with former Commission on a philosophical basis (which we urge this Court do here), the lower Court's re-thinking of Supreme Court precedent was invalidated absent an intervening legislative invitation. Mims & Thomas Mfg. Co. v. Ferguson, 340 So.2d 920 (Fla. 1976)

B. "Arising Out Of" Employment

The District Court has tinkered with one of the three core elements of the workers' compensation concept as it exists in Florida.[2]

We are treating the "arising out of" core element of the workers' compensation concept. For the compensation system as a whole, the issue at bar represents a "Judgement Day" of sorts, for we are deciding nothing less than the threshold question of who shall be allowed to enter the gates of compensability and who shall be barred. Our allegory is imperfect only in the sense the employee--in this case, Thelma Grimes, is not being judged--rather, we judge the industry which she has served. In the broadest sense, if her industry has harmed her, she may enter the gates. If her industry has not harmed her, she may not enter.

[1]The decision involved a complete rethinking of the former "schedule" of impairment benefits. §440.15(3), Florida Statutes (1975).

[2]That an injury (any injury and every injury) be by (1) accident, (2) arising out of, (3) and in the course of employment. §440.02(6) Florida Statutes (1983).

In contemplating the meaning of "arising out of"; the "time of day" harm had befallen Thelma Grimes is beside the point. Likewise impertinent in this case is the fact she suffered her misfortune on the industrial premises. These time and space concepts relate to the third of the three core elements: course of employment. Thelma Grimes was hurt in the course of her employment, just as claimants McCook[3] and Levenson[4] were. "Course of employment" is not an issue here today--and it is certainly not, as the First District Court would have it, the sine qua non of our inquiry.

The honorable First District Court of Appeal acknowledges the controlling influence of the "arising out of" concept in the introductory discussion of its opinion, subheading I. The employers and servicing agents representing your Amicus Curiae readily acknowledge the "arising out of" term can be defined in various ways, with varying degrees of employment contribution to the employees own personal risk of harm implied. As we state at the outset-the District Court should not have operated first and sought approval later-but confronting its holding straight away, your Amicus Curiae submits it is obvious that after acknowledging the stature of, and deference deserved by, this core statutory element, the First District Court then proceeded to downgrade the "arising" concept so much so that in practical effect it represents a mere synonym for "course of employment". The purported requisite

[3] Southern Bell Telephone & Telegraph Co. v. McCook, 355 So.2d 1166 (Fla. 1977).

[4] Market Food Distributors, Inc. v. Levenson, 383 So.2d 726 (Fla. 1DCA 1980).

standard for compensability would now lie somehwere between "no" industry-generated contribution to the employee's own personal risk of harm--to perhaps "a scintilla" or, merely a "symbolic" contribution (i.e., did the employment "contribute" gravity, which helped "precipitate" a fall during seizure?).

Your Amicus Curiae respectfully submits the First District Court was not at liberty to, in effect, expunge this core statutory prerequisite, (that injury cause the malady in question, at least to some meaningful degree). Expunge? A strong word--merely the self-indulgent excesses of an overly zealous advocate? We think not.

We are given to know through the worthy and effective brief of the petitioners in this matter that Ms. Grimes experienced precisely the same occurrence at least once before, and at home (R31,32). Why did that occurrence not "arise" out of employment? It did not, the District Court would likely reason, because it didn't happen between the proverbial hours of nine to five--that is to say, it did not occur "in the course of" employment. Under what legitimate rationale does the cost of educating children in Leon County increase so as to reflect expenditures through the injured workers compensation system made on respondents behalf--but not increase as a consequence of her fall of August 8, 1985 while at home? There appears to be no legitimate reason, but the effective reason is simply this: The First District Court of Appeal now views workers' compensation benefits as health insurance for a third of the day,

the industrial third. "Being there" satisfies the test for "arising out of" and "not being there" separates "compensable" claims from non-compensable ones under this streamlined but conceptually invalid new social policy. This is an illegitimate test for "arising out of".

Whether the District Court is seeking to broaden the scope of coverage under the Florida Act (as demonstrated by the petitioner); lessen its own work load and/or involvement in these nettlesome "tough" questions (as strongly implied by the petitioner) or is just wrong in its treatment of this issue--the net effect is still the same: the institution, through judicial fiat, of a flawed and unsuitable alteration of the threshold standard for compensability in Florida.

C. A New Social Policy?

Let us look a, the case from the point of view the First District Court wishes us to: plainly and simply--expansion of the scope of coverage under the Florida Act. The Court's action is not, to borrow from another phrase under 5440.02, an "unusual event or result happening suddenly". The Court's been at it for a time. We mean no disrespect and we do not say this disingenuously. Nevertheless, it appears to your Amicus Curiae the First District has evinced, over its span of handling the workers' compensation appellate case load exclusively (and doing an admirable job on a day-in, day-out basis), a trend toward "more is better". In a

sense, the Court's conduct embodies the finest common law traditions toward a majestic, flowing stare decisis. However, the District Court's tendancy toward an ever-broadening view of compensability and benefits is evolution at too fast a pace, especially under the Workers' Compensation Act.

Soon, perhaps, the First District will happen upon this honorable Court's decision in Strother v. Morrison's Cafeteria, 383 So.2d 623 (Fla. 1980), an impressive and logically valid "course of employment" determination made by this honorable Court, well suited to the unique facts there presented. In concert, these cases afford the First District the next logical step in its "ever greater" view of the employer's liability: that the Court may tackle the remaining two-thirds of the day by having Ms. Grimes cite the "fatigue" accumulated during the work day as a cause for her next idiopathic or other internal failure, at home.

At the risk of expanding the scope of this brief beyond what might be appropriate, (and exposing the Court to your Amicus Curiae's own idiosyncratic view of the nature of things) it seems this is what an Article V Court is apt to do with a state program not particularly well suited to flow at so (comparatively) rapid a rate. Zealous, innovative, and creative advocacy seems to "make its (the District Court's)day". The Court sometimes seems not to have one of the requisite pair of pendulum stops as might more readily be perceived in such an institution as the former Industrial Relations Commission, an institution which, owing to its constituent members,

generally [5] balanced out the natural gravitations of claims-advocacy toward more and greater benefits at one stop of the arc by the legitimate concerns borne of system-wide needs at the other.

The "system", has produced such devices as the schedule for impairment benefits (§440.15, 1974) and similar measures toward its goal of administering recurring issues in more-or-less uniform and predictable ways while acknowledging the inevitability of certain individual inequities. This process reflects the trade-off whereby the industry served is able to set reserves and allow for workers' compensation exposure to be treated as a predictable cost of doing business while at the same time assuring the worker nearly instantaneous recovery, regardless of fault.[6] Your Amicus Curiae respectfully submits the District Court of Appeal has been tinkering with this central mechanism and it is likewise respectfully and decorously submitted the cummulative effect of the adjustments have skewed the balance so that it now teeters dangerously. Studies Commissioned by the Department of Labor and other interested entities are emerging with distressing regularity pointing to the prohibitively increasing expense generated by the Worker's

[5] No one is perfect. Yes, the IRC too had its wides swings of the arc. Ferguson, supra

[6] See cases cited by petitioner evincing this Court's earlier analysis of these philosophical tenets of the Workers' Compensation Law, specifically, Protectu Awning Shutter Co. v. Cline, 16 So.2d 342 (Fla. 1944).

Compensation Law as presently construed and implemented.[7] As of this writing, during the 1988 Legislative Session, House bill 1228 is lodged, acknowledged to have been filed on behalf of the Department of Insurance, which essentially guts the ajudicatory system in workers' compensation in Florida as a means toward controlling soaring costs. If it does not pass this year, almost all players in the system are commited to a reform next year--it is hoped, a more thoughtful one than that just alluded to.

It is submitted Florida cannot afford much more of this social philosophy, in the implementation of the Workers' Compensation Act, that "more is always better". The pendulum must have a stop so that it also swings back if it is to produce a useful tempo and reconcile the discordant notes of the various players straining to mark its time.

[7] See Florida 1988 Claim Study, Analysis of the Florida Workers' Compensation System, February, 1988 by the National Council on Compensation Insurance.

An Analysis of Legal Costs In Florida's Workers' Compensation System, A Report Prepared by David J. Nye, Ph.D., February 8, 1988.

Workers' Compensation In Florida Post-Wage Loss: An Update by Fred B. Power and Warren Shows, Professors, Departments of Finance and Economics, Respectively, College of Business Administration, University of South Florida, Tampa.

[Amicus Curiae are unsure of the propriety of attaching these studies as an appendix to their brief. They will be made available to this Court or to either party on request.]

As your Amicus Curiae has alluded to above, the standard of "arising" sought to be imposed by the First District Court of Appeal would require, in terms of the contribution sought by industry to the employee's own personal risk of harm, something between "no" contribution and a "scintilla" or symbolic contribution (i.e.,employment related "gravity", or simply "being there"). It is submitted an apt analogy might be made with our standard of evidence, i.e., what is needed to support an award of compensation? The Court has long ago ruled, in answer to that inquiry, that the "substantial evidence" rule should be invoked in all cases. U.S. Casualty Co. v. Maryland Casualty Co., 55 So.2d 741, 745 (Fla. 1951). In construing the landmark U.S. Casualty case, the Industrial Relations Commission steadfastly refused "...to adopt the "scintilla" rule or "any evidence" rule...Pearce v. Piper Aircraft Corp., IRC Decision 2-2273A (1973) cert. den., 292 So.2d 19 (Fla. 1974).

So too ought there be, nay, so too is there a "substantial contribution" rule in Florida. This Court has announced it. The District Court has heretofore adopted it, in so many words. Essentially, such cases as McCook, supra, hold (your Amicus Curiae paraphrases):

> Where an employee carries a significant personal risk of harm--a risk that remains the same at home or at work, and such employee is injured (by accident or otherwise) in the course of employment in some way involving that personal risk of harm--before injury can be said to "arise out of" the employment, there must be a substantial contribution made by the employment to the employee's own personal risk of harm.

The term "substantial" has varying shades of meaning. Your Amicus Curiae submits the sense of the word implied in the above "rule" is only that degree of substantiality necessary to distinguish the required degree of contribution from insubstantial, i.e, something tangible, real, meaningful--as opposed to insubstantial, inconsequential, meaningless, trivial--a scintilla. Florida is not a "scintilla" state in the evaluation of the requisite degree of evidence necessary to the support of a finding of fact. So too should this honorable Court repudiate the First District Court's instant effort to make Florida a "scintilla" state in terms of the degree of contribution necessary on the part of industry to the support of a finding of medical and factual causation represented by the "arising out of" requirement of the law.[8]

[8]Your Amicus Curiae does not intend to present a litany of complaints With citations of other perceived excesses on the part of the First District but a case illustrating the same "scintilla" search approach in the concomitant requirement that an accident occur "in the course of" employment is New Dade Apparel, Inc. v. DeLorenzo, 512 So. 2d 1016 (Fla. lDCA 1987). For ten years, claimant DeLorenzo had worked precisely the same hours each Saturday morning but had arranged for the morning in question to be set aside as a vacation day. Subsequent to that, the employer asked the claimant reschedule so that he could in fact come in as he normally would have. This small wrinkle prompted the Court to hold the claimant's regular Saturday work had become, on that particular day, a "special errand" and because a visit to his own personal physician that morning had been "expressly acquiesced to" by the employer, the Court held:

> "His absence during this specially assigned work day due to the appointment was a specifically agreed interruption, in that the record reflects that the employer expressly acquiesced to appellee keeping the appointment as a condition of his completion of this special work day. While personal travel interruptions during an assigned period of work may not ordinarily be covered by the special errand status of the work period, the interruption in this case was agreed between the parties, thus effectively changing the day's special assignment into two periods which would each qualify for the special errand exception to the going and coming rule, supra. Under these circumstances we conclude that appellee's accident is compensable." DeLorenzo, supra, P. 1018, ("Scintilla" logic, as defined by your Amicus Curiae, underscored).

Note that working on a day claimant "ordinarily did not work" and having been required to work a location of the employer different from that customarily worked was insufficient to create a special errand in another case decided two years earlier, Radomski v. Great Bicycle Shop, Inc., 464 So.2d 1346 (Fla. 1DCA 1985).

Your Amicus Curiae are not intending to seem overly critical of the work of the First District Court of Appeal--to the contrary--it has inherited an enormous and largely unfamiliar body of law and in discharging the obligations newly thrust upon it in 1979, it has performed more than admirably--but in the ways described herein--your Amicus Curiae submits it has approached its work with an imperfect understanding of the larger needs of the program it so potently guides.

D. Curtailment of Appellate Activity?

The petitioner makes an interesting case for the proposition the District Court is, perhaps, weary of these recurring "tough" questions and has fashioned the complained-of "new" arising test in an effort to either curtail the number of such cases brought to it for consideration, or simply to avoid having to deal with these difficult recurring questions altogether--or a combination of both. Again, it is respectfully submitted this approach, if an accurate representation of what is afoot here, is misguided.

There are, from time to time, and in landmark cases, both great and small "rules" announced. These are usually well thought out and serve, for bench, bar and litigants as both helpful guideposts along the way and as occasional bridges over troubled, legal waters. In this case, the contemplated new rule is simply a guidepost proclaiming "bridge out".

The legislature advises industry it is to compensate where injury "arises" out of employment and in the vast majority (literally) of cases, all participants in the system know what is meant by the phrase. The troublesome cases go to the District Court of Appeal. As petitioner argues, the Court should not shy away from tackling the troublesome close cases--for indeed--the close cases are why there is a District Court of Appeal.

E. Summary

As we have said at the outset, the First District would downgrade the statutory term "arising out of" so that in practical effect, it is a mere synonym for "course of employment" and is, effectively, expunged. A scintilla, or in this case, as petitioner ably demonstrates, virtually "no" contribution to the employee's personal risk of harm, need be shown so long as harm occurs during the industrial third of the day. Your Amicus Curiae urge that the concept mean more.

Your Amicus Curiae urge that "arising" be construed so as to require a showing of substantial contribution to the employee's personal risk of harm--substantial in the sense that it is meaningful versus meaningless, significant versus insignificant, material versus immaterial, i.e., substantial versus insubstantial. We implore that it not be construed so as to require only a scintilla of contribution. Your Amicus Curiae pray the meaning

given by this honorable Court in McCook, supra, and by the District Court of Appeal in previous cases such as Market Foods, Inc., supra, be restored to this elemental, statutory term and that the First District Court's ill-humor in tackling the question on December 15, 1987 be forgiven, but that its opinion be quashed.

CONCLUSION

Your Amicus Curiae adopt the conclusion of the petitioners as their own.

Respectfully submitted,

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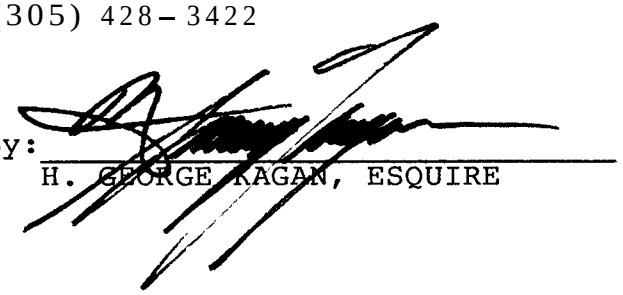
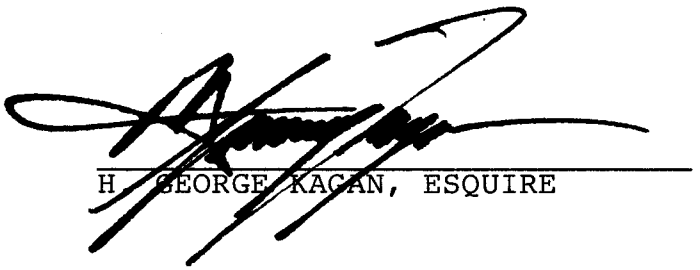


By: _____
H. GEORGE KAGAN, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amicus Curiae Brief was sent by regular mail this 28th day of April, 1988 to RICHARD M. POWERS, ESQUIRE, 701 Barnett Bank Building, 315 S. Calhoun Street, Tallahassee, Florida 32310 and DAVID MC CRANIE, ESQUIRE, P.O. Box 229, Tallahassee, Florida 32302.



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