SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA



CYPRESS CREEK NURSERY and CLAIMS CENTER,

Petitioners,

vs.

FLORENCE EAGLE,

Respondent.

CASE NO.: 72, 710

1ST DCA CASE NO.: 87-1183

# PETITIONERS' REPLY BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

In this Petitioners' Reply Brief on the Merits, the Petitioners, Cypress Creek Nursery and Claims Center, will be referred to herein as the "employer/servicing agent" or by their separate names. The Respondent, Florence Eagle, will be referred to herein as the "claimant". Designations to the transcript of record shall be referred to as "TR" followed by the appropriate page number. References to the Respondent's Answer Brief on the Merits shall be referred to as "AB" followed by the appropriate page number.

## STATEMENT OF THE CASE AND FACT

The Petitioners readopt and reallege the Statement of the Case and Statement of the Facts provided in pages two through seven of the Petitioners' Brief to the Florida Supreme Court.

## POINTS ON APPEAL

### POINT I

THAT THE DISTRICT COURT OF APPEAL ERRED IN APPLYING THE LAW OF GRIMES V. LEON COUNTY SCHOOL BOARD, TO THIS CAUSE AND, IN EFFECT, LEGISLATING AWAY THE REQUIREMENT THAT AN INDUSTRIAL ACCIDENT AND INJURY MUST ARISE OUT OF THE EMPLOYMENT.

### POINT II

THAT THE FIRST DISTRICT COURT OF APPEAL COMMITTED ERROR IN MAKING UNSUBSTANTIATED FINDINGS OF FACT IN THAT THE CLAIMANT'S ABILITY TO CONTROL HER ACTIVITIES AND POSITIONAL CHANGES WAS NOT AS GREAT AT WORK AS IT WOULD HAVE BEEN AT HOME.

## SUMMARY OF THE ARGUMENT

It is respectfully submitted that the Respondent's lengthy essay regarding injuries sustained by traveling employees and the "personal comfort" doctrine is merely an attempt to cloud the issues before this Honorable Court. The Respondent was neither a traveling employee nor has there been any mention of the "personal comfort" doctrine by any party at interest, including the First District Court of Appeal, prior to the Respondent's insertion of a new issue at this late hour.

The Respondent also takes great pains to stress that Florence Eagle did not have any problems with her right knee until June 10, 1985 (AB 5, 36, 37). However, the Respondent's own statement, prior to any litigation in this matter, that her right knee had been hurting since June 8, 1985 (TR 161), cannot simply be ignored. Further, unlike the First District Court of Appeal, the Deputy Commissioner, as finder of fact, had the opportunity to observe the candor and demeanor of all the witnesses before rejecting the Respondent's multiple versions in favor of the testimony of Minnie Grace, who did not have a financial interest in the matter (TR 167).

Finally, although the Respondent has difficulty comprehending how the claimant would not be able to better control her activities at home than at work (AB 35), there is absolutely no evidence in the transcript of record regarding the Respondent's ability to control her activities in the interior of her home. In contrast, there is an abundance of evidence that the Respondent, who worked out of doors, was able to change positions

at will while at work (TR 9, 48, 49). This is in direct conflict with the facts of Grimes v. Leon County School Board, 518 So.2d 327 (Fla. 1st DCA 1987), where the claimant had to work indoors in a crowded environment (AB 22).

## ARGUMENT

### POINT I

THAT THE DISTRICT COURT OF APPEAL ERRED IN APPLYING THE LAW OF GRIMES V. LEON COUNTY SCHOOL BOARD, TO THIS CAUSE AND, IN EFFECT, LEGISLATING AWAY THE REQUIREMENT THAT AN INDUSTRIAL ACCIDENT AND INJURY MUST ARISE OUT OF THE EMPLOYMENT.

It is respectfully submitted that the Respondent's lengthy discussion of traveling employees and the "personal comfort" doctrine (AB 26-30) is an irrelevant avoidance of the issue on appeal as stated above.

The Respondent does correctly point out (AB 22) that the claimant in Grimes testified that her working conditions were crowded much more so than at home. Such crowded conditions at work are diametrically opposed to the conditions at Cypress Creek Nursery. The transcript of record is replete with evidence that at Cypress Creek the Respondent worked both inside and outside and was able to change positions while working (TR 9, 37, 48, 49).

As stated in Medeiros v. Residential Communities of America, 481 So.2d 92 (Fla. 1st DCA 1985):

> "When a claimant suffers from an idiopathic, or pre-existing condition which results in injury, the injury is compensable only if the claimant can show that it 'arose out of' his employment. Southern Bell Telephone and Telegraph Company v. McCook, 35 So. 2d 1166, 1168 (Fla. 1977), House v. Preferred Auto Leasing, 476 So.2d 1337 (Fla. 1st DCA 1985). An injury 'arises out of' employment when the employment necessarily exposes the claimant to conditions that substantially contribute to the risk of injury, conditions which the claimant would not normally encounter during his non-employment life. Legakis v. Sultan & Sons, 383 So.2d 938, 940 (Fla. 1st DCA 1980)"

In the case at bar, the Deputy Commissioner found that the claimant's condition predated her employment and that her current symptoms and conditions are unrelated to it (TR 167).

It is respectfully submitted that the Respondent has not demonstrated that her surroundings at Cypress Creek in any way contributed to the risk of injury anymore than they would have in non-employment life.

Therefore, the vast difference in working conditions between the claimant in Grimes and the Respondent would preclude application of the First District Court of Appeal's legislative creation, the "actual risk" doctrine, to the case a bar.

Further, there is a lack of evidence that the Respondent's employment exposed her to hazardous conditions that she would not be exposed to in everyday life, thereby precluding recovery under the "increased hazard" doctrine.

## ARGUMENT

## POINT II

THAT THE FIRST DISTRICT COURT OF APPEAL COMMITTED ERROR IN MAKING UNSUBSTANTIATED FINDINGS OF FACT IN THAT THE CLAIMANT'S ABILITY TO CONTROL HER ACTIVITIES AND POSITIONAL CHANGES WAS NOT AS GREAT AT WORK AS IT WOULD HAVE BEEN AT HOME.

The Respondent was correct in stating that the First District Court of Appeal found the claimant was entitled to compensation because her ability to control her activities and positional changes was not as great at work as it would have been at home (AB 34).

Even if the First District Court of Appeal was the finder of fact, which is contrary to the mandate of this Honorable Court, it is respectfully submitted that the First District Court is basing its findings on facts not in the record. There is not an iota of evidence in the record regarding the Respondent's ability to control her activities and positional changes at home. There is, however, ample evidence that the Respondent had the ability to control her positional changes and activities while at work (TR 9, 38, 39, 48, 49).

Further, competent, substantial evidence clearly indicates that the Respondent's falls were not related to her ability or inability to control her activities or change positions. This fact is verified by statements made by the Respondent (TR 30, 31) and Minnie Grace whose testimony the Deputy Commissioner specifically accepted (TR 42, 167).

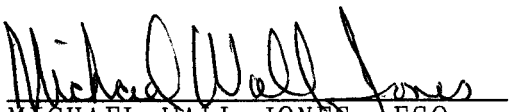
## CONCLUSION

The First District Court of Appeal assumed the role of the legislature when it elected to ignore the requirement that an accident and injury must "arise out of" the employment. In so doing, the District Court also overturned many prior decisions of this Court.

The First District Court of Appeal also erred when it assumed the role of finder of fact and based its conclusions on facts not in the record.

Therefore, the decision of the First District Court should be reversed and the order of the Deputy Commissioner reinstated.

Respectfully Submitted,



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Reply Brief on the Merits has been furnished by U. S. Mail, this 12th day of December, 1988 to J. David Parrish, Esquire, 1000 East Robinson Street, Orlando, Florida 32801 and William J. McCabe, Esquire, 319 North Magnolia Avenue, Orlando, Florida 32802.

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