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IN THE SUPREME COURT OF FLORIDA

UNIVERSITY OF FLORIDA and
DIVISION OF RISK MANAGEMENT,

Petitioners,

vs. CASE NO.: 76,414

EMMETT H. MASSIE,

Respondent.

_____/

ON PETITION TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL OF THE FIRST DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE

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STATEMENT OF THE CASE AND FACTS

Your Amicus Curiae, FEISCO, accepts Petitioners' Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

This is a crucial time for Florida's Workers' Compensation legislation. The Court knows that this is so: as of this writing the legal/political firestorm embodied in Martinez v. Scanlan, Case No. 77,179 is still pending. This case is a crucial case.

Petitioner presents to this Court an articulate dissection of the judicial history and substantive holding in this the final of the District Court's three treatments of the cause sub judice. Your Amicus Curiae cannot improve on Petitioner's development of the error. Instead, their presentation will amplify on the importance of this Court's recent Leon County School Board v. Grimes, 548 So.2d 205 (Fla. 1989) as a bellwether for disposition of this cause--for reasons that are obvious and for some that are not so obvious.

In Grimes, this Court quashed an opinion evincing an express desire on the part of the First District Court to create, spontaneously, (without leave of the legislature) liability for compensation benefits where an accident may have occurred "in the course" of employment but where injury did not "arise out of" the employment. Put another way: Thelma Grimes' industry did not harm her--it merely provided the backdrop against which her personal calamity unfolded. As such, the cost of the industry Thelma Grimes served should not have been increased,

to the ultimate consumer, by the cost of treatment and disability flowing from Ms. Grimes' personal distress.

The District Court had earlier in this cause issued another expansive opinion but withdrew same owing, it was widely thought, to the pendency of its first, similar effort in Grimes. Since then this Court has issued its cogent disapproval of the District Court's new philosophy by first noting the District Court would found liability on the part of the employer for conditions personal to the Claimant, and, it commented on the inappropriateness of such judicial legislation. Parenthetically, the Court also noted the fact the District Court seemed to buttress its holding with "findings" contradictory of those made by the trier of fact. The District Court's re-introduction of substantively the same holding as before repeats the process repudiated in Grimes in virtually every respect. Though the departure is as great, it is not expressly announced (compare the certified question presented in Grimes): the same panel of the District Court would now remand for an award based on aggravation of a disease personal to the Claimant where, here, there is not even an "accident" (as there was in Grimes).

The District Court finds all three statutory prerequisites to a compensable "injury" satisfied by one concept and that is: hard work. Here, the accident is "hard work." Injury "arises out of" hard work. Because the hard work occurred at work, "course of employment" is thereby satisfied. The holding conflicts with this Court's pronouncement in Grimes. The portents for the workers' compensation system are both ominous and negative.

Moreover, per Petitioner's Point II: the peculiar process by which the

District Court would grant the relief given invites instability and increased legislation by introducing, (again by judicial decree, sans the imprimatur of the legislature) a third basis for a statutory petition for modification.

ARGUMENT

POINT I

THE DISTRICT COURT OF APPEAL ERRED IN FINDING THAT RESPONDENT SUSTAINED AN "ACCIDENT" WITHIN THE MEANING OF § 440.02(1), FLORIDA STATUTES

A.

Uniquely in the statutory setting of the workers' compensation law, an appellate's court function should be to articulate clearly and then maintain the rules so that, in simplest terms, the cost of doing business may be projected and appropriate reserves set.

The social experiment known as Workers' Compensation Legislation is not so amenable to the majestic flow of stare decisis as is the common law. Here, the "flow" of change must emanate from the legislature as society, not courts, may perceive the need. The legislature's power to act is circumscribed by the necessity of allocating limited resources among competing needs and scarcities coupled with the sure knowledge many worthy causes will go wanting in any event. A court is not presented with all unmet needs vis-a-vis limited options simultaneously, and its "generosity" in the expansion of a "compensation" law can easily partake more of the nature of wish fulfillment than legal reasoning unless rigorous self-discipline and circumspection is exercised. As will be lamented in epilogue, following Argument,

sometimes it falls to a few defense attorneys--the unhappy task of standing before the Court and in the way of this wish fulfillment. The role is a frustrating one (for counsel and no doubt for the courts). But speak we must, and this is what we say: The decision of the District Court below actively promotes uncertainty and instability in the sufficiently unstable workers' compensation field whereas that single court, given all workers' compensation appellate responsibility, should instead be the exemplar of stability and predictability. Yet--as is implicit within the text of the opinion--and explicit within the concurring opinion--the First District Court of Appeal seems to regard continuous change and judicial expansion of the employer's liability as appropriate, even laudable goals.

Some warning signs have been extant for the better part of a decade. Now the crisis is declared in the most graphic terms. [Chapter 90-201, Preamble, Laws of Florida (1990)]

B.

As Petitioner reminds us, in order to receive workers' compensation benefits, the worker must sustain; (1) injury, (2) by accident, (3) arising out of, and, (4) in the course of employment. § 440.02(6), Fla. Stat. 1979, since renumbered § 440.02(18), Fla. Stat. 1983. The concept "accident:"

> "...means only an unexpected or unusual event or result, happening suddenly. A mental or nervous injury due to fright or excitement only...shall be deemed not to be an accident by injury arising out of the employment." [§ 440.02(18), Fla. Stat. 1979, since renumbered § 440.02(1), Fla. Stat. 1983.]

In this case the District Court holds "injury" (in the form of aggravation of a

condition personal to the Claimant) was brought about by "accident" in the form of hard work and nothing more. The "arising out of" (origin of the risk of harm); the "in the course of" and the "accident" elements are satisfied by the same concept: hard work.

The lower court's expansive (of the employer's liability) decisions in Grimes, supra, and in the cause sub judice, are neither unrelated nor inadvertent. The First District Court of Appeal wants to compensate where the only connections with work are the fortuitous circumstances of time and space--irrespective of industrial contribution. The tendency was, in substantive effect, well documented in this Honorable Court's excellent analysis in Grimes. There the District Court would have repealed the "arising out of" statutory prerequisite to compensable industrial harm. Here it endangers both the "arising out of" requirement and the "accident" concept.

For our purposes in this case, as a matter of law, stress, anxiety, i.e., "mental and nervous injury" and the like, standing alone, are precluded as a basis on which to award benefits. § 440.02(18), Fla. Stat. 1979, since renumbered § 440.02(1), Fla. Stat. 1983. Although the District Court seems to suggest nothing is "new" in its opinion, its practical effect is to abrogate, or at least jeopardize, the statutory prohibition on stress-based compensation claims. It permits stress to act as a conduit by which a pre-existing, personal disease condition may be connected to the work without an "accident arising out of and in the course of employment."

The concurring opinion is illuminating. While acknowledging only an extremely narrow and conventional basis for the court's reversal, the concurring Judge then proceeds to lament the court's limited powers to recede from this

Honorable Court's (disfavored) interpretations. Paradoxically -- it would seem the Court in fact acted in accordance with the concurring Judge's wishes! [Perhaps we miss his meaning, but on the surface, we question why the Honorable concurring Judge laments restraints on certain action in concert with a holding taking precisely that action.]

Your Amicus Curiae's central thesis is this: It believes a disturbingly similar process was utilized by an identical panel of the District Court of Appeal in Grimes v. Leon County, 518 So.2d 327 (Fla. 1DCA 1987) quashed by this Honorable Court in Leon County School Board v. Grimes, 548 So.2d 205 (1989).

In Grimes too the District Court seemed to make little of its accomplishment -- purporting to reconcile its holding in that case with the decisions of this honorable court. Based on its own (appellate) determination there was significant "physical" repetition in otherwise routine work, the District Court stated, in essence: Grimes was just another "repeated trauma" case.[1]

As this Court astutely recognized in quashing; first, the District Court's "findings" of "physical" contribution to injury (via repetition and crowding) was unsupported by the record (that is to say, the Judge's conclusion there was no such material contribution made by industry to the employee's personal risk of harm was supported). Second, the import of the District Court's holding was portrayed in its true light: The District Court's opinion in Grimes would have:

"...broadened the purpose (of workers' compensation

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[1]If that were so, there would have been no need for copious quotations from cases of Texas, New Jersey, California and Mississippi. [Grimes, supra at 331-334]

> legislation) to allow recovery for any injury occurring in the work place, including injuries arising out of conditions personal to the claimant which are not caused or aggravated by industry." [Grimes, supra at P.206]

Likewise, this Court recognized, notwithstanding the District Court's declared adherence to established precedent--to leave the opinion in tact:

> "...would require us to overrule numerous decisions of this court." [Grimes, supra at P.206] (Emphasis added.)

The District Court failed to explicate its reasons for either withdrawing its original opinion after a two-year gestation period, or for the re-issuance of an opinion with comparatively small changes after another two years had passed. As Petitioner and your Amicus have stated: It is clear the Court wants to compensate in these cases and it is likewise clear the Court feels frustrated by this Honorable Court's superior position which represents an impediment toward implementing its expressed aims. [See concurring opinion, Massie, at 977.]

In the instant cause, (as in Grimes): in an effort to embrace the statutorily disallowed condition "stress" within something more recognizable under the law and thereby compensate for a personal disease process, the court developed its opinion in the following way. First, the Court tacitly acknowledged what the claim was about:

> "In an effort to prove that the aggravation of his multiple sclerosis was due to employment-related stress, claimant testified at the modification hearing...." [Massie, revised opinion, at P. 9.]

What the court felt was pivotal testimony of the expert witness in furtherance of the claim as above described was, likewise, accurately summarized as follows:

> "[Claimant] had a pressure-packed, stressful job." [Massie, revised opinion, at P. 8.]

However, further discussion of the case begins to incorporate "physical" stress--to the extent the two (emotional and physical) became the tag by which the claim becomes referenced on through to the conclusion of the opinion:

> "The aggravation of claimant's multiple sclerosis by his prolonged exposure in his employment to a combination of emotional and physical stress and strain attributable to unusual circumstances and exceptionally long hours may be compensable so long as the exposure to stress and strain is greater than that to which the general public is exposed.
>
> It is now abundantly clear that based on the testimony of claimant's expert, Pappas, the Deputy Commissioner could find that the stress and physical exertion to which claimant had been exposed in his employment...was indeed greater than that to which either the general public was exposed or other station engineers in similar employment were generally exposed." [Massie, revised opinion, at P. 13]. (Emphasis added.)

The court went on to explain:

> "Nor did either Order contain any explicit finding that the claimant's working twelve to eighteen hours a day did not impose unusual, physical exertion on claimant greater than that imposed on the general public, or that physical exertion due to these long hours, acting in concert with the mental stress shown by claimant's evidence, did not contribute to the aggravation of claimant's pre-existing condition of multiple sclerosis. [Massie, revised opinion at P. 31.] (Emphasis added.)

The Court acknowledged: the Judge was not persuaded of the physical nature of the stress below. Just as was done in Grimes, the District Court seemed to mix this established ingredient (physical) into a brand new recipe so that the resulting flavor would have a familiar taste. It does not. It is a new food and one

that is too rich for the workers' compensation system to digest. Perceived "uncommon" stress is common: proof it does not exist is more elusive.

In the Victor Wine case discussed by Petitioners,[2] Justice Roberts gave us the following thoughts which are illuminating in discussions of this kind:

> "We are once again confronted with the problem of whether we have workmen's compensation, or whether we have health insurance. In General Properties v. Greening, 154 Fla. 814, 18 So.2d 908, 911, we said, 'This very valuable statute, (Chapter 440, Florida Statutes) while fulfilling a long-standing public need, was not designed to take the place of general health and accident insurance.' As was said by this court, *** in *** Protectu Awning Shutter Co., et al. v. Cline, 16 So.2d 342 ***: 'The purpose of the act is to shoulder on industry the expense incident to the hazards of industry; *** and to ultimately pass on to the consumers of the products of industry such expense. Our act affords no relief for disease or physical ailment not produced by industry,' and further, 'Can the courts, in their sympathy for the unfortunate, question the wisdom and policy of the legislature in this regard? *** The wisdom and policy of legislative acts is a matter for the legislature to determine.'" [Victor Wine, supra at 583]

Petitioner's sought-after relief is both appropriate to this claim, and essential to the very troubled program from which it arises.

POINT II

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE ORDER OF THE JUDGE OF COMPENSATION CLAIMS DATED APRIL 30, 1986 WHICH DENIED RESPONDENT'S PETITION FOR MODIFICATION

The Petitioner makes clear the fact the law provides only two means by

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[2]Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581 (Fla. 1962)

which a claim previously disposed of by final Order may be re-opened. Where, as here, the original compensation Order denied the compensability of the claim, there was, effectively, only one means available--which was and should remain difficult to establish. It is the latter of the following:

> "...[O]n the ground of a change in condition or because of a mistake in a determination of fact, the Deputy Commissioner may, ...review a compensation case and ...issue a new compensation Order which may...award compensation." [§ 440.28, Fla. Stat. 1979.] (Emphasis added.)

The fact-finder below was not persuaded either criterion had been satisfied. At the conclusion of an inexplicably tortured process, the District Court became persuaded the then Deputy had made a mistake in a determination of fact in the original Order of denial (and that it too did so in affirming!) and remanded for entry of an Order making the award.

As urged under Point I, the single appellate court charged with the whole of the workers' compensation appellate responsibility should strive to make its decisions exemplars of stability and predictability. Paradoxically, and especially with respect to the argument presented under this point--the District Court promotes uncertainty and instability.

Here though, the Court does not deliberately strive to achieve expansion and change as it did per discussion under Point I. Here the Court adopts a more circumspect stance: The judicially enacted 'third' basis for a Petition for Modification is intended to prevent a "manifest injustice." It is submitted the ratio decidendi of both the second appearance and the third recurrence of this cause

before the District Court of Appeal partakes almost of the nature of a claims bill granted by the judicial branch of the government in sympathy with Mr. Massie's lamentable plight. Unlike a true claims bill--a private affair between an individual and the state via its elected legislature--this one is not private. This relief is going to be studied by an aggressive and resourceful claimant's bar. This one impacts on the whole of the workers' compensation system which is already in a crisis state. This is not an efficient means of implementing good intentions.

The only point your Amicus Curiae would add to Petitioners' cogent analysis of the defect below is to add its voice to Petitioners in urging the Court consider carefully the cautionary remarks presented by Petitioner at the bottom of Page 34 of its brief. These are not the hyperbolic "floodgate" warnings of a distressed but myopic litigant. Consider the likely, not hypothetical ramifications if a decision of this kind is allowed to stand. The workers' compensation system does not need further instability and uncertainty. This latter observation, too, is not a hypothetical warning--it is a paraphrasing of the crisis that has been declared by the elected governing body of Florida. [Chapter 90-201, Preamble, Laws of Florida (1990)]

EPILOGUE

The radical and clearly negative alteration of the benefits and entitlement section of the Workers' Compensation Law during the 1990 legislative session are related to a crisis in confidence in the system as a whole, and a crisis in the cost of that system as borne by industry and consumers. Although the District Court certainly did not cause the crisis, it is respectfully submitted its pattern of benevolent interpretations are not an insignificant component.

Your undersigned finds himself in the excruciatingly discomfiting position of feeling his professional obligations require that he make the strong statements found in this text whereas, by training and upbringing, he has the utmost respect for both our judicial system and its high and honorable members. It brings no pleasure to have to say these things. Indeed, it is daunting. These things are said, however, because in the professional judgement of the undersigned, they appear appropriate. The District Court is clear in its stated intention to alter the status quo. Our judicial system provides for few who are in a position to answer. The task has fallen to the Petitioners and your Amicus Curiae, exclusively. The challenge is freely undertaken but it is respectfully and decorously requested this Honorable Court recognize the sensitivity of the position of the undersigned advocate for Amicus Curiae and accept his personal assurance that whether he is right or wrong, the arguments flow from professional judgements and observations based on his sixteen years of exclusive involvement in the workers' compensation system.

CONCLUSION

Your Amicus Curiae adopts the conclusion of Petitioners and likewise, respectfully requests this Honorable Court quash the decision of the District Court of Appeal and reinstate the Order of the Judge of Compensation Claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Amended" Brief of Amicus Curiae was forwarded this 22nd day of April, 1991 to TERRENCE J. KANN, ESQUIRE, 2929 Plummer Cove Road, Jacksonville, Florida 32223 and DAVID A. McCRANIE, ESQUIRE, 4811 Beach Boulevard, Suite 402, Jacksonville, Florida 32207.

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