OA 6-6-91



IN THE SUPREME COURT OF FLORIDA

UNIVERSITY OF FLORIDA and
DIVISION OF RISK MANAGEMENT,

Petitioners,

CASE NO. 76,414

vs.

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**
Submitted on Behalf of Respondent by
ACADEMY OF FLORIDA TRIAL LAWYERS

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## FLORIDA STATUTES CITED

## STATEMENT OF THE CASE AND FACTS

Your Amicus Curiae, AFTL, accepts Respondent's Statement of the Case and Facts.

## SUMMARY OF THE ARGUMENT

While Respondent has more than aptly set forth a summary argument that should persuade this Court of either the correctness of the District Court's opinion that is appealed or the lack of this Court's jurisdiction, your Amicus Curiae would offer the following:

1. The District Court's opinion should stand or fall on the basis of the uncontroverted facts established by the record and found by the trial judge and confirmed by the appellate court after their extensive review of that record. Neither unrelated cases pending before this Court nor any perceived crisis, real or imagined, should be given any consideration in this Court's determination of this appeal. Likewise, the makeup of the DCA panel that decided this case should have no bearing on this appeal.

2. The uncontroverted facts found in the record establish that a compensable "accident" (aggravation or acceleration of a non-disabling pre-existing condition) occurred to the claimant in this cause under the pronouncements in Worden v. Pratt and Whitney Aircraft, 256 So.2d 209 (Fla. 1971), Festa v. Teleflex, Inc., 382 So.2d 1119 (Fla. 1990), Silvera v. Miami Wholesale Grocery,

Inc., 400 So.2d 439 (Fla. 1981), and a host of other cases cited by the Respondent.

3. The case of Leon County School Board v. Grimes, 518 So.2d 327 (1987), is distinguishable from this case on the basis that Grimes offered no evidence that her pre-existing polio condition was in any way aggravated by her job, i.e., her fall on the job was in no way caused by increased risk or hazard attributable to the work place and therefore did not arise out of her employment.

4. Based on Harris v. Lewis State Bank, 482 So.2d 1278, the District Court has the inherent power to correct its errors made in the same case during a previous appeal.

## ARGUMENT

### POINT I

DISABILITY RESULTING FROM AGGRAVATION OF M.S. BY PROLONGED EXPOSURE IN EMPLOYMENT TO A COMBINATION OF MENTAL AND PHYSICAL STRESS AND STRAIN ATTRIBUTABLE TO UNUSUAL CIRCUMSTANCES AND EXCEPTIONALLY LONG HOURS IS COMPENSABLE WHEN THE EXPOSURE IS GREATER THAN THAT TO WHICH THE GENERAL PUBLIC IS EXPOSED.

Respondent has made an exhaustive and comprehensive analysis of uses and argued them in support of the compensability of the aggravation of claimant's pre-existing M.S. The conditions to which Massie was exposed on his job cannot logically be considered as not causing an aggravation of his pre-existing M.S. if this Court wishes to remain consistent with the holdings in Worden, Festa and Silvera, supra, and other cases cited by Respondent. Additionally,Respondent has cited and distinguished cases (heart attack and other sudden internal failure cases) upon which the petitioner has placed mistaken reliance. Your Amicus Curiae can add very little to this well researched, well reasoned argument.

However, the fact that E/C may claim against the Special Disability Trust Fund should be further addressed. Pursuant to section 440.49(4)(f)1.i., F.S., the Legislature has stated that if an employer has knowledge of the employee's pre-existing M.S., then this knowledge gives rise to an "informed conclusion" that the condition was permanent and a hindrance to employment. Obviously, the Legislature thinks that pre-existing M.S. is compensable

and reimbursable under the fund statute where it merges with a subsequent on the job accident.

POINT II

THE DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT WHEN THERE IS A COMPLETE ABSENCE OF ANY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT AN EARLIER DENIAL OF A CLAIM, SECTION 440.28, FLORIDA STATUTES, REQUIRES THE JUDGE OF COMPENSATION CLAIMS (ONCE A TIMELY MOTION FOR MODIFICATION IS FILED) TO ORDER MODIFICATION.

Again, your Amicus Curiae is unable to improve upon Respondent's very able presentation of Point II, but would simply state that there was no competent, substantial evidence for the trial judge's original finding that claimant was not subjected to stress to an extent greater than the general public, nor the appellate court's first opinion nor the trial judge's denial of the modification petition. The only evidence of compensability was that presented by claimant and his witnesses and it clearly established the facts found in the Judge's original trial order (but not his finding) and the appellate court's opinion, which is the subject of this appeal.

If the Harris court, supra, can recede in a second appeal from its previous affirmance of a motion for summary judgment in the first appeal on the principle that the court's duty to administer justice outweighs its duty to be consistent, then based on that same principle the Massie court should be entitled to recede from its holding in the first appeal in this case. Moreover, based on the fact that the second appeal in Massie has a statutory basis

("mistake in a determination of fact") the Massie court's change of its prior decision appears to have more justification that that of the Harris court.

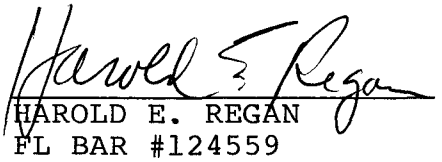
This is essentially the holding in the second appeal when the Court holds on page 977 that section 440.28 "provides an exception to the doctrines of res judicata and law of the case...."

## CONCLUSION

This case has had a torturous path to this point. The trial judge conceded that he injected his personal opinions in the decision making process without the benefit of one scintilla of evidence, and he has not receded from this concession. The appellate court that rendered the first opinion admitted that it re-interpreted or re-construed the evidence thereby committing procedural error that caused mainifest injustice to the claimant. Your Amicus Curiae would urge this court not to proceed down that same path of manifest injustice.

Your Amicus Curiae urges this Court to conclude this case in the manner stated in Respondent's Conclusion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to DAVID A. McCRANIE, ESQUIRE, 4811 Beach Boulevard, Suite 402, Jacksonville, FL 32207; H. GEORGE KAGAN, ESQUIRE, 455 Fairway Drive, Suite 101, Deerfield Beach, FL 33441; and TERENCE J. KANN, ESQUIRE, 2929 Plummer Cove Road, Jacksonville, FL 32223 on this 29th day of May, 1991.

Harold E. Regan

HAROLD E. REGAN