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 ON JURISDICTION OF RESPONDENT, EMMETT H. MASSIE

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STATEMENT OF THE CASE AND FACTS

Respondent, Emmett H. Massie ("Massie") takes exception with much of the Petitioners' ("The University") Statement Of The Case And Facts. Due to space limitations, Massie will limit his corrections to the key points as an understanding of the facts, case, and issues is critical to a consideration of whether any conflict exists.

The University commences its Statement Of The Facts And Case with a misstatement of the issues involved in order to lay the foundation for its "sky is falling" conclusion. Properly, or as stated by Massie and the First District Court of Appeals, the narrow issues presented by this case are:

> I. WHETHER AGGRAVATION OF A PRE-EXISTING MULTIPLE SCLEROSIS ("M.S.") CONDITION DUE TO **UNUSUAL** AND **EXCESSIVE PHYSICAL** AND MENTAL **STRESS** AND **STRAIN** BEYOND THAT TO WHICH THE GENERAL PUBLIC IS SUBJECTED, IS COMPENSABLE; AND
>
> II. WHETHER A FINAL ORDER MAY BE MODIFIED FOR A MISTAKE IN A DETERMINATION OF FACT UNDER SECTION 440.28 F.S., WHERE THERE IS AN ACKNOWLEDGED **COMPLETE ABSENCE** OF COMPETENT EVIDENCE TO SUPPORT THE ALLEGED MISTAKE OF FACT (EMPHASIS ADDED).

Massie v. University of Florida, Case No. BN-98 (Fla. 1st DCA June 29, 1990) at 24, 25, and 13.

Massie originally sought workers' compensation benefits claiming that his pre-existing M.S. was aggravated due to unusual and excessive physical and mental stress and strain which was beyond his control and beyond that to which the general public is exposed. Massie demonstrated that over a period of less than four years he became totally disabled due to aggravation of pre-existing M.S. The unrefuted evidence was that during that

time he regularly worked 10-12 hours per day and sometimes as many as 18. His department was plagued by high turnover, a need to rapidly expand and relocate, and an extended emergency caused by an airplane colliding with and destroying the transmitting tower. Massie was required to respond to conflicting job descriptions and pressured to purchase equipment in violation of state law. Slip op. at 2, 3.

Although the deputy commissioner specifically found that Massie was subject to unusual and excessive physical and mental stress and strain (the specific findings are set forth in footnote 1 of the district court's opinion, Slip op. at 4-5), he inexplicably and contradictably found that the unusual and excessive physical and mental stress and strain was not beyond that to which the general public is exposed. Later, in a remarkably candid statement, the deputy commissioner explained his contradictory findings by acknowledging that he knew there was no support in the record for his finding (that the physical and mental stress and strain was not beyond that to which the general public was exposed) but that he did not think the situation fit the philosophy of workers' compensation. Slip op., on Motion For Rehearing, at 2, 3. Nonetheless, the district court, in its original opinion affirmed.

A motion for modification based on a mistake in fact was filed. At the hearing, Massie specifically relied on the deputy's admission and the fact, which is beyond contravention, that there was no evidence to support the finding that Massie's unusual and excessive physical and mental stress and strain was

not beyond that to which the ordinary public is exposed. The claim was denied and Massie appealed.

An initial opinion was entered on June 2, 1988 finding in favor of Massie. This was withdrawn on the Court's own motion so that the case could be considered en banc. Approximately two years later the Court voted to dissolve the en banc and the current revised opinion was issued.

SUMMARY OF ARGUMENT

The decision of the First District Court of Appeal in Case No. BN-98, does not conflict with **Power v. Joseph G. Moretti, Inc.**, 120 So.2d 443 (Fla. 1960), in that, in the Massie case, as acknowledged by the deputy commissioner, there was a complete absence of competent evidence to support the deputy's mistake of fact. Furthermore, there is no precedential authority precluding a deputy commissioner from modifying an earlier compensation order on the ground of mistake of fact in the exceptional circumstances where there is an admitted total lack of evidence to support denial.

For the same reason, the decision does not conflict with the rule of law announced in **United States Casualty Co. v. Maryland Casualty Co.**, 55 So.2d 741 (Fla. 1951), as there is, as admitted by the deputy commissioner, no competent evidence of any nature whatsoever to support the deputy's mistake of fact.

Substantively, the decision does not break new ground; it merely recognizes that where a claimant's pre-existing M.S. (admittedly an organic condition) is aggravated due to unusual

and excessive physical and mental stress and strain, which is beyond his control, and beyond that to which the general public is subjected, the condition is compensable. **Festa v. Teleflex, Inc.**, 382 So.2d 122 (Fla. 1st DCA), pet. for rev. denied, 388 So.2d 1119 (Fla. 1980).[1] As the Massie case does not involve a sudden failure of the cardiovascular system (heart attack) but rather an aggravation of M.S. based on repeated exposure to excessive stress and strain (under the law as established in **Festa**, **supra**) the proof requirements established in **Victor Wine & Liquor, Inc. v. Beasley**, 141 So.2d 581 (Fla. 1961) and its progeny, are not applicable.

ARGUMENT

Although the University would contend otherwise, the scope of the issues presented by the **Massie** case is quite narrow. Furthermore, contrary to the assertions of the University, the only issue of public importance presented by this case is whether workers' compensation claimants (such as Massie) shall be afforded their constitutional right of access to the courts guaranteed by Section 21 of the Declaration of Rights in Article I of the Florida Constitution. As recognized by the district court, in the Massie case the court was confronted "with a **clear instance of manifest injustice** apparent from the record of the original hearing before the deputy commissioner" (emphasis

1/ It is interesting to note that repetitive strain injuries now account for nearly half of the nation's occupational illnesses. **A.F.T.L. Journal**, No. 337, at p. 4, citing the **Washington Post**, August 31, 1990 at p. A7.

added), Slip op. at 30. The district court, after considering the matter en banc, found that it was **manifest** that **its own prior decision was in error** and that the error should not continue the control the parties and the deputy commissioner in subsequent proceedings. Slip op. at 32, 33. In righting the wrong, the district court issued a thoughtful and well reasoned opinion which conflicts with no Florida law.

ISSUES

I. **WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN POWER v. JOSEPH G. MOREITT, INC., 120 So.2d 443 (Fla. 1960).**

Massie acknowledges that the opinions stated by his expert witness at the modification hearing, on the issue of whether the unusual and excessive physical and mental stress and strain experienced by Massie was beyond that to which the general public is subjected, were substantially similar to the opinions the same witness rendered at the original hearing. At the same time, Massie's expert noted that in its original opinion the district court had misquoted, twisted and misconstrued his testimony so as to completely change its meaning (the First District is now in full agreement with the contention, Slip op. at 31). Massie argued that there was really no dispute, as the deputy commissioner himself had acknowledged, that there was absolutely no evidence in the record to support the deputy commissioner's mistake of fact.

As noted by the district court, no case had previously ruled on the issue of whether a final order may be modified for a

mistake in a determination of fact under Section 440.28, F.S., where there was a complete absence of competent evidence to support the alleged mistake of fact. If there is to be any statutory basis for modifying a final order for a mistake in a determination of fact under Section 440.28, then most assuredly it must exist when, upon consideration of a timely motion for modification, the moving party demonstrates and the deputy commissioner concedes the complete absence of competent evidence to support the alleged mistake of fact. Slip op. at 24, 25.

This Court in **Power**, **supra**, proscribed modification based on a reanalysis by the deputy commissioner and a change of his conclusion as the result of a retrospective exploration of a original order. Neither **Power**, **supra**, nor any case has held that a deputy commissioner is powerless to correct a mistake in a determination of fact where the deputy recognizes and the record clearly demonstrates that there is a complete absence of competent evidence to support the mistake of fact. Alternatively, as noted by the district court, there is ample precedent for the district court to correct its own mistake of law or fact to avoid manifest injustice. **Strazzulla v. Hendrick**, 177 So.2d 1st, (Fla. 1965). This principal has been applied even though the prior decision of the tribunal became final after appeal. See, **E. T. Harris v. Lewis State Bank**, 482 So.2d 1378 (Fla. 1st DCA 1986).

Accordingly, this court should decline to exercise its discretionary conflict jurisdiction to review the decision of the district court.

II. **WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH UNITED STATES CASUALTY CO. V. MARYLAND CASUALTY CO., 55 So.2d 741 (Fla. 1951).**

Massie recognizes that if the decision of the deputy is supported by competent substantial evidence it should not be disturbed. However, he is also aware of this court's decision in **Dixie Lime & Stone Company v. Lott**, 196 So.2d 422 (Fla. 1967). In **Lott**, after first noting that the above rule of law "has been so often repeated as to have become hackneyed" (**Lott** at 423), this court stated that a review to determine whether competent substantial evidence comporting with logic and reason supported the claim was proper. This court reversed the findings of the IRC and the deputy when its review revealed no facts in support of one of the ultimate findings.

In the instant case, not only has the deputy commissioner acknowledged that there was no competent and substantial evidence to support his finding; the district court, after exhaustively reviewing the record and considering the matter en banc, has reached the same conclusion. Under these circumstances, there is no need for this Court to exercise it discretionary conflict jurisdiction, to perform a third review, which could only reach the same conclusion.

III. **WHETHER THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN VICTOR WINE AND LIQUOR, INC. V. BEASLEY, 141 So.2d 1961, AND TINTERA V. ARMOUR & CO., 362 SO.2D 1344 (FLA. 1978).**

In **Festa**, **supra**, it was held that where a claimant was subjected to repeated trauma (consisting of twisting and turning

action of the wrists) over a prolonged period of time, causing (in the opinion of competent medical testimony) an injury, an "accident" had occurred. An "accident" has also been recognized to include physical strain such as that encountered by a clerk from lifting cartons or other heavy objects. **Armstrong v. Munchies Caterers, Inc.**, 377 So.2d 748, (Fla. 1st DCA 1980).

The Massie Court has simply recognized that where pre-existing M.S. is aggravated due to a combination of unusual and excessive physical and mental stress and strain, beyond that to which the general public is subjected, the aggravated condition is compensable. Slip op. at 33.

In **Victor Wine**, **supra**, this court receded from language in prior decisions and established a rule of law which has, to date, been applied only to cases involving sudden cardiovascular or pulmonary failure. The rule requires that where there has been a "sudden failure" there must be a specific precipitating event involving strain or exertion not routine to the type of work the claimant was accustomed to performing. Of course, such a rule of law has no place in cases coming under the repeat exposure doctrine (including Massie) as in repeat exposure cases there must be a finding that there has been "prolonged exposure" to one or more particularly deleterious conditions, or to out of the ordinary physical (or physical and mental) strain. Obviously, a finding of prolonged exposure necessarily precludes a finding of a single precipitating event. Rather than requiring an "unusual strain or overexciting not routine to the type of work (the claimant) was accustomed to performing", **Festa**, **supra**, and it

progeny require a finding that the strain and stress causing injury be unusual, excessive and beyond that to which the general public is exposed.

Cases decided under **Festa**, **supra**, necessarily cannot conflict with the rule in **Victor Wine**, **supra**; therefore, this court should decline to exercise its discretionary jurisdiction.

CONCLUSION

As noted by the University, the Florida legislature has recently enacted the Comprehensive Economic Development Act of 1990 wherein the scope of workers' compensation coverage was thoroughly addressed. As part of the legislative effort, Section 440.02(1) F.S. was amended to make it clear that mental injuries due solely to stress are not compensable. The limitation is specific. It would have been an easy matter for the legislature to have precluded coverage for all injuries brought on by stress, or all injuries brought on by a combination of physical and mental stress and strain; however, that is not what the legislature choose to do.

It is not the function of this court to expand on recent enactments of the Florida Legislature. Yet, that is precisely what the University is urging. A careful reading of the decision of the district court leaves one with only one inescapable conclusion; i.e., that the scope of the district court's ruling is both narrow and completely supported by existing Florida law.

Finally, as noted by the district court, the Massie case presented it with a

clear instance of manifest injustice apparent from the

> record of the original hearing before the Deputy Commissioner. The original order denying compensability was based on a finding of fact admittedly not supported by competent substantial evidence in the record...Upon review of the entire record, it is now manifest that [the First DCA's] prior decision was in error and should not continue to control the parties and the Deputy Commissioner in subsequent proceedings in this case. Slip op. at 30, 31, 32, 33.

Respondent Massie has waited seven years for justice to be done. There is no legal reason why justice should be further delayed.

Accordingly, for the reasons stated above, Massie respectfully requests this Court to decline to exercise its conflict jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David A. McCranie, Esquire, McConnaughhay, Roland, Maida, Cherr & McCranie, 101 North Monroe, Ste. 950, P. O. Drawer 229, Tallahassee, FL 32302-0229, by U. S. Mail this 23rd day of October, 1990.

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