

047

FILED

SID J. WHITE

DEC 27 1991

CLERK SUPREME COURT

By _____
Chief Deputy Clerk

IN THE
SUPREME COURT OF FLORIDA

JOHN HOLDER,

Petitioner,

-VS-

KELLER KITCHEN CABINETS,
and ALEXSIS, TNC.,

Respondents,

DOCKET NO: 78,891
DCA : 88-3284
CLAIM NO : 416-52-5566
D/A : 3/15/79

APPEAL FROM
AN OPINION OF THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENTS

~~John A. Bachman Esquire~~
ZIMMERMAN, SHUFFIELD, KISER
& SUTCLIFFE, P.A.
Post Office Box 3000
Orlando, Florida 32802
(407) 425-7010

Attorneys for Respondents

INDEX

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	iv
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT :	
<u>POINT I</u>	4
IS A COMPENSATION CLAIM UNDER CHAPTER 440, F.S., FOR TEMPORARY DISABILITY DURING KNEE REPLACE- MENT SURGERY, AND FOR CONSE- QUENTIAL IMPAIRMENT GOVERNED BY SECTION 440.28 OR BY SECTION 440.19(1)(a) WHEN PERMANENT DISABILITY COMPENSATION HAD BEEN PREVIOUSLY AWARDED AND PAID UNDER A COMPENSATION ORDER WHICH DETERMINED MAXIMUM MEDICAL IMPROVEMENT AT A TIME WHEN FUTURE SURGERY WAS UNCERTAIN?	
CONCLUSION	16
CERTIFICATE OF SERVICE	17

TABLE OF CITATIONS

	<u>Page</u>
<u>CASES</u>	
<u>Atkins v. Green Hut Construction Co., 440 So.2d 268 (Fla. 1st DCA 1983)</u>	15
<u>Bassett's Dairy v. Thomas, 429 So.2d 1356 (Fla. 1st DCA 1983)</u>	9, 16
<u>Bishop v. Pinellas Framing & Finishing, 414 So.2d 596 (Fla. 1st DCA 1982)</u>	9
<u>Boston v. Budget Luxury Inns, 474 So.2d 355 (Fla. 1st DCA 1985)</u>	18
<u>Budget Luxury Inns, Inc. v. Boston, 407 So.2d 997</u>	11, 13
<u>Delgado v. LaQuinta Motor Inns, 457 So.2d 572 (Fla. 1st DCA 1982)</u>	15
<u>Emergency One Inc. v. Williams, 431 So.2d 251 (Fla. 1st DCA 1983)</u>	14
<u>Food Fair Stores v. Tokayer, 167 So.2d 563 (Fla. 1964)</u>	11
<u>General Electric Co. v. Osborne, 394 So.2d 1089 (Fla. 1st DCA 1981)</u>	9
<u>General Electric Co. v. Spann, 479 So.2d 289 (Fla. 1st DCA 1985).</u>	9, 16
<u>Hughes v. Denny's Restaurant, 328 So.2d 830 (Fla. 1976)</u>	17
<u>Jones v. Ludman Corp., 190 So.2d 760 (Fla. 1966)</u>	9, 11, 20
<u>Lopez v. Nabisco Brands, Inc., 516 So.2d 993 (Fla. 1st DCA 1987)</u>	14
<u>Mansell v. Mulberry Construction Co., 196 So.2d 436 (Fla. 1967)</u>	11

<u>Massie v. University of Florida</u> , 570 So.2d 693 (Fla. 1st DCA 1980)	17
<u>Northwest Orient Airlines v. Gonzalez</u> , 500 So.2d 699 (Fla. 1st DCA 1987)	17
<u>Palm Beach County Board of County Commissioners v. Robertson</u> , 500 So.2d 180 (Fla. 1st DCA 1986)	15
<u>Robinson V. JDM Country Club</u> , 455 So.2d 1077 (Fla. 1st DCA 1984)	9
<u>Roe v. City Investing</u> , 16 Florida Law Weekly, 715 (Fla., November 8, 1991)	19
<u>University of Florida v. McLarthy</u> , 483 So.2d 723 (Fla. 1st DCA 1985)	9, 16
<u>Washington v. Dade Co. School Bd.</u> , IRC Order 2-3694 (Feb. 8, 1979)	9

STATUTES

Florida Statute §440.19(1)(a)	9
Florida Statue 5440.28	9
Florida Statute §440.28, (1975)	10

PRELIMINARY STATEMENT

In this answer brief, the parties will be referred to as they appeared before the Judge of Compensation Claims (herein "JCC"). The Petitioner, John Holder, will be referred to as the claimant. The Respondents, Keller Kitchen Cabinets and Alexsis, Inc., will be referred to as the employer/carrier.

All references to the record on appeal will be designated by the letter "R" followed by the appropriate page numbers. All references to the Petitioner's Initial Brief will be designated by the letters "IB" followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

The respondent adopts the petitioner's statement of the facts and statement of the case as presented in the Initial Brief on pages 2-4 and pages 5-8, respectively.

SUMMARY OF ARGUMENT

Decades of case law in Florida, including opinions of this court, having consistently held that once an order establishes a date of maximum medical improvement and awards permanent partial disability benefits, a later claim, whether seeking additional temporary or permanent benefits, must meet the limitations provision of Section **440.28**. *University of Florida v. McLarty*, 483 So.2d 723 (Fla. 1st DCA 1985); *Jones v. Ludman Corp.*, 190 So.2d 760 (Fla. 1966).

It would be improper to characterize the claimant's July 20, 1988, claim as a "new claim". This argument has been attempted in the past and the court has held that the claim should be designated as one seeking modification of a prior order and not seen as a new claim. *General Electric Co. v. Spann*, **479 So.2d 289** (Fla. 1st DCA 1985).

Florida courts have held that a claimant is entitled to TTD benefits for a period of hospitalization and recuperation following curative procedures necessitated by a compensable injury after the claimant has reached MMI and after an award of PPD benefits have been made, but only in situations in which a petition for modification was timely filed. Likewise, Florida courts have consistently denied benefits under the situation when the claim was filed beyond the limitations period found in Section 440.28.

Even if Section 440.19(1)(a) was applicable, the subsequent finding of the JCC that the claimant was temporarily disabled and not at MMI or had established a new MMI date, would be inconsistent

with the Judge's prior order. A modification of the prior order is essential. The statutory limitations for modification found in Section **440.28** is an absolute jurisdictional requirement.

Section **440.28** is not unconstitutional. Moreover, the constitutionality of the statute is not a question put before this court by the First DCA. The legislative purpose of statutes of limitations, to enforce the finality of decisions, would be defeated by the claimant's argument. Moreover, workers' compensation cases would never end if the statute of limitations were not permitted to serve their purpose.

The certified question presented before this court is not one of great public importance, but instead is one which has been consistently decided by Florida courts, including this court. The question before this court is whether Section 440.19(1)(a) or Section **440.28** should apply must be answered consistently with decades of prior case law. That is, Section **440.28** and the limitations found therein, is the only applicable provision under the facts of the instant case.

POINT I

IS A COMPENSATION CLAIM UNDER CHAPTER 440, F.S., FOR TEMPORARY DISABILITY DURING KNEE REPLACEMENT SURGERY, AND FOR CONSEQUENTIAL IMPAIRMENT GOVERNED BY SECTION 440.28 OR BY SECTION 440.19(1)(a) WHEN PERMANENT DISABILITY COMPENSATION HAD BEEN PREVIOUSLY AWARDED AND PAID UNDER A COMPENSATION ORDER WHICH DETERMINED MAXIMUM MEDICAL IMPROVEMENT AT A TIME WHEN FUTURE SURGERY WAS UNCERTAIN?

It has long been held and made clear in Florida case law that, as in the instant **case**, once an order establishes **the** date of maximum medical improvement (MMI) and awards permanent partial disability (PPD) benefits, a later claim, **whether** seeking additional temporary or permanent benefits, must meet the limitation provisions of Section 440.28, not Section 440.19(1)(a).

University of Florida v. McLarthy, 483 So.2d 723 (Fla. 1st DCA 1985); General Electric Co. v. Spann, 479 So.2d 289 (Fla. 1st DCA 1985); Bassett's Dairy v. Thomas, 429 So.2d 1356 (Fla. 1st DCA 1983); Robinson V. JDM Country Club, 455 So.2d 1077 (Fla. 1st DCA 1984); Bishop v. Pinellas Framing & Finishing, 414 So.2d 596 (Fla. 1st DCA 1982); Washington v. Dade Co. School Bd., IRC Order 2-3694 (Feb. 8, 1979); General Electric Co. v. Osborne, 394 So.2d 1089 (Fla. 1st DCA 1981); Jones v. Ludman Corp., 190 So.2d 760 (Fla. 1966).

In University of Florida v. McLarthy, *supra*, the claimant suffered an industrial accident on April 20, 1975. A claim for benefits was filed on June 13, 1979, and on January 21, 1981, an

order was entered fixing a date of maximum medical improvement of October 21, 1980, with a 16% permanent physical impairment rating. The claimant was paid (PPD) benefits through April 25, 1982. A petition for modification of that order was filed in 1983 and denied by the JCC on July 13, 1983. In July, 1984, the claimant underwent shoulder surgery due to the original injury and the employer/carrier voluntarily paid TTD benefits for some period. On November 19, 1984, the claimant filed a claim for TTD benefits for the period of time that he **was** recovering from the surgery from August 1, 1984, to October 18, 1984. The employer/carrier defended on the basis that the claim was not timely filed pursuant to Section 440.28, Fla. Stat. (1975). 483 So.2d at 724-725.

The First District Court of Appeal agreed with the employer/carrier and held that the claim was barred since it was not filed within the time limitations provided in Section 440.28. The court recognized that Section 440.19(1)(a) and Section 440.28 are designed to be used in different situations, depending upon whether benefits have been furnished pursuant to a compensation order, as in the instant case, or whether the benefits were furnished entirely without an award. The court further found that even the new order denying the 1983 petition for modification did not toll the running of the statutory provisions provided in Section 440.28. Furthermore, the carrier's voluntary payments of compensation and voluntary furnishing of remedial treatment to the claimant did not revive the statutory provisions of Section 440.28 after the original compensation order had been entered. Id. at

727. The court in McLarthy recognized that

General Electric Co. v. Spann is clear cut authority for the position that once an order fixes the date of MMI and awards PPD, a later claim, whether seeking additional temporary or permanent benefits, or both, must meet the limitation provisions of only Section 440.28 - not Section 440.19(1)(a).

Id. at 726.

The factual scenario in Bassett's Dairy v. Thomas 429 So.2d 1356 (Fla. 1st DCA 1983) involved a case "in which clearly only Section 440.28 should be applied." Id. at 1359. In that case the claimant suffered an industrial accident on April 27, 1971, and an order dated May 1, 1974, awarded him benefits for 20% permanent partial disability. The final payment of those benefits was made on June 12, 1975. The employer/carrier voluntarily paid TTD benefits from June, 1981, to October 10, 1981, erroneously. In February, 1982, a claim was filed for, among other things, TTD benefits. The court's opinion dealt solely with the issue of whether further Compensation benefits were due. Id. at 1357. In deciding whether Section 440.19(1)(a) or Section **440.28** was appropriate, the court held that Section 440.28 was the only section which should be applied. Id. at 1359, citing Mansell v. Mulberry Construction Co., 196 So.2d 436 (Fla. 1967); Jones v. Ludman Corp., 190 So.2d 760 (Fla. 1966); Food Fair Stores v. Tokayer, 167 So.2d 563 (Fla. 1964); Budget Luxury Inns, Inc. v. Boston, 407 So.2d 997 (Fla. 1st DCA 1981).

Again, a similar factual situation was presented in General Electric Co. v. Spann, 479 So.2d 289 (Fla. 1st DCA 1985). The claimant was injured in 1977, and in 1978 was found to have reached

MMI with 0% impairment. In 1980, a petition for modification was filed and an order entered on October 6, 1980, awarding 5% PPD which was paid in a lump sum in 1981. In March, 1984, the employer/carrier voluntarily paid additional impairment benefits erroneously. Shortly thereafter the claimant filed a claim for benefits seeking additional TTD benefits among other things. This court found that the claim for additional disability benefits was barred two years after full payment of PPD, which was made in 1981 pursuant to the 1980 order. "The 1980 order having adjudicated MMI and awarded PPD, the 1984 claim, insofar as it sought additional temporary and permanent disability benefits, must meet the requirements of Section 440.28, including its limitation provisions." Id. at 290. Citing Washington v. Dade County School Board, IRC Order 2-3694 (Feb. 8 1989); Basset's Dairy v. Thomas, supra.

In the instant case, the claimant was injured in an industrial accident on March 15, 1979. A claim was filed and an order was entered on September 29, 1980, finding the claimant to have reached maximum medical improvement on February 19, 1980, with a 40% permanent partial disability rating. The employer/carrier paid the benefits pursuant to the order and last issued a check for permanent partial benefits on May 18, 1981. The claim for additional TTD benefits was not filed until July 20, 1988, more than seven years after the last payment of compensation benefits and five years after the applicable limitations period had run. The relevant facts of the instant case directly parallel those of

the line of cases which have consistently, and with clarity, held that the statutory limitations time period found in Section **440.28** is the applicable limitations provision. In each case the claimants were required to seek modification of the prior order pursuant to Section **440.28** only. Additionally, it has been consistently held that when the subsequent claim for temporary or for permanent benefits is filed outside the statutory time period, the claim is barred as not timely.

The claimant argues in the instant case that the claimant's July 20, 1988, claim "was a new claim, governed by Sec. 440.19(2)(a) (1979) and not a modification of a prior order governed by F.S. 440.28." (I.B. at 14). This attempt to get around the statutory provisions of Section **440.28** by contending that the untimely claim for TTD benefits was a "new claim" is not a novel one. In General Electric Co. v. Spann, the First District Court of Appeal recognized that "[a]lthough the claimant attempted to characterize his claim as a "new claim" for benefits never awarded, the deputy correctly designated the claim as one seeking modification of the prior October 6, 1980, Order, at least insofar as it sought TTD benefits and an increase in the PPD previously awarded." 479 So.2d at 290. Likewise, in University of Florida v. McLarthy, the court recognized that

[b]ecause claimant in the instant case suffered only one work related injury for which he received compensation pursuant to order, any later claim seeking to alter the effect of such order was not an initial claim, but a request to modify the prior order because of a change in condition. The provisions of Section **440.28** therefore exclusively apply.

483 So.2d at 726. See also, Budget Luxury Inns, Inc. v. Boston, 407 So.2d 997, (court found Section 440.19(1)(a) inapplicable where claimant argued that her claim should be considered a new claim for additional benefits pursuant to Section 440.19(1)(a)).

The petitioner points out that Florida courts have consistently held that a claimant is entitled to TTD benefits for a period of hospitalization and recuperation following curative procedures necessitated by a compensable injury even after the claimant has reached MMT and after award of PPD has been made for the same injury. (I.B. at 15). Neither this point of law nor the cases supporting it cited by the petitioner serve to have any bearing whatsoever against the First DCA's decision in the instant case. The claimant cites Lopez v. Nabisco Brands, Inc., 516 So.2d 993 (Fla. 1st DCA 1987). This case did not involve a statute of limitations issue. In addition, the opinion does not even reveal the claimant's date of accident or other pertinent facts. Furthermore, the case was decided on a competent substantial evidence issue and thus the case has no bearing on the instant case.

Likewise, the petitioner cites Emergency One Inc. v. Williams, 431 So.2d 251 (Fla. 1st DCA 1983) which also is lacking in necessary relevant facts. There was no prior order which awarded temporary or permanent benefits or which established a date of maximum medical improvement. Again, the date of the accident is not even mentioned in the case. It obviously does not involve a situation dealing with either modification of a prior order, or the

running of the statute of limitations.

The three other cases cited by petitioner confirm that modification under Section **440.28** is the proper procedure for obtaining TTD benefits subsequent to a hearing which established the date of maximum medical improvement. However, in each, there was not an untimely filing of the petition for modification. See Delsado v. LaQuinta Motor Inns, 457 So.2d 572 (Fla. 1st DCA 1982) (a post-July 1, 1979 case in which a claim for benefits was filed within two years of the prior order); Palm Beach County Board of County Commissioners v. Robertson, 500 So.2d 180 (Fla. 1st DCA 1986) (modification was within two years of the prior compensation order); Atkins v. Green Hut Construction Co., 440 So.2d 268 (Fla. 1st DCA 1983) (petition for modification and claim for benefits filed within two years following the prior order).

The petitioner brings to this court's attention that the opinion below noted that none of the above **cases** involved the scenario apparently presented in the instant case. (I.B. at **16**). The reason for that is because no appellate court has ever held that TTD benefits should be awarded in a case where there has been a claim for disability benefits following an order fixing the date of MMI when the claim has been filed after the statutory time period for filing a petition for modification. This point only solidifies the employer/carrier's position and supports the opinion below.

In the instant case, for the Deputy Commissioner to have **made** a finding that the claimant was temporarily and totally disabled

subsequent to her earlier finding of maximum medical improvement, would require a modification of the prior order pursuant to Section **440.28**. The claimant did not even bring a claim by way of petition for modification under Section **440.28**. Even if the claim had been brought under the proper statutory provision, it would have been barred as untimely. There is nothing unique about the instant case which would serve to distinguish it from the line of cases finding Section **440.28** to be the only provision for seeking additional TTD benefits.

The petitioner **goes** to great lengths to argue that Section 440.28 was not the appropriate provision to be applied under the facts of the instant case. This of course is contrary to the plethora of **cases** already cited in this brief, which have held that Section **440.28** is the only applicable provision under these facts. The petitioner's arguments are nothing more than an attempt to circumvent the ultimate consequences of the limitations found in Section **440.28**. The petitioner's argument is an attempt to undermine the intent of the legislature and the purpose of the statute of limitations. The statute was intended to apply to the precise factual situations found in the instant case. The argument presented by the claimant would serve to totally defeat workers' Compensation statutes of limitation and would result in a workers' Compensation claim that would never end by statutes of limitations or res judicata.

Petitioner argues that a modification is not appropriate in the instant case since the essential elements of res judicata do

not exist. (I.B. at 17). As recently announced by the First DCA and pointed out by the majority in the opinion below, Section **440.28** creates an exception to the traditional motions of finality based on res judicata, law of the case, or estoppel by judgment. Massie v. University of Florida, 570 So.2d 693 (Fla. 1st DCA 1980); Huuhes v. Denny's Restaurant, 328 So.2d 830 (Fla. 1976). The absence of the element of identity will not serve to foreclose workers' Compensation claims on res judicata grounds. Northwest Orient Airlines v. Gonzalez, 500 So.2d 699 (Fla. 1st DCA 1987); Boston v. Budget Luxury Inns, **474** So.2d 355 (Fla. 1st DCA 1985).

The claimant argues that the legislature's removal of the phrase "without award" from Section 440.19(1)(a) should allow a longer limitation, and thus permit their claim to prevail. This conclusion, however, totally overlooks several essential points. First, it overlooks the decades of Florida case law both from this court and the First DCA consistently announcing that under these particular facts, Section 440.28 is the applicable provision. Second, as pointed out by the First DCA's majority opinion below in note five, the instant claim for TTD benefits, if decided under the 1979 amendment to Section 440.19(1)(a), would still be inconsistent with the terms of the Judge's prior 1980 order which made definite findings of a date of maximum medical improvement and permanent impairment rating. Third, the result would effectively negate the legislative intent and design of Section **440.28**.

The constitutionality of Section **440.28** is not part of the question put forth to this court by the First DCA. The question

for this court is simply whether Section **440.28** or Section **440.19** is applicable. Furthermore, in workers' compensation matters, all statutes of limitation serve to, in effect, bar claims before they ripen. That is, a claimant's claim for medical benefits does not exist until he receives the medical treatment. The same is true for temporary total disability benefits. The claim for temporary total disability benefits does not arise until the claimant is temporary and totally disabled. If the claimant's argument is taken to its logical conclusion, then there can never be a statute of limitations in workers' compensation matters because a claimant's status of either needing medical treatment or needing compensation benefits does not automatically exist on the date of accident. It exists at the alleged time of need of the benefit. Cases would continue to be litigated forever because they would never die but would continue to ripen.

The legislative purpose of statutes of limitations, to enforce the finality of decisions, would likewise be defeated if this legislative intent is not upheld. The petitioner's arguments mean that a claimant who has not received compensation benefits ten years, twenty years, thirty years or even fifty years later can come back and claim to have a need for some remedial treatment as a result of the original accident and claim additional benefits. This certainly was never the intent of the legislature.

The petitioner argues that proceeding under Section **440.28** is contrary to *Roe v. City Investing*, 16 Florida Law Weekly 715 (Fla., November 8, 1991). That case, however, is distinguished in

numerous ways. In Roe, there was no prior order rendered. In addition, Roe dealt with the interpretation of Section 440.19(1)(a) (1983). Moreover, the holding of Roe was simply that a claim for disability is not time barred, despite a two year gap between the injury and the claim, so long as the claim was filed within two years after the last remedial treatment. In addition, Roe dealt with an exemption to the statute of limitations under Section 440.19(1)(a) because the claimant received remedial attention relating to the insertion or attachment of a prosthetic device to a part of the body. There is simply nothing persuasive from this court's opinion in Roe which would raise a challenge to decades of established case law holding that Section 440.28 was the appropriate provision to be applied under the facts of the instant case.

Finally, the petitioner's basic premise in this appeal, that Section 440.19(1)(a) should apply in facts such as in the instant case, is an argument which has consistently been denied for decades. In Jones v. Ludman Corp., 190 So.2d 760 (Fla. 1966), this court **was** faced with a very similar question.

Petitioner contends that his current claim is not one for modification but simply for additional benefits and should be governed by Section 440.19(1)(a). The language of that section is limited, however, as already noted in the earlier decision relied on by the commission, to the situation where payments are made without an award, in which case further claims may be made within two years after payment of compensation or remedial treatment. In view of the clear distinction made in this instance and throughout the act between medical benefits and disability compensation, we do not find error in the

cited decision nor can we ignore the explicit provision of Section **440.28** by which a determination of disability compensation becomes final and unalterable unless modified upon petition filed within the specified time after the last payment of compensation. Id. at **761-762.**

Since Section **440.28** is the sole provision applicable to the instant case, and the limitations found within that provision is an absolute jurisdictional requirement, the petitioner's claim for TTD benefits **was** barred.

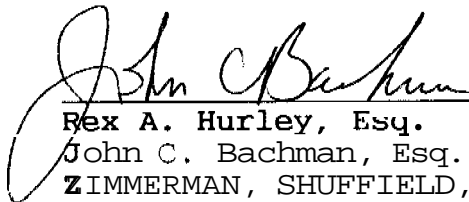
It is respectfully submitted that the certified question presented before this court is not one of great public importance, but instead is one which has been consistently decided by Florida courts including this court. Section **440.28** and the limitations period found therein, is the only applicable provision under the facts of the instant case.

CONCLUSION

Since a prior Order established the date of MMI and awarded PPD benefits, the later claim seeking additional TTD benefits must meet the limitations provision of Section **440.28**, not Section **440.19(1)(a)**. Decades of case law in Florida have supported this result and the facts of the instant case do not require a different holding. The claimant's untimely claim for additional TTD benefits **was** not "a new claim", but instead was an effort to avoid the limitations found in Section **440.28** which had run some five years earlier. A modification of the prior order by way of Section 440.28 is essential since the prior order established a date of MMI and entitlement to PPD benefits. Section 440.28 is not unconstitutional, but rather, includes a statute of limitations which serves the legislative intent of establishing finality of claims.

Therefore, the First DCA's opinion below must be affirmed and this court must find that Section **440.28**, not Section **440.19(1)(a)** must be applied.

Respectfully submitted,



Rex A. Hurley, Esq.
John C. Bachman, Esq.

ZIMMERMAN, SHUFFIELD, KISER
& SUTCLIFFE, P.A.
Past Office Box 3000
Orlando, Florida 32802
(407) 425-7010

Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to EDWARD H. HURT, SR., ESQUIRE, 1000 E. Robinson Street, Orlando, FL 32801 and BILL MCCABE, ESQUIRE, 1450 West S.R. 434, Longwood, FL 32750, Attorneys for the Petitioner, by regular U.S. mail this 23 day of December, 1991.



Re: X A. Hurley, Esq.
John C. Bachman, Esq.
ZIMMERMAN, SHUFFIELD, KISER
& SUTCLIFFE, P.A.
Post Office Box 3000
Orlando, Florida 32802
(407) 425-7010

Attorneys for Respondents