IN THE SUPREME COURT
OF THE STATE OF FLORIDA

ARLENE J. McGUIRE,

Petitioner,

vs.

Case No.: 82,619

PUBLIX SUPER MARKETS, INC.,
and HARTFORD INSURANCE,

Respondent.

RESPONDENT'S BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEALS
FIRST DISTRICT
CASE NO.: 92-884

ON APPEAL FROM THE JUDGE OF COMPENSATION CLAIMS
IN AND FOR DISTRICT E
CLAIM NO.: 060-26-3171

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CITATIONS OF AUTHORITY

PREFACE

The Petitioner will be referred to as "Claimant" or by name. Respondent will be referred to as "Employer/Carrier" or "E/C." The Judge of Compensation Claims will be referred to as "JCC."

References to the record will be in the form (R.--).

STATEMENT OF THE CASE AND FACTS

On October 26, 1989, Claimant, Arlene J. McGuire, a 57-year old mother of seven, sustained either a coronary artery spasm or a heart attack while working for Publix Super Markets (R.194). Mrs. McGuire was in good health prior to this incident with the exception of high blood pressure, for which she was receiving treatment (R.199). At the time of her cardiovascular injury, Mrs. McGuire had been taking prescription diuretics to control her hypertension for at least six years (R.87). A catheterization performed after Mrs. McGuire was hospitalized also revealed the presence of mild to moderate coronary artery disease (R.73).

Mrs. McGuire testified that meeting her Publix supervisor, Mr. Kapocsi, made her nervous because she went over his head by writing a letter to Publix management (R.13). The meeting however was admittedly not antagonistic (R.21) and Mrs. McGuire acknowledged that Mr. Kapocsi was nice to her (R.204). Mr. Kapocsi never raised his voice to Mrs. McGuire and was pleasant toward her (R.21). Mrs. McGuire never raised her voice during the meeting (R.205). Mr. Kapocsi never threatened to fire Mrs. McGuire (R.21) and he never told her that he was angry or upset with her for writing a letter (R.26). Mrs. McGuire testified that she "knew" Mr. Kapocsi was angry however from the tone of his voice (R.27). She was admittedly nervous before she was ever actually called into the office (R.24).

Although the claimant testified that during the meeting she

told Mr. Kapocsi and Mr. Myers, the store manager, that she did not feel good and was having chest pains (R.16), Mr. Kapocsi testified that Mrs. McGuire did not tell him she was having chest pains during the meeting (R.39). Mr. Kapocsi remembers the meeting as cordial and recalls discussing payroll, pay scale, and the reasons given by Mr. Myers for his decision not to give Mrs. McGuire a raise at that time (R.38). Mr. Kapocsi explained that the pay raise decision was based on Mrs. McGuire's inability to be flexible with her work schedule (R.40). Apart from appearing a little nervous, Mr. Kapocsi remembered that Mrs. McGuire conducted herself well during the 20-30 minute meeting (R.38). Mr. Kapocsi testified that he was not upset with Mrs. McGuire for writing the letter and that he responds to similar employee concerns all the time (R.43). Following the meeting, Mr. Kapocsi left the store feeling good about the meeting and that Mr. Myers was justified in his pay scale decision (R.38,40).

Mrs. McGuire called the store office when she got back to her register and told them that she was not feeling well (R.201). She was told to go to the back office and sit down (R.201). After some of the employees opined that Mrs. McGuire could be having a heart attack, they called her son who took her to the hospital (R.17).

All three individuals present at the meeting were standing for the duration of the meeting (R.15). Other than standing, Mrs. McGuire was not doing anything physical during the meeting (R.209). Mrs. McGuire did not do anything requiring any type of physical exertion prior to the meeting (R.209). Aside from walking to her

register and then walking to the office, Mrs. McGuire had not worked at all prior to the onset of the chest pains (R.209). Mrs. McGuire testified that she was not angry with either Mr. Kapocsi or Mr. Myers during the meeting (R.205). She was however scared of losing her job (R.205). Mrs. McGuire had worked earlier that day as a crossing guard for the City of Clearwater but testified that nothing unusual had happened during work (R.210). Mrs. McGuire could also not identify anything unusual in her private life which had occurred during the day or two prior to this incident (R.211).

Mrs. McGuire was treated at the hospital by Dr. Sahasra Naman, an internist (R.63). She gave a history of developing chest pain during an argument with her boss at work over a pay raise (R.68). During Mrs. McGuire's hospitalization, Dr. Naman ordered blood work and repeat cardiograms (R.69). The blood work results revealed that certain enzymes were present in a higher proportion indicating the presence of heart damage (R.69). On the basis of the blood work, Dr. Naman determined that Mrs. McGuire had sustained a heart attack (R.70). Dr. Naman defined a heart attack as the death of muscle in the heart (R.70). After Mrs. McGuire had stabilized, Dr. Naman ordered a catheterization to look at her coronary anatomy (R.71). The catheterization revealed 30-50% blockage of the left anterior descending and 50% blockage of the circumflex arteries (R.72). These blockages are normally caused by plaque (R.72). The catheterization did not reveal complete blockage at any place (R.72).

A heart attack is generally thought to be caused by a blockage

of one or more of the heart arteries causing a stoppage of blood flow which results in the death of tissue in the heart (R.72). The 30-50% blockage found in the catheterization of Mrs. McGuire was labeled mild to moderate indicating that these percentages would generally be expected in a person over 50 years of age (R.73). Dr. Naman, an internist, testified that the claimant would not have had much potential for a heart attack due to the extent of the blockage alone (R.74). On the basis of the catheterization and blood test results, Dr. Naman presumed that, at some point, Mrs. McGuire had endured a sustained coronary artery spasm (R.75). A coronary artery spasm is for all practical purposes a complete temporary blockage of an artery (R.76). Whether blockage is due to plaque or due to spasm, the result is the same because lack of blood flow for whatever reason will result in the death of heart tissue (R.76).

It was Dr. Naman's opinion, based on the history of the onset of pain during a heated argument, that the most likely reason for or event most likely precipitating the coronary artery spasm was the emotional stress of the meeting (R.79). Dr. Naman was unwilling to testify however that his opinion that the artery spasm was precipitated by the emotional stress of the argument was based upon reasonable medical probability (R.89). Dr. Naman explained that some people suffer a spontaneous spasm which is a coronary artery spasm which occurs without any precipitating event (R.89). Heart attacks and artery spasms are often associated with excess adrenalin surges (R.89). Dr. Naman could only <u>presume</u> that the meeting was the precipitating cause of the spasm because of the

correlation in time (R.89).

Judge Robbins held that coronary artery spasms have historically been treated differently from heart attacks under Florida law and have been deemed compensable even where there was no unusual physical exertion or associated accident present (R.240). The JCC based her determination on the First District Court of Appeal's decision in Citrus Central, Inc. v. Gardner, 466 So.2d 369 (Fla. 1st DCA 1985) (R.240). The Employer/Carrier appealed the JCC's finding that the presumed coronary artery spasm was compensable. After reviewing the record, the First District Court of Appeal, sitting en banc, reversed the finding of compensability in Publix Super Markets, Inc. v McGuire, 18 Fla. L. Weekly D2220 (Fla. 1st DCA Oct. 12, 1993) (en banc). The First District receded from Gardner to the extent that it excludes coronary artery spasms from other failures of the cardiovascular system after concluding that a coronary artery spasm is an internal failure of the cardiovascular system. The First District held that emotional strain alone, independent of any activity evincing unusual physical strain or overexertion is insufficient to meet the test of compensability under this court's decisions in Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581 (Fla. 1961), and Richard E. Mosca & Co., Inc. v. Mosca, 362 So.2d 1340 (Fla. 1978).

SUMMARY OF ARGUMENT

Resolution of the question certified on appeal is unnecessary under the facts of the instant appeal in which the claimant was taking prescription diuretics to control her hypertension for at least six years and a catheterization performed subsequent to the claimant's coronary artery spasm or heart attack revealed pre-existing coronary artery disease restricting the claimant's arteries from 30-50%, a restriction described by the claimant's treating physician as mild to moderate. Each of these conditions has been previously identified as a pre-existing nondisabling cardiovascular condition of the type contemplated by this Court in Victor Wine and Mosca. Whether or not this court eventually finds that a pre-existing condition must be demonstrated in order to require the legal causation analysis promulgated in Victor Wine, the Victor Wine test is applicable under the facts of the instant appeal and precludes a finding of compensability where the claimant was not subject to any unusual strain or overexertion not routine to the type of work she was accustomed to performing.

The First District Court of Appeal's determination that the legal causation test established by this Court in Victor Wine and Mosca does not require for its application evidence that the claimant suffered from a pre-existing cardiovascular condition was a well reasoned determination based on sound public policy. The Victor Wine standard has been applied by the Florida courts for over 30 years without any requirement that the employer/carrier demonstrate the existence of some pre-existing cardiovascular

disease or defect prior to requiring the claimant to meet the legal causation test. Indeed, the test is often stated without the pre-existing cardiovascular disease language now seized upon to challenge the application of the Victor Wine causation standard in this appeal. There is no precedent for reallocating the burden of proof in this manner. This Court has repeatedly recognized the wisdom of and corresponding need for the legal causation requirement in order to ensure that compensation is not paid where there is no reliable proof that industry brought about the injury.

The facts of the instant case, as well as the facts before the Court in Zundell v Dade County School Bd., 609 So.2d 1367 (Fla. 1st DCA 1992) (en banc), demonstrate that in 1993, as in 1978 when Mosca was decided, emotional strain is still too elusive a factor to be utilized, independent of any physical activity, in determining whether there is a causal connection between a heart attack or other internal failure of the cardiovascular system and a claimant's employment. This Court as well as other appellate courts interpreting the standard established in Victor Wine have made it absolutely clear that in the absence of an accident, legal causation may only be established by proof of unusual physical strain or physical overexertion. There is no policy justification for accepting the type of the subjective emotional trauma testimony presented by Arlene McGuire, based only on her own insecurity, to establish a causal connection between the claimant's employment and an internal failure of her cardiovascular system. This Court's holding in Mosca has been challenged by the dissent below for

making obvious assumptions of medical facts with regard to the current state of medical knowledge and technology but no medical testimony has been offered to support the dissent's underlying premise that current medical knowledge and technology have advanced sufficiently to eliminate the need for the legal causation requirement set out in Victor Wine and Mosca. To the contrary, the facts before this Court in the instant appeal and before the Court in Zundell weigh against any determination that the ability of medical specialists and physicians to diagnose and identify the specific or precise cause of various internal cardiovascular problems has progressed sufficiently to eliminate the need for the legal causation requirement established in Victor Wine. In the only record medical testimony before the Court in this appeal, the treating physician refused to testify that the claimant's cardiovascular injury could be traced within a reasonable degree of medical probability to her employment because coronary artery spasms, like heart attacks, are associated with excess adrenalin surges and can spontaneously occur without any precipitating event. The only medical testimony in the record clearly supports this Court's determination in Mosca that emotional strain is too elusive a factor to be relied on for the determination of legal causation.

After a thorough review of the medical testimony and after interpreting the reasoning underlying this Court's decision in Mosca, the First District reached the inescapable conclusion that a coronary artery spasm is an internal failure of the cardiovascular system. The only medical testimony in the record

established that both heart attacks caused by spasm and heart attacks caused by plaque are technically heart attacks and both have the same practical result, the death of heart tissue. The facts presented by this appeal are very similar to the facts before the Court in Mosca and, accordingly, the public policy concerns and legal issues are indistinguishable. As was determined by this Court in Mosca and in University of Florida v Massie, 602 So.2d 516 (Fla. 1992), where there is no accident, there must be some unusual physical strain or overexertion not routine to the job in order to sufficiently establish legal causation and ensure that there is reliable proof that the industry brought about the injury.

ARGUMENT

Issue I

Certified Question

WHETHER THE "RULE FOR HEART CASES" ANNOUNCED IN VICTOR WINE & LIQUOR, INC. V BEASLEY AND LATER EXTENDED TO "OTHER INTERNAL FAILURES OF THE CARDIOVASCULAR SYSTEM" BY RICHARD E. MOSCA & CO., V MOSCA IS APPLICABLE TO CASES IN WHICH THERE IS NO EVIDENCE THAT THE CLAIMANT SUFFERED FROM A "PRE-EXISTING NON-DISABLING" CARDIOVASCULAR DEFECT, FAILURE, OR DISEASE, THEREBY REQUIRING PROOF THAT, AT THE TIME OF THE INJURY, A CLAIMANT WAS "SUBJECT TO UNUSUAL STRAIN OR OVER-EXERTION NOT ROUTINE TO THE TYPE OF WORK" A CLAIMANT WAS ACCUSTOMED TO PERFORMING.

While the First District majority found the above stated question to be one of great public importance, resolution of this question is unnecessary under the facts of the instant appeal. This issue was never raised by the claimant prior to Judge Mickle's erroneous observation in the majority opinion below that Arlene McGuire "had manifested no pre-existing nondisabling heart disease" such as was contemplated in Victor Wine. McGuire at D2222.

At the time of her heart attack or coronary artery spasm, Mrs. McGuire had been taking prescription diuretics to control her hypertension for at least six years (R.87,99). Mrs. McGuire's treating physician, Dr. Naman, testified that Mrs. McGuire's pre-existing coronary artery disease had restricted her arteries from 30-50%, a restriction he described as mild to moderate (R.73). Numerous prior decisions, including this Court's decision in Mosca, have identified high blood pressure, even if medically controlled,

as a significant pre-existing nondisabling cardiovascular condition. Mosca at 1341. In fact, in Zundell, Judge Webster, writing in dissent, specifically identified medically controlled hypertension as the pre-existing condition relied on by this Court in Mosca. Zundell at 1372. There can also be little question that Mrs. McGuire's pre-existing coronary artery disease was a nondisabling cardiovascular disease as envisioned by this Court in Victor Wine. In City of Miami v Rosenberg, 396 So.2d 163 (Fla. 1981), this Court cited the JCC's finding that the claimant's long-standing arteriosclerotic heart disease with coronary atherosclerosis was a pre-existing heart condition. Rosenberg at 165. See also Victor Wine at 586 (f.6). This Court has not, however, ever required the employer/carrier to prove that pre-existing heart disease contributed to the heart attack or even predisposed the claimant to an attack.

In the First District's en banc decision in Zundell, a case which is also on appeal before this Court, the lower court reviewed a case in which the treating physician specifically testified that the claimant did not suffer from any pre-existing condition. Zundell at 1369. In Zundell, the First District properly rejected the theory that a pre-existing condition is a necessary element of proof prior to applying the standard found in Victor Wine and Mosca. Id. at 1371. Regardless of the Court's eventual finding on that issue, this case is distinguishable from Zundell because there was never any testimony in this case that Arlene McGuire did not suffer from any pre-existing cardiovascular condition and, given

Dr. Naman's identification of pre-existing hypertension and coronary artery disease, there could not have been. Although there is no evidence in the record that either pre-existing condition contributed to Arlene McGuire's cardiovascular injury or pre-disposed her to such injury, such evidence has never been required by this Court or any other court interpreting the Victor Wine standard. Arlene McGuire's claim is clearly not compensable under existing law and apportionment therefore was not an issue. The issue of apportionment is not reached where, as here, there is absolutely no evidence of any unusual strain, physical or psychological, or physical overexertion not routine to the type of work the claimant was accustomed to performing. Although the employer/carrier was not required to demonstrate the presence of a pre-existing condition under any existing precedent prior to this stage of the litigation, the record contains competent substantial evidence sufficient to satisfy any burden placed on the employer/carrier to demonstrate the presence of a pre-existing condition thereby requiring the employee to establish the requisite conditions for compensability of her internal cardiovascular failure. The burden of establishing compensability is, and should remain, on the claimant.

At the time of her injury, Arlene McGuire was clearly not subject to any unusual strain or overexertion not routine to the type of work she was accustomed to performing. McGuire at D2221. Mrs. McGuire has never argued that she was subject to any unusual physical strain or overexertion but has instead seized upon

language from the dissenting opinions below, authored by Judges Joanos and Zehmer, which invite this Court to revisit the entire body of heart case precedent in light of "modern medical reality".

The real issue raised by Arlene McGuire, under the facts of this appeal, is not whether or not the employer/carrier was required to prove the existence of pre-existing cardiovascular condition prior to requiring the claimant to prove that she was subject to non-routine unusual strain or overexertion at the time of her cardiovascular injury but whether her cardiovascular injury was an accident as defined by §440.02(1), Florida Statutes (1993). Although heart attacks and coronary artery spasms are generally unexpected or unusual events which happen suddenly, mental or nervous injuries due to fright or excitement only are specifically not, by definition, "injuries by accident arising out of the employment". §440.02(1), Fla.Stat. (1993).

In Massie, this Court acknowledged that psychological pressures often have negative physical results. Massie at 524. This Court went on to expressly find, however, that such stresses are neither a physical cause nor an accident under Florida Workers' Compensation law. Id. This Court stated in Massie its unwillingness to redefine workers' compensation coverage to include situations where psychological causes may have physical effects. Id. at 524-525. In the instant appeal, this Court has been invited to revise the entire existing body of "heart case" precedent, and indeed "accident" precedent, to find that an employee with pre-existing cardiovascular disease, who sustained a cardiovascular

injury without any physical exertion shortly after a subjectively emotional or stressful meeting with her supervisor, sustained a compensable injury.

The First District Court of Appeal, in a well-reasoned opinion, has held in Zundell that this Court's decisions in Victor Wine and Mosca are applicable even where there is no evidence that the claimant suffered from a pre-existing cardiovascular condition. Zundell at 1368. This interpretation of Victor Wine is supported by sound public policy. The Florida courts have been interpreting "heart cases" in the workers' compensation system according to guidelines established by this Court in the Victor Wine decision for over 30 years. Although many decisions note the presence of some pre-existing cardiovascular disease or defect, there is no sound public policy justification for restricting the application of the rule to cases in which the employer/carrier can prove the existence of a pre-existing cardiovascular condition. The decisions of this Court and the courts below which have noted the existence of a pre-existing condition have merely cited this as a historical fact and have never required any proof that the non-routine physical overexertion acted in concert with the pre-existing condition to produce the heart attack or internal cardiovascular failure. In numerous reported cases there is no mention of a pre-existing condition. See, e.g., Tintera v Armour & Co., 362 So.2d 1344 (Fla. 1978); Diaz v City of Miami, 427 So.2d 1085 (Fla. 1st DCA 1983); and City of Opa Locka v Quinlan, 451 So.2d 965 (Fla. 1st DCA 1984). Indeed, the Victor Wine standard or

test is often stated without the pre-existing language questioned in Zundell. See, e.g., Richards Department Store v Donin, 365 So.2d 385 (Fla. 1978); Walker v Friendly Village of Brevard, 559 So.2d 258 (Fla. 1st DCA 1990); and Gardinier, Inc. v Coker, 564 So.2d 254 (Fla. 1st DCA 1990). The strength of the Victor Wine decision and the focus of the courts interpreting it for over 30 years has been the requirement that the employment legally cause the cardiovascular injury.

In Victor Wine, this Court was concerned with imposing financial responsibility on employers in cases where disabling heart attacks only fortuitously occur while the claimant is at work. The Workers' Compensation Act was not designed to take the place of general health and accident insurance and was not intended to afford relief for disease or physical ailments not produced by industry. Victor Wine at 583. The legal causation requirement established by this Court in Victor Wine and Mosca is essential to ensure that the Workers' Compensation system is not converted into generalized health insurance. Abrogation of the Victor Wine rule in cases such as this would allow compensation to be paid where there is no reliable proof that industry brought about the injury. Zundell at 1370.

Issue II

IN LIGHT OF MODERN MEDICAL KNOWLEDGE, UNUSUAL WORKPLACE EMOTIONAL STRAIN ALONE, INDEPENDENT OF UNUSUAL PHYSICAL STRAIN OR OVEREXERTION, IS STILL INSUFFICIENT TO SUPPORT COMPENSABILITY.

As determined by this Court in Mosca, emotional strain is too elusive a factor to be utilized, independent of any physical activity, in determining whether there is a causal connection between a heart attack or other internal failure of the cardiovascular system and the claimant's employment. Mosca at 1342. In her initial brief to this Court, Mrs. McGuire recognized that this Court in Mosca made it absolutely clear that Victor Wine requires unusual physical strain or physical overexertion. The level of emotional strain relied on to establish the causal relationship in this case confirms the continuing validity of this Court's conclusion in Mosca that "emotional strain is too elusive a factor" to be utilized in determining whether there was a causal connection between a cardiovascular injury and a claimant's employment. Id.

Mrs. McGuire testified that the meeting with her supervisor was not antagonistic and that her supervisor was nice to her (R.21,204). The claimant in this matter gave a subjective history of an emotional and stressful meeting to her treating physician but admittedly only assumed her supervisor was angry with her by the tone of his voice (R.27). She conceded that Mr. Kapocsi was pleasant toward her and never raised his voice during their meeting (R.21,205). Arlene McGuire was nervous because she had written a

letter to Publix management which she assumed would make her supervisor, Mr. Kapocsi, angry (R.11). She was nervous before she was ever actually called into the office to speak to Mr. Kapocsi (R.24). There is no policy justification for accepting this type of subjective emotional trauma testimony, based only on an employee's insecurity, to sufficiently establish a causal connection between the claimant's employment and an internal failure of the cardiovascular system.

It was Dr. Naman's opinion, based on the claimant's subjective history of the onset of pain during a heated argument, that the most likely reason for or the event most likely precipitating the coronary artery spasm was the emotional stress of the meeting (R.79). Importantly, Dr. Naman was unwilling to state his opinion regarding causation within a reasonable degree of medical probability (R.89). Dr. Naman explained that he could only presume that the meeting was the precipitating cause because of the correlation in time (R.89). The testimony of Dr. Naman does not clearly establish a causal link between the claimant's subjective emotional strain and her subsequent cardiovascular injury without further reliance on his presumption that the correlation in time would indicate a causal relationship. The holdings in Victor Wine and Mosca were specifically intended to prevent courts from relying on this type of "positional risk" analysis. If compensability of heart attacks under the workers' compensation statutes is to remain distinguishable from general health and accident insurance as intended by Victor Wine and Mosca, this Court must require evidence

of a "specifically identifiable" work-related event as required by this Court in Rosenberg. Rosenberg at 165. A heart attack is not, and should not be, automatically compensable simply because it can be temporally tied to the claimant's employment.

In the dissenting opinion below, Chief Judge Zehmer criticized this Court's opinion in Mosca for rejecting competent medical evidence. McGuire at D2224-5. Judge Zehmer has argued that this Court made obvious assumptions of medical facts that may or may not be consistent with current medical knowledge and technology when it opined that "emotional strain is too elusive a factor". Id. This Court's assumption of medical facts in Mosca, if indeed such an assumption was made, has not however been challenged by the introduction of any medical testimony in this matter to support Chief Justice Zehmer's assertion that current medical knowledge and technology have advanced since this Court rendered its decisions in Victor Wine and Mosca. To the contrary, the facts before this Court in the instant appeal weigh against any determination that the ability of medical specialists and physicians to diagnose and identify the specific or precise cause of various internal cardiovascular problems has progressed sufficiently to eliminate the need for the legal causation requirement established in Victor Wine.

The facts of the instant appeal illustrate the wisdom of the Victor Wine standard in light of "modern medical reality". The treating physician in this case originally determined that Mrs. McGuire had suffered a heart attack (R.70). A heart attack is

defined as the death of muscle fibers in the heart (R.70). A heart attack is generally thought to be caused by a blockage of one or more of the heart arteries causing a stoppage of blood flow which results in the death of tissue in the heart (R.72). A coronary artery spasm is essentially a complete temporary blockage of an artery (R.76). Whether the blockage is due to plaque or to spasm, the result is the same because the lack of blood flow for whatever reason will result in the death of heart tissue (R.76). Technically, Mrs. McGuire's spasm was a heart attack (R.70).

Although Dr. Naman originally determined that Mrs. McGuire had sustained a heart attack on the basis of her bloodwork (R.70), a subsequent catheterization revealed 30-50% blockage which was described as mild to moderate indicating that these percentages would generally be expected in a person over 50 years of age (R.73). Dr. Naman testified that Arlene McGuire would not have had much potential for a heart attack due to this extent of blockage alone (R.74). Based on the extent of the blockage and the evidence of heart tissue damage, Dr. Naman presumed that, at some point, Mrs. McGuire had endured a sustained coronary artery spasm (R.75). It was Dr. Naman's opinion, based on the subjective history of the onset of pain during a heated argument, that the most likely reason for or event most likely precipitating the coronary artery spasm was the emotional stress of the meeting (R.79). Dr. Naman was, however, unwilling to express his opinion that the artery spasm was precipitated by the emotional stress of the argument within a reasonable degree of medical probability, explaining that some

people suffer a spontaneous spasm (R.89). A spontaneous spasm is a coronary artery spasm which occurs without any precipitating event (R.89). Dr. Naman testified that heart attacks and artery spasms are often associated with excess adrenalin surges (R.89). Dr. Naman could only presume, in reliance on Mrs. McGuire's subjective history, that the meeting produced an excess adrenalin surge which presumably precipitated the spasm because of the correlation in time (R.89). Dr. Naman's testimony and specifically his refusal to determine causation within a reasonable degree of medical probability demonstrates the wisdom of substituting legal cause for medical cause given the state of "modern medical reality".

In Zundell, the First District recognized that the existence of a pre-existing heart or cardiovascular defect may be difficult or impossible to establish. Zundell at 1370. The First District noted that the facts of that case were also illustrative of the difficulties involved. Id. In Zundell, the doctor based his diagnosis on the fact that the arteriogram revealed no prior condition but when asked whether the arteriogram would have revealed a weakness, the doctor had to admit that it would not. Id. After reviewing this testimony, the First District found that the speculative nature of the doctor's testimony coupled with the high incidence of heart and cardiovascular disease in the work force demonstrated the need for the legal causation test promulgated by this Court in Victor Wine and Mosca. Id.

The facts of the instant case and the facts before this Court

in Zundell clearly demonstrate that in 1993, as in 1978 when Mosca was decided, emotional strain is still too elusive a factor to support compensability. Chief Judge Zehmer's underlying premise, that advancements in medical science have considerably increased the knowledge and ability of medical specialists and physicians to diagnose and identify the specific or precise cause of various internal cardiovascular system injuries, is not supported by the facts of either case pending before the Court on this issue. If emotional strain alone were compensable without any requirement of demonstrating a specifically identifiable accident or event, a heart attack sustained by an employee while worrying about a job task at home would be absolutely compensable based solely on the employee's subjective history. Compensability under the Workers' Compensation Act must remain limited to accidents arising out of physical trauma, physical contact or injury sustained as a result of an identified unusual strain or overexertion. A determination that the type of routine emotional strain before the Court in this matter is compensable would constitute a significant expansion of workers' compensation entitlement equating it, as a practical matter, with general health insurance.

Issue III

A CORONARY ARTERY SPASM IS AN INTERNAL FAILURE OF THE CARDIOVASCULAR SYSTEM UNDER MOSCA THEREBY REQUIRING PROOF THAT, AT THE TIME OF THE INJURY, THE CLAIMANT WAS SUBJECT TO UNUSUAL STRAIN OR OVEREXERTION NOT ROUTINE TO THE TYPE OF WORK THE CLAIMANT WAS ACCUSTOMED TO PERFORMING.

In the only medical testimony contained within the record, Dr. Naman explained that a coronary artery spasm is technically a heart attack (R.70). Dr. Naman defined a heart attack as the death of muscle fibers in the heart (R.70). A heart attack is generally thought to be caused by blockage of one or more of the heart arteries causing a stoppage of blood flow which results in the death of tissue in the heart (R.72). A coronary artery spasm is for all practical purposes a complete temporary blockage of an artery (R.76). Whether blockage is due to plaque or due to spasm, the result is the same because lack of blood flow for whatever reason will result in the death of heart tissue (R.76).

The First District, in an attempt to determine the proper scope of Mosca, concluded that "cardiovascular" pertains to the heart and blood vessels. McGuire at D2222. The First District further found that an artery is "a vessel through which the blood passes away from the heart to the various parts of the body" citing Dorland's Illustrated Medical Dictionary 138 and 275 (27th Ed. 1988). Id. The First District Court of Appeal, en banc, held:

> Our thorough review of the medical testimony in the case at bar, and our interpretation of the reasoning underlying Mosca and its progeny, lead us to the inescapable conclusion that a coronary artery spasm is an internal

> failure of the cardiovascular system. Accordingly, we must recede from Gardner to the extent that it excludes coronary artery spasms from "other internal failures of the cardiovascular system". Mosca, 362 So.2d at 1341.

There is no rational or public policy justification for distinguishing between a blockage caused by plaque and a temporary blockage caused by spasm where the only medical testimony established that both are technically heart attacks because both result in the death of heart tissue.

The facts in the Mosca case were very similar to the facts before the Court in this case. In Mosca, the claimant was a 43 year old man who, prior to suffering a ruptured aneurism, was in good health with a history of medically controlled hypertension. Mosca at 1341. The claimant in Mosca was extremely anxious and nervous about an important sales meeting and the meeting produced a tense atmosphere. Id. During the meeting, the claimant suffered a rupture of a congenital cerebral aneurism. Id. The attending physicians testified that although the rupture could have occurred at some other time, the tension and stress of the meeting caused an elevation of the claimant's blood pressure which resulted in the rupture of the aneurism. Id. at 1342. Arlene McGuire also has a history of medically controlled hypertension and also sustained a cardiovascular injury after becoming anxious and nervous during a meeting with her supervisor. Dr. Naman testified that both heart attacks and coronary artery spasms are associated with excess adrenalin surges and that some people suffer spontaneous coronary artery spasms without any precipitating event (R.89).

The First District Court of Appeal's decision in Gardner was a deviation in principle from the rationale of Victor Wine and Mosca and was therefore properly receded from to the extent that the decision excluded coronary artery spasms from "other internal failures of the cardiovascular system" under Mosca. McGuire at D2222. The attending cardiologist in Gardner determined that the claimant had not suffered a heart attack or coronary artery spasm but instead suffered musculoskeletal chest pain. Gardner at 370. Rather than simply accepting the testimony of the cardiologist, the First District Court of Appeal held that a coronary artery spasm was not a heart attack and there was not therefore, under Victor Wine, any requirement of non-routine physical exertion. Gardner at 371. Mrs. McGuire suffered a heart attack presumably brought on by a coronary artery spasm (R.70,75). The "exception" created and subsequently receded from by the First District Court of Appeal amounted to a distinction without a difference and was in direct conflict with the spirit and the express holding of Mosca.

Although there is no record evidence in this matter that Arlene McGuire's pre-existing condition predisposed her to a coronary artery spasm, a limitation proposed by Judge Joanos in his dissent, there is similarly no evidence in the record that a coronary artery spasm would not be more likely in a patient with mild to moderate coronary artery disease and hypertension. McGuire at D2223. It would indeed seem logical that a pre-existing 30-50% blockage acting in concert with high blood pressure could predispose a claimant to a complete temporary blockage in the event

of a coronary artery spasm.

The claimant has incorrectly argued that the evidence in the record suggests that the spasm was a one-time occurrence caused directly by the emotional trauma of a workplace confrontation. The record reflects instead that Mrs. McGuire is still taking medication to prevent another heart spasm (R.82). There is also absolutely no record evidence, contrary to the claimant's assertions, that the spasm was not attributable to any internal deficiencies or Mrs. McGuire's pre-existing cardiovascular disease or high blood pressure. The issue was simply not raised by the claimant, not relevant, and therefore not addressed by either party.

In his dissenting opinion below, Chief Judge Zehmer argued that since the most likely event to have caused the arterial spasm was the "physical" reaction of the claimant's cardiovascular system to the angry confrontation between the claimant and her superiors, it was irrelevant whether a coronary artery spasm should be characterized as an internal failure of the cardiovascular system within the meaning of Mosca. McGuire at D2225. The test established in Victor Wine and Mosca is not however the body's physical response to external forces but rather the legal standard of evidence required to demonstrate that the external forces caused the physical response. This Court has repeatedly held that emotional strain alone is not sufficient to support a determination of legal causation. Mosca at 1342. Where there is no accident, there must be some unusual physical strain or overexertion not

routine to the job. Id.

In Massie, this Court recently reviewed a case in which the claimant alleged that job stress exacerbated his pre-existing multiple sclerosis. Massie at 516. This Court in Massie reinstated the JCC's finding that stress, while it may exacerbate multiple sclerosis, or for that matter many other organic diseases, is in the nature of psychological trauma and is not compensable and the claimant had therefore not suffered a compensable accident under the Workers' Compensation Act. Massie at 519. The JCC in Massie noted that if job pressure and stress were compensable there would be no end to compensable claims under the Act because in today's world all gainful activities are subject to this disease. Id. This Court reaffirmed that the Victor Wine test clearly requires an occurrence of some physical strain or exertion. Massie at 521. This Court in Massie specifically refused to accept that job stresses were either a physical cause or an accident under the Workers' Compensation Act although the Court acknowledged that psychological pressures often have negative physical results. Massie at 524. This Court noted that the manager in Massie did not face stresses uncharacteristic of those which all managers must occasionally face. Id. This assessment would unquestionably also apply to the facts of the instant appeal. Chief Judge Zehmer is asking this Court to redefine workers' compensation coverage to include situations where elusive psychological causes may have physical effects, an invitation which this Court specifically and properly declined in Massie.

CONCLUSION

The employer/carrier respectfully requests this Court to accept jurisdiction in this case to answer the issue raised by the First District Court of Appeal majority in the affirmative. The resolution of this question however does not effect the decision of the First District Court of Appeal rendered below. The record clearly shows that Arlene McGuire suffered from pre-existing nondisabling hypertension and mild to moderate coronary artery disease requiring proof that, at the time of her injury, she was subject to unusual strain or overexertion not routine to the type of work she was accustomed to performing.

The employer/carrier further respectfully requests that this Court again decline the invitation of the dissent below to redefine workers' compensation coverage to include situations where psychological causes may have physical effects unless the Court wishes to again clearly state that routine emotional stress is not a physical cause nor an accident under workers' compensation law. The en banc decision of the First District Court of Appeal below correctly applied the controlling legal principles promulgated by this Court in Victor Wine and Mosca and should not be disturbed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to EDWARD S. ENO, Esq., and SONDRA GOLDENFARB, Esq., 2454 McMullen Booth Rd., Ste. 501A, Clearwater, Fl 34619, this 10th day of December, 1993.

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