

SUPREME COURT  
STATE OF FLORIDA  
TALLAHASSEE, FLORIDA

DANNY L. RUDISILL,

Petitioner,

vs.

FLORIDA HIGHWAY PATROL and  
DIVISION OF RISK MANAGEMENT,

Respondents.

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CASE NO.: SC09-1046

Lwr Tribunal: 1D08-4797

**PETITIONER'S INITIAL BRIEF ON JURISDICTION**

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This is an Initial Brief on Jurisdiction seeking to invoke Discretionary Jurisdiction to review a decision of the First District Court of Appeal, Tallahassee, Florida, opinion issued May 14, 2009.

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### **PRELIMINARY STATEMENT**

The Petitioner, DANNY L. RUDISILL, shall be referred to herein as "RUDISILL".

The Respondents, FLORIDA HIGHWAY PATROL/DIVISION OF RISK MANAGEMENT, shall be referred to as "FHP" (Florida Highway Patrol).

References to the record on appeal shall be abbreviated by the letter "V" (volume), followed by the applicable volume and page number.

References to the appendix attached to Petitioner's Initial Brief on Jurisdiction will be referred to by the letters "AP" and followed by the applicable appendix page number. The appendix contains the opinion issued by the First District Court of Appeal on May 14, 2009.

## **STATEMENT OF THE CASE AND STATEMENT OF THE FACTS**

Prior to Claimant/Petitioner, DANNY L. RUDISILL, reporting to the FHP academy in Tallahassee, RUDISILL underwent a pre-employment physical on May 23, 1978 (V1-24, V2-240,241,384).

RUDISILL started at the FHP academy in 1978 (V1-47, V2-332). When RUDISILL was at the academy the first time, RUDISILL tore some ligaments in his ankle and due to the demands of the academy RUDISILL resigned on September 13, 1978 (V1-47,48, V2-332,335). RUDISILL then returned to Miami where he went back to his prior job a service adviser (V2-333). RUDISILL then got another letter from the FHP academy stating he was accepted again (V1-55,56, V2-333,335,336).

After being accepted again, RUDISILL began attendance at the FHP academy on January 22, 1979 (V1-22,48). RUDISILL was not required to take another pre-employment physical after he was accepted again (V1-48,56). FHP used the pre-employment physical RUDISILL previously took (V1-56).

Prior to becoming a highway patrolman, RUDISILL was never diagnosed with or treated for hypertension, heart disease, elevated cholesterol or diabetes (V1-43,44).

Eventually, on October 26, 2001 RUDISILL was shaving when he began having chest pain and numbness in the left hand, headaches, dizziness, profuse sweating, shortness of breath and heart palpitations (V1-34,35, V2-352). RUDISILL was taken to

Lakeland Regional Medical Center where RUDISILL underwent a heart catheterization at which time he found out he had an artery that had almost shut down in restriction (V1-36).

On the following day, October 27, 2001 RUDISILL had a stent put in to open up the restrictions of the artery (V1-36, V2-350,361).

The October 26, 2001 incident is the accident which is the subject of this appeal.

Eventually on May 14, 2008 Claimant underwent an IME under the direction of Dr. Michael Nocero, cardiologist, Orlando, Florida (V2-249,250,308-310,311-315). In his 5/14/08 report, Dr. Nocero diagnosed Claimant's condition, inter alia, as follows:

1. Coronary artery disease, status post bypass surgery, status post stent placement.
2. Essential hypertension.
3. Type II diabetes mellitus.
4. Hypercholesterolemia. (V2-314)

In his 5/14/08 report Dr. Nocero stated, inter alia:

"The Claimant has multiple risk factors (listed in the present illness) that contributed to his development of coronary artery disease. He eventually required bypass surgery to reconstitute severely restricted coronary artery blood flow. These risk factors worked in concert to increase the Claimant's chances of developing coronary arteriosclerosis. . ." (V2-314).

In his 5/14/08 report Dr. Nocero also stated:

"It is my opinion that the reason that the Claimant developed stenosis of this graft to the right coronary artery was due to ongoing arteriosclerosis as a progressive pathological process. This Claimant will need annual cardiology evaluation including nuclear scanning (SPECT) to monitor him for the possibility of further obstruction occurring in the rest of his coronary artery tree. It is also my opinion that the Claimant's coronary artery arteriosclerosis was not due causally to his occupation. It is also my opinion that the Claimant's multiple risk factors that led to his coronary artery disease were not caused by his occupation." (V2-314).

In his 8/26/08 deposition Dr. Nocero testified there are numerous risk factors for the development of coronary artery disease (V2-263). Those risk factors include hypertension, cigarette smoking, hypercholesterolemia, diabetes, metabolic syndrome, and family history (V2-263-265). Dr. Nocero opined the risk factors Claimant has are blood pressure elevation, elevated cholesterol, diabetes mellitus, history of cigarette smoking and the metabolic syndrome, specifically the low HDL (V2-265).

Dr. Nocero also testified when there is a constellation of risk factors then there is that much more statistical evidence they are working in concert and cause the coronary artery disease (V2-282).

Dr. Nocero also testified however that with regard to the risk factors, you cannot look at one individual risk factor and state with a reasonable degree of medical certainty this risk factor definitely played in the development of the coronary artery disease (V2-291,292). Dr. Nocero testified risk factors

are basically a statistical increased risk of developing the process, it is a possible association but not a definite link (V2-292). Conversely, cause is an actual process that will lead to the disease, in other words, there is a definite link there (V2-292).

Dr. Patrick Mathias, a cardiologist who performed an IME on June 6, 2008 also testified a risk factor is a condition or factor that has a statistical association with a high incidence of development of a disease (V1-146). However the link between a risk factor and development of the disease is not clear and there is no clear cut causative link (V1-146). An individual could have multiple risk factors and never get the disease or could have no risk factors and have the disease (V1-146).

Dr. Mathias testified a cause is a condition that is directly linked to the production of a disease (V1-146). Dr. Mathias testified we don't know what the cause of coronary artery disease is (V1-147).

On August 29, 2008 the JCC entered a Final Compensation Order which is the subject of this appeal (V3-405-419). The JCC found Claimant suffers from hypertension and heart disease (coronary artery disease and ectopy) (V3-415). The JCC found, however, Claimant was not entitled to the presumption of compensability afforded by the provisions of F.S.112.18(1)(2001) because Claimant did not pass a pre-employment physical which



revealed no evidence of the above referenced conditions prior to the time he was re-hired in 1979 (V3-415). The JCC found Claimant must have a physical examination upon entering employment in order to qualify for the presumption of compensability afforded by F.S.112.18(1)(2001) (V3-416). The JCC found Claimant did not take a pre-employment physical prior to beginning his employment with the employer in 1979 (V3-416).

The JCC further found that had she ruled Claimant was entitled to the presumption of F.S.112.18(1)(2001) the burden would have shifted to the E/C to prove some other factor caused Claimant's condition and need for treatment (V3-416). The JCC found the E/C rebutted the presumption of compensability of Claimant's coronary artery disease by establishing there was a non-work related cause (the combination of risk factors that amounted to the cause of Claimant's heart disease) based upon Dr. Nocero's testimony (V3-417).

On May 14, 2009 the First District Court of Appeal entered an opinion affirming the JCC's order, based on Punsky v. Clay County Sheriff's Office, 34 F.L.W. D469(Fla.1st DCA March 6, 2009) (en banc) (AP-1).

**POINT ON APPEAL**

**POINT I**

**WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE AT BAR EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS HONORABLE COURT IN CALDWELL V. DIVISION OF RETIREMENT, 372 So.2d 438(Fla.1979).**

**SUMMARY OF ARGUMENT**

**I**

There can be no actual conflict discernable in an opinion from a District Court of Appeal containing only a citation to other case law unless one of the cases cited as controlling authority is pending before this Honorable Court, Tippens v. State, 897 So.2d 1278(Fla.2005).

In the case at bar the opinion of the First District Court of Appeal cites Punsky v. Clay County Sheriff's Office, 34 F.L.W. D 469(Fla.1st DCA March 6, 2009) (en banc) (AP-1). Punsky v. Clay County Sheriff's Office, Supra, is currently pending before this Honorable Court, (SC09-879). As such RUDISILL respectfully submits this Court has conflict jurisdiction.

**ARGUMENT**

**POINT I**

**WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE AT BAR EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS HONORABLE COURT IN CALDWELL V. DIVISION OF RETIREMENT, 372 So.2d 438(Fla.1979).**

Article V, Section 3(b)(3), Fla. Const., provides the jurisdiction of this Honorable Court may be invoked to review any decision of a District Court of Appeal that:

" . . . Expressly or directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law." See also, Fla.R.App.P.9.030(a)(2)(A)iv.

There are two principle circumstances that support this Honorable Court's jurisdiction to review District Court decisions based upon alleged express and direct conflict, Wallace v. Dean, 3 So.3d 1035(Fla.2009). The two circumstances are:

- (1) The announcement of a rule of law that conflicts with a rule previously announced by this Court or another district court; or
- (2) The application of a rule of law to produce a different result in a case that involves substantially similar controlling facts as a prior case disposed of by this Honorable Court or another district court, Wallace v. Dean, Supra at 1039 fn 4.

In Jollie v. State, 405 So.2d 418(Fla.1981), this Honorable Court held, following the 1980 amendment to Article V, Section 3, of the Florida Constitution, that a District Court of Appeal per curiam opinion which cites as controlling authority a decision that is either pending review in this Honorable Court or has been reversed by this Honorable Court continues to constitute prima facie express conflict and allows this Honorable Court to exercise its jurisdiction.

The above referenced rule of law has also been set forth in Tippens v. State, 897 So.2d 1278(Fla.2005), Gandy v. State, 846 So.2d 1141(Fla.2003), and the The Florida Star v. BJJF, 530 So.2d 286(Fla.1988).

In the case at bar, the First DCA entered a per curiam opinion affirming the JCC's order of August 29, 2008 (AP-1). The First DCA affirmed the JCC's order based on Punsky v. Clay County Sheriff's Office, 34 F.L.W. D469(Fla.1st DCA March 6, 2009) (en banc). (AP-1).

The case of Punsky v. Clay County Sheriff's Office, Supra, is currently pending before this Honorable Court, docket number SC09-879. The Petitioner in Punsky v. Clay County Sheriff's Office, Supra, has alleged the First DCA's opinion in Punsky v. Clay County Sheriff's Office, Supra, expressly and directly conflicts with this Honorable Court's decision in Caldwell v. Division of Retirement, 372 So.2d 438(Fla.1979).

Petitioner's brief on jurisdiction in Punsky v. Clay County Sheriff's Office, Supra, was filed on June 3, 2009.

RUDISILL respectfully submits that since the First DCA issued its per curiam opinion in the case at bar based on Punsky v. Clay County Sheriff's Office, Supra, and since Punsky v. Clay County Sheriff's Office, Supra, is currently pending before this Honorable Court, this constitutes prima facie express conflict and allows this Honorable Court to exercise its jurisdiction,

Tippens v. State, Supra, Gandy v. State, Supra, The Florida Star v. BJF, Supra, Jollie v. State, Supra.

#### **CONCLUSION**

Since the First DCA's opinion in the case at bar relies on Punsky v. Clay County Sheriff's Office, Supra, and since Punsky v. Clay County Sheriff's Office, Supra, is currently pending before this Honorable Court, docket number SC09-879, Petitioner respectfully requests this Honorable Court grant Petitioner's Notice to Invoke Discretionary Jurisdiction and accept jurisdiction of this appeal.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this \_\_\_\_\_ day of June, 2009 to: Paul A. Kelley, 807 West Morse Blvd, Suite 201, Winter Park, Florida 32789, William H. Rogner, 1560 Orange Avenue, Suite 500, Winter Park, Florida 32789.

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**CERTIFICATE OF TYPE FACE COMPLIANCE**

I HEREBY CERTIFY that this Initial Brief on Jurisdiction for Petitioner was computer generated using Courier New twelve font on Microsoft Word, and hereby complies with the font standards as required by Fla.R.App.P 9.210 for computer-generated briefs.

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