IN THE SUPREME COURT OF FLORIDA

THE TRIBUNE COMPANY, Petitioner, vs. LEONARD D. LEVIN, Respondent.	Case No. 63,217

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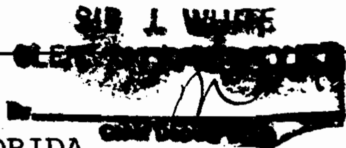

CERTIFIED FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE

The amicus curiae is a faculty member at the University of Florida College of Law where he teaches and studies the law of torts, including the law of defamation. Amicus curiae deems the resolution of the issue before the court to be of great importance to the proper development of the law in Florida and, hence, to the welfare of the people of the state. Amicus believes this brief may augment those of the parties in properly illuminating the issues addressed to this Court.

REQUESTED ORDER OF THE COURT

Amicus curiae respectfully requests this Honorable Court to answer the certified question by approving the holding below and that in Miami Herald Publishing Co. v. Ane, 423 So. 2d 376 (3d D.C.A. 1982): that is, that a private person who is not a public figure or a public official must prove negligence, and not constitutional malice, as a part of the prima facie case of defamation against a publisher of libelous materials.

STATEMENT OF THE CASE

Amicus curiae accepts statements of the case as reported in The Tribune Co. v. Levin, 426 So. 2d 45 (Fla. App. 1983).

ARGUMENT

I. THE GOAL OF RATIONALIZING THE LAW OF CIVIL REPARATIONS WILL BE SERVED BY ACKNOWLEDGING NEGLIGENCE AS THE STANDARD OF FAULT IN DEFAMATION ACTIONS NOT CONTROLLED BY NEW YORK TIMES V. SULLIVAN, 84 S. CT. 710 (1964).

Defamation, deceit and negligence all spring from entirely different common law roots but the evolution of the law is pressing toward the acknowledgement of simple negligence as the universal standard of fault, except for that class of defamation cases controlled by New York Times v. Sullivan, 84 S. Ct. 710 (1964) [hereinafter referred to as Sullivan]. Although purists might decry this amalgamation of various branches of the law of civil reparation, most lawyers will applaud it as a movement to unify and simplify the law and to excise arcane distinctions that have been stumbling blocks for generations of lawyers and litigants. To acknowledge negligence as the standard of fault for all defamation actions not controlled by Sullivan would support this salutary movement. To impose constitutional malice (i.e., spoken with knowledge of falsity or knowledge that the speaker does not know whether the statement is true or false) as the standard not only would thwart this rational goal, but would also grossly distort the defamation cause of action as it exists in the common law of Florida and elsewhere.

The law of negligence crystallized out of the common law writs of trespass and trespass on the case in the middle of the nineteenth century, both in this country and in England. Among

the many cases that shaped the negligence standard of care were Vaughan v. Menlove, 132 Eng. Rep. 490 (1837), in England, and Brown v. Kendall, 60 Mass. 292 (1850), in the United States. The former of these cases defined the negligence standard of care as that degree of care that would be exercised by a reasonable man of ordinary prudence under same or similar circumstances. That is now the virtually invariate standard of negligence. It is well understood by lawyers and judges, who in turn know how to make it understandable to jurors.

The law of deceit developed separately from the law of negligence. Prior to the decision in Derry v. Peek, [1889] 14 App. Cas. 330 (House of Lords), it had been held that actions for false representations could be maintained only upon a showing that the defendant misspoke knowing of the falsity of his statement. In Derry, it was held that an action might be maintained upon proof of scienter, meaning that the defendant had actual knowledge of the falsity of the statement or that he knew that he did not know whether the statement was true or false. Regrettably, the judgments in Derry had the effect of rigidifying the law of misrepresentation to the extent that proof of scienter became the exclusive means of recovery for misrepresentation. For years both English and American courts refused to acknowledge a distinction between the intentional tort of deceit and the separate tort of negligent misrepresentation. Gradually, both English and American courts began to permit recission of unexecuted contracts on the grounds of negligent (and even innocent) misrepresentation. More recently, both English and American

courts have permitted damage suits for negligent misrepresentations under circumstances in which the speaker could reasonably foresee that a negligent misrepresentation would impose a risk upon a particular plaintiff or a plaintiff of a class of limited size. In England, the latter stages of this evolution produced a more general standard of liability for negligent misrepresentation in Hedley Bryne & Co. Ltd. v. Heller & Partners Ltd., [1964] App. Cas. 465 (House of Lords). Florida accepted negligence as a basis for a damage action in misrepresentation as early as 1942 in Joiner v. McCullers, 158 Fla. 562 (1942). In Joiner, this Court held that scienter may be sufficiently made out not only by Derry scienter but also "under circumstances in which the person making [the misrepresentation] ought to have known ... of its falsity." Id. at 568. This statement has been cited to the effect that "[i]n this state, a negligent misrepresentation is considered tantamount to actionable fraud." Ostreyko v. B.C. Morton Organization, Inc., 310 So. 2d 316, 317 (Fla. App. 1975). It thus appears that the law of deceit in Florida has been augmented by a robust theory of negligent misrepresentation.

The roots of defamation sink deep into the murky soil of ecclesiastical law as to slander and of sedition as to libel. This brief will not attempt to trace the evolution but will merely remind the Court that defamation was always a strict liability tort in England, having crystallized as such long before the American Revolution. Indeed, it was held as early as the seventeenth century in Mercer v. Sparks, 74 Eng. Rep. 1005, discussed in Bromage v. Prosser, 107 Eng. Rep. 1051, 1054-55

(1830), that "words themselves are malicious and slanderous," thus obviating any need for the plaintiff to show ill will, intention to harm or negligence. In England and most United States jurisdictions, including Florida, the common law of defamation remains a strict liability tort except in those instances in which a publisher merely reproduced "outside press dispatches ... purporting on their face to have been solely derived from outside agencies ...." John H. Layne v. The Tribune Co., 108 Fla. 177, 184, 185 (1933). In form, malice is required in common law actions, but in law the publication of the defamatory statement constitutes an irrebutable implication of malice. Id. at 181. Moreover, in the common law, publication of a libel also carried an irrebutable presumption of actual damages. Id. This history is amply detailed in Sullivan, 84 S. Ct. 710 (1964), and Gertz v. Robert Welch, Inc., 94 S. Ct. 2997 (1974) (in particular, White, J., dissenting) [hereinafter referred to as Gertz]. Moreover, it is not to be denied that the law of defamation in Florida required no showing of fault prior to Sullivan, as to public figures and officials, and prior to Gertz as to other plaintiffs.

As this Court well knows, Sullivan and Gertz both impose restrictions upon the common law of defamation in order to conform it to latter-day constructions of the First Amendment to the United States Constitution. These cases do not change the common law; they merely overlay it with conditions that must be yielded to in recognition of the superiority of the United States Constitution. In Gertz, the United States Supreme Court was careful to

articulate a standard that would constitute the minimum intrusion upon underlying local law. So long as no liability is imposed without fault, the states may impose the standard that best conforms to local law. The flexibility is great enough to permit this determination to be made at any stage of the litigation, even upon appellate review. Time, Inc. v. Firestone, 96 S. Ct. 958 (1976).

The Florida law of civil reparation will best be served by adopting a defamation standard of fault that incorporates the general principle of negligence. In so doing, this Court will be making another commitment toward the unification and simplification of the law of civil reparation in harmony with steps already taken in the law of negligent misrepresentation. It is also consistent with the internal development of the law of negligence, reshaping many former no-duty and limited duty rules into the general standard of negligence liability. This development was summarized in this Amicus Curiae's brief in Champion v. Gray, Case No. 62,830 (filed Dec. 3, 1982), and will not be repeated here. Indeed, to impose constitutional malice upon defamation cases controlled by Gertz, thus moving defamation from a strict liability tort to one that imposes the most arduous civil law burden of proof upon plaintiffs, would be in jarring contradistinction to the movement in misrepresentation and negligence, which is to lighten the burden upon plaintiffs under the universal standard of negligence. To accept negligence as the correct defamation standard when Gertz applies is consistent with this harmonizing movement in Florida law, is maximally understandable

by lawyers and judges, and constitutes the minimum distortion of the underlying common law of defamation.

II. TO IMPOSE CONSTITUTIONAL MALICE AS THE STANDARD OF FAULT WHEN NOT MANDATED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION IS INCONSISTENT WITH THE CONSTITUTIONAL STRUCTURE OF ARTICLE I, SECTIONS 4 AND 21, 1968 FLORIDA CONSTITUTION.

The free speech provision of the 1968 Florida Constitution, Article 1, Section 4 provides:

> Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right ....

That statement is notably different from the First Amendment statement that "Congress shall make no law ... abridging the freedom of speech, or of the press ....", particularly in the explicit acknowledgement that "abuse" of the rights are not protected speech under the Florida Constitution. History establishes beyond peradventure or doubt that the Florida Constitution does not protect common law defamation. As stated by this Court in Miami Herald Publishing Co. v. Brautigam, 127 So. 2d 718, 722 (1961), "the [Florida constitutional] rights of free speech and press were designed primarily to prevent interference by government with a man's speech or writing but not to obviate his responsibility for what he has published." Indeed, in a historical context, the Florida Constitution establishes common law defamation as a form of abusive and, thus, unprotected speech. Id. It necessarily follows that any intrusion imposed by the United States Constitution on common law rights protected by the Florida Constitution ought to be held to its narrowest-permitted limits

in order to execute faithfully the goals expressed by the people of Florida in the constitution of the state.

This construction of the Florida Constitution is augmented by Article I, Section 21 providing:

> Courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

This Court has regularly employed this principle to safeguard the people against legislative usurpation of their common law rights. Kluger v. White, 281 So. 2d 1 (1973), best exemplifies the protection offered by this provision. In Kluger, this Court invalidated the legislature's attempted abrogation of the common law right to recover damages to personal property without also supplying some reasonable alternative mode of relief. Kluger articulated this principle.

> [W]here a right of access to the courts for redress for a particular injury has ... become a part of the common law of the State pursuant to § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown. Id. at 4.

It is plain on the face of the Constitution that the limitations of Article 1, Section 21 apply to all departments of government, the judicial and executive as well as the legislative. It thus follows that the principle of Kluger must guide the pronouncements of this Court. By the same token, it is clear from what

has been said above that the common law of libel existed in England as of July 4, 1776 and thus was incorporated into the law of Florida by Fla. Stat. § 2.01. See, e.g., John H. Layne v. The Tribune Co., 108 Fla. 177, 185 (1933). It, therefore, follows that any intrusion upon the law of defamation broader than that required by Gertz would constitute an abrogation of a protective common law right that is not supported by "overpowering public necessity." That no such overpowering necessity exists is settled under the United States Constitution by Gertz, which explicitly held that the First Amendment requires only that there be no liability without fault, and it is settled under the Florida Constitution by the wording of Article I, Section 4 itself, which does not protect abusive speech, including defamation as established by the cases cited above.

It follows, therefore, that to impose a standard of care more rigorous than negligence in situations controlled by Gertz is inconsistent with the constitutional structure of Article I, Sections 4 and 21, 1968 Florida Constitution.

III. FLORIDA CASE LAW AND STATUTORY CASE LAW LONG HAVE RECOGNIZED THAT NEGLIGENCE APPLIES TO DEFAMATION WHEN PUBLIC POLICY REQUIRES A MORE STRINGENT STANDARD OF CARE THAN STRICT LIABILITY.

John H. Layne v. The Tribune Co., 108 Fla. 177, 184-90 (1933) differentiated between libelous publications that were the original work product of a newspaper publisher and those that were mere republications of news stories and reports of other publishers that were "apparently authentic on their face, and not suggestive of a duty to specifically verify them in advance

because of some intrinsic tendency for doing a wrongful injury, if they should prove untrue." Id. at 189. As to the former, the publisher was strictly liable, but as to the latter the plaintiff must show that the publisher or his agents exhibited "either wantonness, recklessness or carelessness in its publication ...." Id. at 190. Thus, in John H. Layne this Court acknowledged that mere carelessness or negligence is a sufficient standard of care where public policy requires a more rigorous standard than strict liability. The Court also held that wantonness and recklessness would be actionable but it is evident that if mere negligence imports liability, a fortiori, these more culpable forms of behavior do as well. It is also appropriate to observe that common law wantonness and recklessness does not mean scienter as described in Part I above and applied in Sullivan, but instead means "not caring about or heedless to the harmful consequences that are virtually certain to occur." Thus, the law of defamation in Florida has already adopted common law notions of negligence as the standard to apply when fault is required. It only remains for this Court to reaffirm that law.

Likewise, long before either Sullivan or Gertz were decided, the Legislature of Florida adopted negligence as the standard in defamation actions when it believed a standard more rigorous than strict liability was required. In 1947 Fla. Laws, chapter 23802, section 1, the legislature prescribed failure "to exercise due care" as the standard of fault when a radio or television broadcaster broadcasts a "defamatory statement published or uttered in or as a part of a radio or television broadcast, by one other

than [the] owner, licensee or operator, or general agent or employees thereof ...." The original provision, as amended, is now found in Fla. Stat. § 770.04 (1982). It is apparent that the intent of the legislature was to extend the holding of John H. Layne, which was decided in the early days of radio and prior to the advent of commercial television, to the broadcast media and in doing so adopted simple negligence as the standard of care. As in other matters not controlled by the Florida Constitution, this Court should give great weight to the public policy positions adopted by the Florida Legislature. In these circumstances, the legislature's expression of negligence should be adopted by this Court, as the appropriate standard of fault in cases controlled by Gertz.

IV. PUBLIC POLICY SUPPORTS NEGLIGENCE AS THE PROPER STANDARD OF PROOF IN THE DEFAMATION CASES CONTROLLED BY GERTZ.

Some writers have pointed to a few defamation verdicts handed down by juries in Gertz-controlled cases as establishing a need to do something more to protect the commercial print and broadcast press against juries in defamation cases. See, e.g., Kaufman, The Media and Juries: Time for Re-Evaluation, N.Y. Times, Nov. 4, 1982, at Op-Ed Page; Jenkins, Chilly Days for the Press, 11 Student Law. 22 (1983). In lamenting defamation general damage verdicts that appear unreasonably large, these authors merely single out a particular cause of action in a sea of escalating recoveries. It is apparent that the discretion permitted juries by law in negligence actions, in both common law and product strict liability actions, in trespass and nuisance

actions, in intentional tort actions and in defamation actions is being employed fully nowadays to bring in recoveries of magnitudes that are virtually inconceivable by contrast to awards made by juries only a few years ago. It may be accepted arguendo that courts and legislatures would be justified to impose more restrictive guidelines on the amounts of awards in defamation and other areas of civil reparation, but it would be singularly inappropriate to abolish large classes of actions to obtain that result. Specifically, it would not be justified to abolish defamation causes of actions permitted by the Gertz fault standard merely because juries award large damages under that standard when it seems appropriate to them to do so. Indeed, within the constraints of the constitutions and laws, the job of juries in civil litigation is to apply public policy as they perceive it to be. It is unseemly to derogate that process when no appropriate attempt has been made to restrain any undue discretion that may be at work.

It is not to be doubted that the Florida Legislature has the power to restrain damages in defamation actions. In Fla. Stat. § 770.02 (1982), the legislature limited recoveries against publishers or broadcasters to actual damages when a defamation was "published in good faith" and the publisher issued a retraction as prescribed by the statute. This statute also eliminates punitive damages and the presumed damages of the common law. It is notable that the legislature enacted this statute in 1933 (ch. 16070, § 2) long before Sullivan and Gertz were decided. Furthermore, in Ross v. Gore, 49 So. 2d 412 (1950), this Court

upheld the statute against charges of constitutional invalidity. Furthermore, the 1983 legislature has before it a bill (S.B. 240) that would restrict tort recoveries in most if not all phases of civil liability. Hence, the legislature not only has the power to enter this field in a much more precise manner than by cutting off all recovery in most defamation cases by imposing the Sullivan standard universally, even to those cases controlled by Gertz, but it has done so in the past and is presently considering whether the public policy of Florida requires that additional limitations be imposed.

The courts of no other English speaking common law country have determined that free standing public policy, unsupported by a written constitutional free speech imperative, requires even the imposition of the Gertz fault standard in defamation cases much less the more stringent Sullivan constitutional malice standard. Not the United Kingdom, not Canada, not Australia, not New Zealand, not any other English speaking common law country has so diluted the common law of defamation that applies in all. That is not to say that journalists and others in those nations do not eye the favored status in law occupied by journalists in this country, but it is to say that the public policy makers in those countries have not deemed it necessary or desirable to emulate the United States position. This is not evidence as to what the United States Constitution requires, but it is evidence of what public policy requires within the limitation of the Constitution.

The subject has not been without careful inquiry in the United Kingdom, Australia and New Zealand. In March 1975, the Report of the Committee on Defamation (the Faulks Report, Cmnd. 5909) was presented to the United Kingdom Parliament. The Faulks Report examined the contention that the law of defamation had a chilling effect on the news media and rejected it. Faulks Report, Cmnd. 5909, ¶ 214(b), cited in New Zealand Report, infra, ¶ 10.232). Hence, the need for the Sullivan standard in the United Kingdom was refuted.

In New Zealand, a different conclusion was reached, mainly on grounds that the publishing environment of a nation of only slightly more than three million souls is much less robust than in the United Kingdom. This was the finding of the Report of the Committee on Defamation of December 1977, entitled "Recommendations on the Law of Defamation", made to the New Zealand Minister of Justice. New Zealand Report, ¶ 1.5. Nevertheless, the Sullivan standard was rejected. Said the Committee:

> We were unpersuaded that such a radical change, which would effectively deny a public official or public figure a remedy in the majority of cases in which he might be defamed, is necessary to correct the balance between reputation and freedom of speech. In our view, if the American approach was adopted in New Zealand, too much emphasis would be placed upon the principle of free speech at the expense of the equally fundamental principle that reputation deserves reasonable protection. Id. ¶ 1.16.

A fortiori, the Committee obviously would not have accepted constitutional malice as the standard for cases controlled by Gertz. The recommendation of the New Zealand Committee was to

acknowledge a qualified privilege where "the subject matter of the publication was one of public interest [and] the publisher acted with reasonable care in relation to the facts he published and believed them to be true." Id. ¶ 1.25A. The heart of this is negligence, the standard that this Court should adopt for cases controlled by Gertz.

The Australian Law Reform Commission proposed a slightly different approach to defamation as applied to public officials and public figures. In a report entitled "Defamation -- Options for Reform", Discussion Paper No. 1, p. 9, quoted in New Zealand Report, supra, ¶ 1.17, the Commission proposed to eliminate general damages where the defendant published the defamation "on reasonable grounds and after making all inquiries reasonably open to him" and supplied a timely retraction. The heart of this standard, which was proposed for application to public officials, is negligence. A fortiori no higher standard would be imposed upon plaintiffs in cases controlled by Gertz.

These authorities might speciously be objected to on grounds that these nations have no First Amendment. That objection is groundless in the instant case because the question is not what the First Amendment requires -- this Court knows that to be no liability without fault -- but is whether or not public policy requires a more stringent standard than does the First Amendment. To that question these authorities are relevant and persuasive. Protection of reputation is a cherished interest throughout the common law world; it demands more protection for people who are neither public figures nor public officials than the Sullivan

standard affords. Our common law cousins are not places of oppression and suppressed speech. Indeed, along with the United States, they are leading bastions of free expression on this globe. Any thought that to apply negligence as the standard for Gertz-controlled defamation would be oppressive of speech is purely fanciful.

Finally, this Court should contemplate the trends in institutional liability that have evidenced themselves in the past two decades. On the commercial side the doctrine of caveat emptor is in battered retreat, the requirement of privity in product liability actions has been routed through application of implied warranties and the evolution of product strict liability, and the theory of enterprise liability has greatly lessened, not increased, the burden of proof imposed upon individual litigants when confronting a commercial institutional defendant. On the public side, governments themselves are now exposed to liability unknown a mere few years ago because of the abrogation of sovereign immunity both statutorily and judicially. Moreover, the whole field of constitutional torts has blossomed under 42 U.S.C. § 1983 (1982) to protect individuals against constitutional deprivations by governments and many governmental entities are now potentially liable to private suits under the federal antitrust laws.

This movement is clearly an antedote to the institutionalization of the way things are done in this country which has concommitantly attenuated the relative power and status of the individual vis-a-vis institutions. The corner grocery store with

the neighbor as the proprietor has become the outlet of a supermarket chain with a non-entity as the temporary clerk. Similarly, governmental agencies have burgeoned in size and grown impersonal in demeanor. Any natural balance that once existed between these institutions and the ordinary private person has been lost. The only redeeming counterveiling force has been the trend in the law to provide more effective remedies for the individual than the common law afforded.

Against this backdrop what has happened to the law of defamation is an anomoly. The commercial press has become institutionalized as much or more than commerce in general. Yet, at the same time, running counter to the general trend, the law of defamation has become more difficult to employ and more niggardly in its awards not only to public figures and public officials through Sullivan, but also to private parties through Gertz. These restrictions were required by the United States Constitution. Petitioners now ask that the obstacles to recovery be further heightened in a manner not required by the Constitution.

Amicus Curiae respectfully urges that this Court eschew this plea. The ultimate announced goal of First Amendment absolutists is that the law of defamation simply be abolished. Such a step would result in the creation of a completely uncontrollable force in our body politic, a posture that is inimical to the fundamental balances of power that apply universally elsewhere in our form of government and in our laws.

Today the commercial press arrogantly flaunts the First Amendment as if it were its exclusive possession, elevating

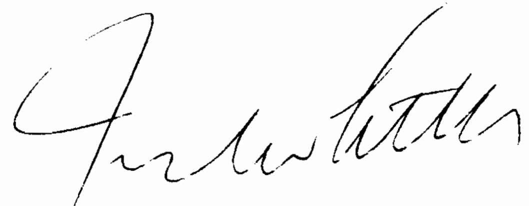
commercial journalism to a status of virtual immunity from the law. Such a view is not law, it is brazen effrontery. It has long been the position of this Court that rights of press and speech are rights of all Americans, not some favored class. As stated by this Court in Miami Herald Publishing Co. v. Brautigam, 127 So. 2d 718, 721 (1961):

> In the United States and this state, every citizen is guaranteed the right of fair expression. This right includes freedom of speech and of the press. However, both the citizen and the newspaper are held to the same liability for the abuse of these rights. Freedom of speech and freedom of the press do not carry with them freedom from responsibility in the misuse of those rights ... [T]he law of libel exists as limitation on the right of every citizen to speak freely.

Public policy in these states calls for the maintenance of a just balance between speech and reputation within the restraints of the United States Constitution. Private parties who have been negligently defamed and can prove it deserve an opportunity to clear their good names in court. Otherwise, the stigma of a negligent defamation can never be removed. Petitioners would abrogate this right and further aggrandize unbalanced power to themselves, including the power to do negligent harm with impunity. This Court should adopt the standard of negligence as to every citizen, whether private person or institutional press, as the proper balance permitted under the United States Constitution between a free press and the right to obtain redress in the courts for defamatory injuries when a private person is the plaintiff.

CONCLUSION

In light of the foregoing arguments it is respectfully requested that this Court uphold the opinion in the court below and establish negligence as the proper standard of proof in defamation cases controlled by Gertz.



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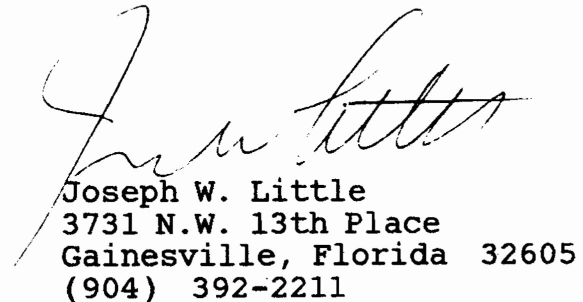
CERTIFICATE OF SERVICE

Amicus Curiae hereby certifies that copies of the foregoing motion and brief were properly deposited in the United States mail on April 22, 1983, for delivery to Sanford L. Bohrer, Esq., Charles V. Senatore, Esq. and Parker D. Thompson, Esq., 1300 S.E. Bank Bldg., Miami, Florida 33131; C. Michael Deese, Esq., 1747 Pennsylvania Avenue, N.W., Washington, D.C. 20006; O. Stephen Thacker, Esq., 1266 Rogers Street, Clearwater, Florida 33516; and John R. Ferguson, Esq., 1150 Connecticut Avenue, N.W., Washington, D.C. 20036.



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