IN THE SUPREME COURT OF FLORIDA

CASE NO: 64,532

GENERAL BUILDERS CORPORATION OF FORT LAUDERDALE, INC.,

Petitioner,

vs.

KELLEY SISK, as Personal Representative of the Estate of JAMES LARRY SISK, CEDAR LANE DEVELOPERS, INC., and WENTWORTH PLASTERING OF BOCA RATON, INC.,

Respondents.

ANSWER BRIEF OF RESPONDENT KELLEY SISK ON THE MERITS

DAVID L. KAHN, P.A.
Attorneys for Respondent SISK
Suite 203
633 South Andrews Avenue
Post Office Box 14190
Fort Lauderdale, FL 33302
(305) 462-6290 - Broward
(305) 944-1306 - Dade

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PREFACE AND GUIDE TO APPEAL

The parties will be referred to in this brief, for the most part, as they appeared in the lower court. The petitioner, General Builders Corporation of Fort Lauderdale, Inc. will be referred to as "Defendant" and/or "GBFL". Cedar Lane Developers, Inc. shall be referred to as "Defendant" and/or "CEDAR". The respondent Kelley Sisk, will be referred to as "Plaintiff" and/or "SISK".

The following symbols will be used:

"R" - Record On Appeal

"A" - Appendix

STATEMENT OF THE FACTS

This action commenced as a wrongful death claim brought by the personal representative of the decedent, James Larry Sisk, as a result of an accident that occurred at the Silver Thatch Condominium in Pompano Beach, Broward County, Florida, on February 25, 1981.

At the time of the accident, the decedent, James Larry Sisk, was an employee of Wentworth Plastering of Boca Raton, Inc., (a third party defendant at the trial court level). Mr. Sisk's responsibilities were that of a plasterer, whose assignment on the date of accident required him to do exterior stucco plastering at Phase II of the Silver Thatch Condominium project. The decedent's employer, Wentworth, was at the job on that date as a result of a contract entered into with General Builders Corporation of Fort Lauderdale, Inc., the petitioner herein. There is no dispute that the decedent, Sisk, fell to his death from a third story balcony while in the course and scope of his employment for Wentworth Plastering.

The plaintiff personal representative contended in the trial court that General Builders Corporation of Fort Lauderdale, Inc. was an owner/builder, and thereby not entitled to immunity from suit, under Florida Statute 440.10 and 440.11. The petitioner, General Builders Corporation of Fort Lauderdale, Inc., contended at a motion hearing for summary final judgment that it was merely a general contractor on the job who sublet a portion of its contract to Wentworth Plastering, the decedent's employer. The petitioner therefrom contended that it had the legal status

of "statutory employer" entitling the petitioner to the same immunity from tort actions that Wentworth Plastering of Boca Raton, Inc. would have.

The trial court determined, as a result, that there was no question of fact as to the status of General Builders Corporation of Fort Lauderdale, Inc. and that it was entitled to statutory immunity from suit and summary judgment was entered (R 895).

The respondent takes issue and disagrees strenuously with some of the contentions made by the petitioner in its "statement of the facts and the case". Primarily, the facts reveal that the petitioner was a wholly owned subsidiary of another corporation named General Builders Corporation. A co-defendant, Cedar Lane Developers, Inc., was also wholly owned by General Builders Corporation. Contrary, however, to the assertion at Page 2 of the petitioner's brief, General Builders Corporation is not "a large national corporation". In fact, all three corporations are closely held by one family, to wit: the Risbergs, and the family patriarch, one Janis Risbergs. (R 742). Filings with the Securities and Exchange Commission demonstrate that General Builders Corporation, the parent, was closely held by the Risbergs family, and was not being actively traded on any stock exchange, trading having been suspended by the Securities Exchange Commission. (R 842-892) There is, as a result, a substantial debate or question of fact, as to the function of General Builders Corporation.

In the context of this case, the record demonstrated that the petitioner, General Builders of Fort Lauderdale, Inc., was a licensed building contractor at Silver Thatch. (R 718).

Cedar Lane Developers, Inc. held paper title to the property when construction commenced. Cedar Lane Developers received bids from no other contractor other than its sister corporation, General Builders Corporation of Fort Lauderdale, Inc. (R 834-836). The president of General Builders Corporation of Fort Lauderdale, Inc. is one Janis Risbergs (R 714). The president of Cedar Lane Developers, Inc. is also one Janis Risbergs (R 714). General Builders Corporation of Fort Lauderdale, Inc. does all the construction on Cedar Lane Developers, Inc.'s lands. (R 718). Officers of all of the corporations are members of the Risbergs family (R 250).

The reason General Builders Corporation of Fort Lauderdale, Inc. builds for Cedar Lane, and in particular this project, was because there would be "better control of the project" (R 554). The same persons who negotiated the contract on behalf of the property owner, Cedar Lane Developers, Inc., were the identical individuals who negotiated on behalf of the contractor, General Builders of Fort Lauderdale, Inc. (R 664). There was no arms length relationship between General Builders Corporation of Fort Lauderdale, Inc. and Cedar Lane Developers, Inc.

STATEMENT OF THE CASE

(Adapted from statement of the case in Sisk's Main Brief to District Court of Appeal, Fourth District.)

The underlying claim was commenced in the Circuit Court in and for Broward County, Florida, by the filing of a complaint for wrongful death in June of 1980. The Appellees, General Builders Corporation of Fort Lauderdale, Inc., and Cedar Lane Developers, Inc., were named as Defendants by virtue of the original complaint and subsequent amended complaints. Cedar Lane Developers, Inc., joined Wentworth Plastering of Boca Raton, Inc., as a third party defendant under the active/passive theory of indemnity. The Defendant, General Builders Corporation of Fort Lauderdale, Inc., moves for and received a grant of Summary Final Judgment in its favor, August 7, 1981. The record will reflect that the basis of the summary judgment was workers' compensation immunity from third party liability because General Builders Corporation of Fort Lauderdale, Inc. was a "statutory employer" under the controlling Florida Statutes, Chapter 440.

Plaintiff's position before the trial court was that the Defendant/Appellee, General Builders Corporation of Fort Lauderdale, Inc., was in reality an owner/builder, and therefore, despite being the "statutory employer", was not entitled to immunity. The Plaintiff argued that there were issues of fact as to the status of General Builders Corporation of Fort Lauderdale, Inc., and that the court could not determine as a matter of law, that General Builders Corporation of Fort Lauderdale, Inc., was not an owner/builder. General Builders Corporation

of Fort Lauderdale, Inc., argued that it had entered into a written contract, with Cedar Lane Developers, Inc., for the construction of Silver Thatch Condominium Phase II in Pompano Beach, Florida. By virtue of their contractual relationship with Cedar Lane Developers, Inc., General Builders Corporation of Fort Lauderdale, Inc., argued that it was the general contractor and Cedar Lane Developers, Inc. was the owner, and that there was no owner/builder relationship assignable to General Builders Corporation of Fort Lauderdale, Inc.

The Plaintiff's response to this argument was that both Cedar Lane Developers, Inc., and General Builders Corporation of Fort Lauderdale, Inc., were wholly owned and entirely owned by the same company known as General Builders Corporation. The plaintiff argued that all of the stock in General Builders Corporation of Fort Lauderdale, Inc., and all of the stock in Cedar Lane Developers, Inc., were owned by the same individual entity. The plaintiff also argued that the Presidents, Vice-Presidents, Board of Directors and Officers of Cedar Lane Developers, Inc., and General Builders Corporation of Fort Lauderdale, Inc., were one and the same individuals. Plaintiff thereby argued that the issue of control of the corporations should be presented to the jury to determine whether in fact General Builders Corporation of Fort Lauderdale, Inc., was an owner/builder, building for itself, the Silver Thatch Condominium, Phase II. Plaintiff argued and presented other aspects of the record that demonstrated a factual issue as to the true status of General Builders Corporation of Fort Lauderdale, Inc., notwithstanding

the existence of a typed and printed contract wherein General Builders Corporation of Fort Lauderdale, Inc., executed the same as "contractor".

The narrow issue on appeal is the precise status of General Builders Corporation of Fort Lauderdale, Inc., and whether the trial court erred in determining as a matter of law that there was no issue or inference thereof that the status of General Builders Corporation of Fort Lauderdale, Inc., extended beyond merely being a "contractor" or "general contractor" so that a trier of fact could say that General Builders Corporation of Fort Lauderdale, Inc., was an owner/builder and therefore not entitled to immunity.

A motion for rehearing was argued and denied on September 18, 1981, wherein plaintiff asked the court to rehear argument, vacate the Summary Final Judgment and allow the Plaintiff the right to amend certain allegations in the complaint which the court had deemed prejudicial to the plaintiff's theory that General Builders Corporation of Fort Lauderdale, Inc. was an owner/builder.

From a summary final judgment for General Builders Corporation of Fort Lauderdale, Inc., plaintiff took an appeal to the 4th District Court of Appeal. Sisk vs. General Builders Corporation of Fort Lauderdale, Inc., 438 So.2d 65 (Fla. 4th DCA 1983). Therein, the 4th District Court of appeal reversed and remanded the cause back to the trial court for further proceedings.

After a petition for rehearing was unsuccessful, General Builders Corporation of Fort Lauderdale, Inc. brought a petition

for Writ of Certiorari to this court as Case No: 64,532. During the pending petition for jurisdiction, this court wrote its opinion in Dania Jai-Alai Palace, Inc. vs. Sykes, 9 FLW 163 (Case No: 63,394, May 3, 1984).

There now appears to be a facial conflict between that opinion and the District Court of Appeal, 4th District opinion in Sisk.

This case now is before the court on the substantive merits as to whether the reversal of a summary final judgment by the Fourth District Court of Appeal should be affirmed.

ARGUMENT I

THE DECISION BY THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA, SHOULD NOT BE REVERSED SIMPLY BECAUSE THIS COURT HAS REVERSED IN DANIA JAI-ALAI PALACE, INC. VS. SYKES, BECAUSE CONSIDERATION OF THE ENTIRE CAUSE ON THE MERITS STILL RESULTS IN A REVERSAL OF THE SUMMARY JUDGMENT FOR THE PETITIONER AT THE TRIAL LEVEL.

This court is not limited in its consideration to merely the question raised by "GBFL"'s Petition Seeking Certiorari Jurisdiction. Bould vs. Touchette, 349 So.2d 1181, 1183 (Fla. 1977). As this court stated:

> "If conflict appears, and this Court acquires jurisdiction, we then proceed to consider the entire cause on the merits." At Page 1183.

The holding by this Court in Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580, 585 (Fla. 1961) speaks right to the point. For there, as in the instant case, where the court had determined without doubt that direct conflict existed between the decision on review and prior decisions; the court's appellate review was not thereby finished. It was still the duty and responsibility of the court to consider the case on its merits and decide the points passed upon by the District Court of Appeal as completely as though the case had come from the trial court directly to this court, and so it is in the instant case. This court now has the duty and responsibility to determine whether the trial court's summary judgment was correctly reversed, because other grounds exist in support of that reversal.

The doctrine controlling the entry of summary final judgment in negligence actions is best characterized by this court's opinion in Holl vs. Talcott, 191 So.2d 40, 43, 46, 48 (Fla. 1966).

> "As this Court and other Appellate Courts have repeatedly held, the burden of proving the absence of a genuine issue of material fact is upon the moving party. Until it is determined that the movant has successfully met his burden, theopposing party is under no obligation to show that issues do remain to be tried."

> "...we feel constrained to observe, through the license of obiter dictum the presumptions which favor the party moved against continue and must be applied throughout the entire consideration of a motion for summary judgment. Not only should the opposing party's papers be liberally read and construed, as opposed to a strict reading of the movant's papers, but the same favorable weighting of the balance should have intended action on the petitioner's subsequent motion for rehearing and motion to vacate the summary judgment..."

> "The requirement that the absence of triable issues be conclusively shown is not new. In effect we have so held in every case in which the point has been discussed. Recently..., we held that 'all doubts regarding the existance of an issue are resolved against the movant...' Requiring that all doubts be removed is the same as requiring that the showing must be conclusive. This conclusive showing is justified because the summary judgment procedure is necessarily in derogation of the constitutionally protected right to trial."

IF A GENERAL CONTRACTOR IS IN REALITY AN OWNER/BUILDER, THEN IT DOES NOT GAIN IMMUNITY UNDER FLORIDA STATUTES 440.10 AND 440.11.

Owners who act as their own general contractor in developing property, do not become a statutory employer of an employee of a subcontractor. In that situation, the owner/builder is not a true contractor within the meaning of the workers' compensation law. As a result, the company he hires is an independent contractor rather than subcontractor, thereby not making the owner/builder a statutory employer. Jones vs. Florida Power Corporation, 72 So.2d 285 (Fla. 1954), Sheedy vs. Vista Properties, Inc., 410 So.2d 561 (Fla. 4th DCA 1982), Sisk vs. General Builders Corporation of Fort Lauderdale, Inc., 438 So.2d 65, 66 (Fla. 4th DCA 1983).

The employee of an independent contractor can maintain an action at law against an owner/builder for damages suffered as a result of the owner/builder's negligence. State ex rel Auchter Company vs. Luckie, 145 So.2d 239, 241 (Fla. 1st DCA 1962). Such an owner/builder, if engaged in actively supervising daily construction, has a duty to keep the premises safe for all workmen on the job and will be liable for failure to do so. Furthermore, such owner/builder will not be entitled to immunity under the workers' compensation law. Atlantic Coast Development Corporation vs. Napoleon Steel Contractors, Inc., 385 So.2d 676, 679 (Fla. 3d DCA 1980).

THIS CLAIM DOES NOT REQUIRE A FINDING THAT THE PARENT CORPORATION'S VEIL BE PIERCED TO AVOID SUMMARY JUDGMENT FOR "GBFL". ONLY THAT "GBFL" AND "CEDAR" WERE OPERATING A CLOSE-KNIT OPERATION AND HELD THEMSELVES OUT TO THE PUBLIC AS A SINGLE ENTERPRISE.

This court has certainly determined, without dispute, that the parent corporation will not be liable for the act of its closely held subsidiary, unless there is evidence or inferences of domination

and improper conduct. Dania Jai-Alai Palace, Inc. vs. Sykes, _____ So.2d _____(Fla. 1984, 9 FLW 163, 166, May 3, 1984). That holding, however, dealt with the liability of the parent (Saturday Corporation) for the acts of its subsidiaries (Carrousel Concessions, Inc.) and (Dania Jai-Alai Palace, Inc.). This court's holding did not eliminate the legal liability of two close-knit subsidiary corporations where they held themselves out to the public as a single enterprise and engaged in a business involving an inherent risk of injury to others. Dania Jai-Alai Palace, Inc. vs. Sykes, supra. at 166.

The record demonstrates that the Plaintiff Sisk still has a cause of action against "GBFL" in much the same way the Plaintiff Sykes has a cause of action against Dania Jai-Alai Palace. The employees and stockholders of "GBFL" believe that it was the owner of the Silver Thatch Condominium Project (A 3-22). Janis Risbergs was the president of "GBFL" (R 714) and was also the president of "CEDAR" (R 714). "GBFL" contracted to do all the construction for "CEDAR" (R 718). "CEDAR" sought and received no bids for construction from any contractor other than its sister corporation, "GBFL" (F 834-836). There was truly no arms length relationship between "GBFL" and "CEDAR". They were both the owner/builder.

The representative of "GBFL" on the job, Peter Risbergs, also represented "CEDAR" on the job and was an owner of an interest in "CEDAR" (R 577-578). There was ample proof that "CEDAR" and "GBFL" were mere instrumentalities of one another. For example, building permits issued by the City of Pompano Beach showed "General Builders" as the owner of the property (A 67-68, 73-74). Even

reports from the Defendant's consulting engineers showed that General Builders had held itself out to those it contracted with as the owner of the project. (A 69-72) (R 316, 660-690, 605-627, 842-892, and 1022).

The Defendant "GBFL" was engaged with "CEDAR" in a close-knit operation, holding themselves out to the public as a single enterprise. This court has already recognized that theory of liability in Dania Jai-Alai Palace, Inc. vs. Sykes, supra. 166. The two corporations were business conduits for one another, or alter egos of each other. They were co-adventurers under the same control. Davis vs. Alexander, 269 U.S. 114, 46 S.Ct. 34, 70 L.Ed. 186 (1916). It has been held that it is a question for the jury as to whether one corporation is responsible instead of another where two defendant corporations are owned and organized by the same person, who owns nearly all of the stock, is president of both, and where the offices of both companies are located in the same place. Jefferson County Burial Society vs. Cotton, 133 So. 256 (Ala. 1930).

There is also a possibility of a de facto merger of the two companies in their operational pursuits, based on the evidence. In merger, the separate existance of the constituent corporations dissolves. In case of a merger, the subsisting corporation is liable for the debts, contracts and torts of the other corporation. Barnes vs. Liebig, 146 Fla. 219, 1 So.2d 247, 253 (1941).

In Green vs. Equitable Powder Manufacturing Company, 95 F.Supp. 127 (W.D. Ark. 1951), two corporations, the Western Cartridge Company and the Equitable Powder Company joined together

to create components for a blasting cap. Both corporations were owned by the same holding corporation. The cause of action alleged that each corporation, being controlled by the same parent, acted as to each other as an agent of the other, thereby constituting one to be a mere instrumentality of the other in the particular enterprise at issue. As a result, it was held that the court can disregard the separate corporate existence of each. The plaintiff was entitled to maintain that the corporations were really one and the same and one thereby equally liable for the acts of the other.

So it appears in the instant case that "CEDAR" and "GBFL" have chosen to conduct their business in such a way that they are indistinguishable from one another in their day to day conduct with the public. Where the record shows that not only building departments, but consulting engineers retained by them, and even their own stockholders thought that "GBFL" was the owner of the Silver Thatch Condominium Project; then under the legal theory recognized by this court and others, the plaintiff should have the right to prove "GBFL"'s liability at that time of trial. The summary judgment was improper.

ARGUMENT II

THE PLAINTIFF NEED NOT ALLEGE IN THE PLEADINGS FACTS WHICH ARE PROVEN IN THE RECORD AND IF THE TRIAL COURT GRANTED SUMMARY JUDGMENT BECAUSE OF THE FAILURE TO SPECIFICALLY ALLEGE OWNER/BUILDER RELATIONSHIP, THE TRIAL COURT WAS OBLIGATED TO GRANT LEAVE TO AMEND THE ALLEGATIONS OF THE COMPLAINT BEFORE DETERMINING THE ULTIMATE ISSUE.

It is unclear to Respondent's counsel and not clear at all from the record as to whether the trial judge granted summary judgment specifically alleged in the complaint though argued and demonstrated in the record. Because of the nature of argument and the fact that the decision was reserved and announced at a later date without further argument, the Petitioner may argue that the allegations were deficient as they did in fact in their Memorandum In Support of Motion for Summary Judgment (R 693-716).

The Appellate Courts of the State of Florida have made many observations regarding the grant of summary judgment based upon the inaccurate pleadings of a cause of action or claim. Where the entry of a summary judgment for a defendant is proper, nevertheless, if the record establishes that the plaintiff may have a viable claim if properly pleaded, then opportunity should be afforded by the trial judge to allow amendment of the complaint. Hart Properties, Inc. vs.Slack, 159 So.2d 236 (Fla. 1963). In Gold Coast Crane Service, Inc., vs. Watier, 257 So.2d 249 (Fla. 1971) it was noted that:

"the interests of justice require

> this cause to be remanded to the trial court for the purpse of allowing respondent to attempt a successful amendment of her complaint, under the record facts indicated such reasonable possibility here."
>
> Amendment is not an arbitrary right in every case upon the granting of a summary judgment, if there are no reasonable indications in the record that a justifiable issue can be made upon amendment to conform to those facts so appearing at the time of the entry of summary judgment; but where so indicated, as here, the litigant is entitled to that opportunity as this Court has held."

The procedure established in Roberts vs. Braynon, 90 So.2d 623 (Fla. 1956) would, at worst, require the trial court to affirm summary judgment, but without prejudice to the plaintiff filing an amendment to the complaint within the facts appearing of record. A remand of the cause for further proceedings on the amendment and the record is then necessary.

It is the policy of the Florida Rules of Civil Procedure that amendments to pleadings be liberally allowed in the interests of justice so that the merits of the case may be reached for adjudication whenever possible. Conklin vs. Smith, 191 So.2d 311 (Fla. 1st DCA 1966) and Janko vs. City of Hialeah, 212 So.2d 800 (Fla. 3d DCA 1968). Rule 1.190(b) permits amendment to conform with the evidence "at any time" and "even after judgment". Fla. R. Civ. P. (30 F.S.A.).

Appeals Courts have recognized a procedure relaxing the formalities where summary judgment is sought. In the Estate of Rutherford, 304 So.2d 517 (Fla. 4th DCA 1974), the court discussed this procedure and stated:

> "However, in special circumstances, special concessions should be made. When it appears that rigid enforcement of procedural requirements would defeat the great object for which they were established, the Trial Judge should relax them, if it can be done without injustice to any of the parties."

The evidence in the record indicates that the plaintiff does have a cause of action albeit not well pleaded. The absence of explicit statement of the relationships of the parties, or statements in the complaint made before discovery was initiated, are not a legal basis for grant of summary final judgment. Sorrells vs. Mullins, 303 So.2d 385 (Fla. 3d DCA 1974).

Wherefore, should it be argued that the allegations of the complaint are insufficient because they do not allege an owner/builder relationship, a grant of summary judgment would have been error. Argument should have been suspended or rescheduled after amendment of the complaint to cure such a defect.

In point of fact, subsequent to the completion of this record, plaintiff did obtain leave to amend the complaint against the remaining defendants and in such amendment made the allegations necessary to sustain plaintiff's theory that General Builders Corporation of Fort Lauderdale, Inc., was an owner/builder and thereby not immune from liability (A 27-38).

CONCLUSION

This court has clarified its position regarding the piercing of the corporate veil in circumstances where a parent is being alleged legally responsible for the acts of a wholly owned subsidiary. Dania Jai-Alai Palace vs. Sykes, 9 FLW 163 (Case No: 63,394, May 3, 1984). By that decision, it is clear that, as to the parent, the Plaintiff Sisk would have to show not only domination (and there appears to be no question of domination in the instant case), but also bad motive, illegal purpose or fraudulent intent. The record does not presently demonstrate an improper or misleading purpose intended by the parent corporation. Those facts were not developed because they were not deemed necessary during the discovery phase of this cause. Whether they exist or not would be a matter for later discovery, should this court return the case to the trial level and reverse the summary final judgment against General Builders Corporation of Fort Lauderdale, Inc.

Nevertheless, the concept of joint enterprise or co-adventurer liability between two wholly owned subsidiaries, still survives by way of this court's opinion in Sykes. The parent "Saturday Corporation" operated Dania Jai-Alai Palace and Carrousel Concessions, Inc. in much the same way that the parent, General Builders Corporation, operated "CEDAR" and "GBFL". Likewise, the relationship between Carrousel Concessions, Inc. and Dania Jai-Alai Palace, Inc. is not entirely dissimilar to the relationship between "CEDAR" and "GBFL". In its opinion, in Sykes, this court stated:

"at the close of the evidence, the

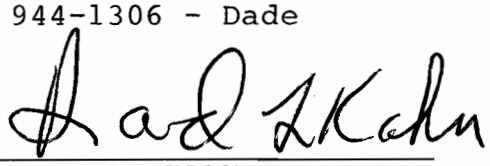
> trial court directed a verdict on the issue of Dania's liability, finding that Dania and Carrousel were operating a close-knit operation, and held themselves out to the public as a single enterprise. The District Court agreed, holding that shen two corporations hold themselves out to the public as a single enterprise, and that enterprise involves an inherent risk to members of the public, both corporations incurred tort liability for the torts of the enterprise. Stuyvesant Corp. vs. Stahl, 62 So.2d 18 (Fla. 1952); Orlando Executive Park, Inc. vs. P.D.R., 402 So.2d 442 (Fla. 5th DCA 1981).

Based upon the record before this court, it cannot be stated conclusively that plaintiffs have not demonstrated a right to pursue General Builders Corporation of Fort Lauderdale, Inc. as the owner/builder. If the greater weight of the evidence at trial establishes that General Builders of Fort Lauderdale, Inc. is an owner/builder, then, as a matter of law, it cannot avoid liability for its neglect or omission of care by virtue of Chapter 440.10 and 440.11 of the Florida Statutes. It seems that a simple interrogatory to the jury at the time of trial, requiring them to determine the level of control between the two subsidiaries, will be adequate to permit the trial judge to make a legal finding regarding the affirmative defense of immunity.

Wherefore, based upon the arguments and the record, the opinion of the District Court of Appeal, Fourth District of Florida, should be affirmed, and the petition for Writ of Certiorari to this court, denied on the merits.

Respectfully submitted,

DAVID L. KAHN, P.A.
Attorneys for Respondent SISK
Suite 203
633 South Andrews Avenue
Post Office Box 14190
Fort Lauderdale, FL 33302
(305) 462-6290 - Broward
(305) 944-1306 - Dade

By: 
DAVID L. KAHN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 10th day of July, 1984, to:

Richard A. Sherman, Esq.
Law Offices of Richard A. Sherman
204 E. Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301

R.O. Holton, Esq.
Pyszka and Kessler, P.A.
707 Southeast Third Avenue
Fort Lauderdale, FL 33316

James A. Smith, Esq.
Wicker, Smith, Blomqvist, Tutan,
O'Hara, McCoy, Graham & Lane
712 Citizens Building
105 South Narcissus Avenue
West Palm Beach, FL 33401

DAVID L. KAHN, P.A.
Suite 203
633 South Andrews Avenue
Post Office Box 14190
Fort Lauderdale, FL 33302
(305) 462-6290 - Broward
(305) 944-1306 - Dade

By: David L. Kahn
DAVID L. KAHN