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IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,623

OLIVIA RODRIGUEZ, as Personal Representative of the Estate of Eddie Rodriguez,

Petitioner,

vs.

CITY OF CAPE CORAL, RENNY WIERSMA and THE AETNA CASUALTY & SURETY COMPANY,

Respondents.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

SHELDON J. SCHLESINGER, P.A.
1212 S.E. Third Avenue
Ft. Lauderdale, Florida 33335
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A.
1201 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

JOEL S. PERWIN

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LAW OFFICES, PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET, MIAMI, FLORIDA 33130-1780

I
STATEMENT OF THE CASE AND FACTS

After accusing the Petitioner's statement of the facts of "substantial inaccuracies" (Brief of Respondents on the Merits at 1), the respondents' brief proceeds to state the facts in the light least favorable to the Petitioner's position--in direct contravention of the Respondents' obligation before this Court--and in the process fails to provide a single example to support its charge that the Petitioner's statement of facts contains "substantial inaccuracies." We stand by every factual statement in our initial brief, inviting the Court to review the citations for itself.

The Respondents' factual re-statement omits to acknowledge a good deal of that evidence. It claims, for example (respondents' brief at 10), that the "only evidence" that Mr. Rodriguez was intoxicated to the point of incapacitation was the affidavit submitted by his wife, ignoring substantial independent evidence of incapacitation outlined in our initial brief on the merits (p. 3 n.3)--for example that Mr. Rodriguez had consumed an entire quart of rum; that he opened the hood of his car for no apparent reason; that he threw a glass containing liquid into the car; that on the bridge he was rocking back and forth, slurring his words, and stooped over; and most significant, that for no apparent reason he stepped off a bridge and walked into a car. A person in control of his capacities hardly does such things--or so a reasonable jury could find. The Respondents (hereinafter the "City") cannot dismiss such evidence by pretending that it does not exist.

Thus, Mrs. Rodriguez' affidavit only supplemented substantial independent evidence of Mr. Rodriguez' incapacitation. The City twice contends (brief at 7, 18) that Mrs. Rodriguez' affidavit had no evidentiary value because it contradicted her deposition testimony, and because she offered no explanation for the discrepancy. That is a very misleading statement, specially from an attorney who is so righteous about accuracy in appellate briefs. As the City knows full well, Mrs. Rodriguez stated flatly during the course of her deposition that her "young son" was in the room with her during the

deposition, and she felt extremely uncomfortable in responding to questions about his father's intoxication in the son's presence (R. 258 at 61). Thus she was very equivocal about Mr. Rodriguez' intoxication during the deposition, repeatedly asserting that she either did not understand the question or that she did not remember certain events (*see, e.g.*, R. 258 at 28). Mrs. Rodriguez clearly did offer an explanation for the discrepancy between her deposition and her subsequent affidavit, which makes their reconciliation a question for the factfinder.[1/]

With or without the affidavit, there was substantial evidence that Mr. Rodriguez did appear to be incapacitated within the meaning of §396.072(1), Fla. Stat. (1977), at the time that he was encountered by the police officers. That helps explain why the trial court *denied* an earlier motion for summary judgment brought by the City (R. 1011), in which the City had argued that there was insufficient evidence to show that Mr. Rodriguez was incapacitated within the language of the statute (R. 641-42). It was only when the City filed a new motion for summary judgment after the decisions in *Everton* and *Duvall*,[2/] adding the claim that the officer's decision not to take Mr. Rodriguez into protective custody was protected by the sovereign immunity doctrine (R. 1089-90), that the trial court granted its motion (R. 1147). At least in the trial court, the City was unable to prevail in its primary contention before this Court--that the evidence was insufficient to convince a reasonable factfinder that Mr. Rodriguez was obviously incapacitated within the meaning of §396.072(1).

[1/] *See Milton v. State*, 415 So.2d 769, 770-71 (Fla. 3rd DCA 1982); *Borders v. Liberty Apartment Corp.*, 407 So.2d 232, 233 (Fla. 3rd DCA), *cert. denied*, 417 So.2d 330 (Fla. 1982); *Croft v. York*, 244 So.2d 161, 165 (Fla. 1st DCA), *cert. denied*, 246 So.2d 787 (Fla. 1971).

[2/] *Everton v. Willard*, 426 So.2d 996 (Fla. 2nd DCA), *review granted*, No. 63,440 (Fla. Sept. 9, 1983); *City of Cape Coral v. Duvall*, 436 So.2d 136 (Fla. 2nd DCA), *review granted*, No. 63,441 (Fla. Sept. 9, 1983).

LAW OFFICES, PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET, MIAMI, FLORIDA 33130-1780

The district court did not disagree with the trial court on this point. Although the City did argue before the district court that the trial court's judgment should be affirmed (apparently under a right-for-the-wrong-reason theory), on the ground that no reasonable factfinder could have found Mr. Rodriguez incapacitated within the meaning of the statute,[3/] even a cursory review of the district court's opinion reveals that this was not the basis for its decision. *Rodriguez v. City of Cape Coral*, 451 So.2d 513 (Fla. 2nd DCA), *review granted*, Case No. 65,623 (Fla. October 24, 1984). In this light, the City's unqualified statement that "the only issue advanced by the City and the District Court was the evidentiary issue" (brief at 12), is incorrect. The City devoted seven pages (16-22) of its Brief of Appellees in the district court to a defense of the *Everton* and *Duvall* decisions, and the district court discussed *only* the sovereign immunity question in its opinion.

Acknowledging that "the District Court discussed only the sovereign immunity issue in its opinion," (brief at 8-9), the City nonetheless asserts that "[t]he fact that there was no evidence to support the claim that Mr. Rodriguez appeared to be incapacitated within the meaning of the statute is implicit in the opinion by the District Court" (brief at 9). The only reason for this offered by the City--while acknowledging that the district court rejected the City's post-decision suggestion that it base its affirmance on the evidence of incapacitation (brief at 13)--is that the City says so, adding that "the only reason that the Court did not discuss the evidentiary issue in its opinion is that the evidentiary issue lacked value as precedent" (*id.*). The suggestion seems to be that the district court went out of its way to reach the sovereign immunity question rather than affirming on a

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[3/] We apologize for our statement to the contrary in the initial brief on the merits (p. 4), which prompted the City to accuse us of a "blatant, clear and unequivocal misrepresentation" (brief at 12).

ground which avoided that question--a ground which the City insists the district court accepted.

That is obviously nonsense. We ask the Court to review the district court's opinion. It says nothing even to hint at agreement with the City that the evidence was insufficient to show incapacitation under the statute; it assumes *arguendo* that in fact the evidence was sufficient; and it proceeds to hold that even if there were such evidence, the officer's factual decision on the question of intoxication was protected by the sovereign immunity doctrine. The conclusion is inescapable that the trial court expressly rejected, and the district court declined to reach, the City's contention that the evidence was insufficient to permit a reasonable jury to conclude that Mr. Rodriguez was incapacitated within the meaning of §396.072(1).

None of this is to deny the City's right to advance this argument before this Court, in support of a contention that both the trial court and the district court were right for the wrong reason--assuming that this Court is willing to entertain an argument which has nothing to do with the basis for its acceptance of conflict jurisdiction. The City was perfectly free to advance the argument, which it does at great length in its brief (pp. 12-20), even though no court has yet found it persuasive. Our sole response is that, as the trial court found, and as we have demonstrated, the evidence was easily sufficient to permit a reasonable factfinder to conclude that Mr. Rodriguez was incapacitated within the meaning of the statute. That question is clearly one for the jury. We therefore proceed to the sovereign immunity argument which *was* the basis for the district court's opinion, which the City obviously thinks is so weak as to be subordinate to the factual argument which no court has yet accepted.

II
ARGUMENT

A. THE DISTRICT COURT'S OPINION MUST BE REVERSED INDEPENDENT OF THIS COURT'S DISPOSITION OF *EVERTON* AND *DUVALL*.

1. *The* Everton *and* Duvall *Decisions Apply the Sovereign Immunity Doctrine Only to Certain Discretionary Operational-Level Conduct, While the Officer Here Had No Discretion, and in Fact Acted Unlawfully, in Failing to Take Mr. Rodriguez into Custody.* We began (brief at 5-7) by emphasizing that at least the *Everton* and *Duvall* decisions agree with decisions of this Court and other courts that the sovereign immunity doctrine cannot apply to a case in which a governmental official or entity is charged with violating a mandatory statutory directive. We cited a number of cases for this proposition. The City offers no response.

Second, we argued that this case fits within that category because the statute provides that an officer "shall" take into treatment an individual who appears to be incapacitated--that is, is unable to make rational decisions or is in need of emergency medical attention (brief at 7-8). We cited a number of cases dealing with the question of statutory construction, and with the meaning of the word "shall." The City responds to none of them, except 1) to assert without supporting authority that the statute simply "gives [the officer] authority to take the [incapacitated] person to a hospital" (brief at 15)--an assertion which completely ignores the word "shall"; and 2) to borrow the district court's reasoning that even though the requirement of taking an incapacitated person for treatment is mandatory under the statute, the statute still gives the officer discretion in deciding whether or not the individual appears incapacitated (brief at 20).[4/]

[4/] This point is made in a curious passage (City's brief at 20), in which the City chastizes us for focusing upon the "single word" "shall," and in the same breadth invites the Court to focus upon the single word "appears."

The City also twice attributes to us the contention that the statute requires police

We addressed the district court's reasoning at pages 8-10 of our initial brief, contending that this discretion in making factual judgments about whether a person appears incapacitated in the context of time, place and circumstance is not the kind of policy-making discretion which even the *Everton* and *Duvall* decisions purported to insulate from liability. This Court has said that the sovereign immunity doctrine protects the exercise of discretion only "in the policy-making sense . . ." *Rupp v. Bryant*, 417 So.2d 658, 665 (Fla. 1982). The City insists that "the determination as to whether a person appears to be incapacitated requires a basic, fundamental, police-power decision" (brief at 21), but offers absolutely no reasoning or any other support for that assertion. For all the City's quotations from cases in this area (brief at 21-25), the City fails to offer even a single suggestion as to why an officer's factual judgment about a person's incapacitation partakes of the essence of governing--of the *prescriptive* formulation of decisions reaching beyond the parameters of a single time, place or circumstance--in a manner analogous to the high-level policy-making decisions at issue in the cases which it

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officers to take *all* intoxicated people for treatment: "The Plaintiff's position is that the statute requires all peace officers to take all persons who appear to be intoxicated to a hospital or an appropriate treatment resource" (City's brief at 19; *see id.* at 22). As we thought we had made very clear in the district court (Reply Brief of Appellant at 9 n.6, 11 n.8), that is not our position, and that is not what the statute requires. It provides that the officer "may" take an intoxicated person for treatment, but that the officer "shall" take for treatment an intoxicated person who appears to be incapacitated. As we could not have stated any more plainly, that is our position.

One other isolated point deserves mention. The City asserts (brief at 14) that nothing in the statute gives "the remotest indication that the legislature intended to create a private cause of action in enacting this legislation." The question is not what the legislature intended, but what it required. It is well-settled in this state that legislative requirements create civil duties amenable to private redress--the breach of which may be negligence per se, prima facie negligence, or proof of negligence. *See Tamiami Gun Shop v. Klein*, 116 So.2d 421 (Fla. 1959); *Reliance Electric Co. v. Humphrey*, 427 So.2d 214 (Fla. 4th DCA 1983). In any event, this point was not raised in the district court, and is not properly before this Court.

cites.[5/]

Our point stands unrebutted that there is nothing about an officer's purely-factual evaluation--not even the kind of half-factual/half-governmental decision in *Everton* about whether or not to make an arrest--which is sufficiently policy-making in nature to warrant the protection of the sovereign-immunity doctrine. To illustrate this point (brief at 9-10), we challenged the City to tell us what operational-level decisions by any governmental officer of any nature would *not* be protected if this Court were to extend protection to the officer's factual judgment in this case. In keeping with the *ad hominem* nature of his argument, the City's counsel answers that he has "no duty to respond to inane questions" (brief at 26)--and then proceeds to prove it by offering no response whatsoever. Instead (brief at 26), the City's counsel asserts, on no authority except his own, that distinguishing between the operational decision in this case, and potential operational decisions in other hypothetical cases, is a very easy thing to do. For example, the City's counsel asserts, although the factual conclusion of a police officer about incapacitation is protected, there should be no such protection for the judgment of a building inspector about the safety of a building, or the judgment of a school-bus inspector about the safety of a school-bus. And what is the basis upon which the City's counsel draws this distinction, while accusing us of playing "semantic games" (brief at 27)? None is provided--only counsel's personal assurance that the suggested distinction is obvious.

[5/] The City does cite the decision in *Wong v. City of Miami*, 237 So.2d 132 (Fla. 1970), for the proposition that "a factual decision" may be protected by the sovereign immunity doctrine. *Wong* involved a mayor's decision to withdraw police from a riot area--a high-level *policy* decision--not a factual decision--which has nothing to do with this case. *Wong* did not involve a single street-level decision by a single officer; it involved "strategy and tactics for the deployment of [police] powers" in general. *Id.* at 134. Because this was a high-level decision made by the mayor, it was inherently prescriptive in nature; though focused on a single event, it made policy. If anything, *Wong* only illustrates the wisdom of a hard line between planning-level and operational-level decisions, to avoid precisely the kind of metaphysics which *Everton* invites.

It is not so obvious to us. When the inspector of a building or school bus decides that it is safe, is his judgment somehow more factual in nature--and less policy-oriented--than the *factual* judgment of an officer that someone appears incapacitated? And what about the assertedly-negligent decisions of firefighters in the course of fighting a fire--which are uniquely-governmental matters of tactics and strategy--now before this Court in review of *Palmer v. City of Daytona Beach*, 443 So.2d 371 (Fla. 5th DCA 1983)? On which side of the line would the City's counsel's intuitive powers put that case? We submit that these are not the kinds of distinctions upon which the sovereign immunity doctrine must depend. We submit that this Court drew the line between decisions made at the policy level, and decisions made at the operational level--no matter how discretionary--in order to avoid precisely this kind of line-drawing. But even if *Everton* is right that certain discretionary operational-level decisions partake of a policy-making character, an officer's factual judgments, pursuant to his performance of a *mandatory* statutory directive, most certainly do not. Apart from its conclusory attacks, the City has said nothing to forestall that conclusion.

2. *Even if the Decision Not to Take Mr. Rodriguez into Protective Custody Was Protected by the Sovereign Immunity Doctrine, the Negligent Implementation of that Decision Was Not.* At pages 10-12 of our brief, we cited substantial authority that even if the officer was protected in deciding not to take Mr. Rodriguez for treatment, he was not protected if he implemented that decision in a negligent manner. We argued that a reasonable factfinder could conclude that the officers were negligent in leaving Mr. Rodriguez at the mercy of the beneficence of a citizen on the bridge, rather than taking a number of other steps to assure his safety.

In response (brief at 27-28), the City does not deny this theory of liability, and cites no authority in its own behalf. It simply argues by assertion that "Sargeant Wiersma had every right simply to drive away, leaving Mr. Rodriguez as he found him" (brief at 27).

Fortunately for the citizens of Florida, our legislature has a more paternal attitude toward citizens who drink too much to the point of incapacitation, providing that the officer "shall" take the citizen for treatment. And as we noted at length in the brief (pp. 12-13 n.9), the officers in this case did not simply leave Mr. Rodriguez as they found him; to the contrary, they affirmatively intervened into the chain of events which ended in his death. They stopped Mr. Rodriguez, questioned him, altered his course of conduct, and made an affirmative decision to put him into the custody of a private citizen. They did not simply fail to act; they acted affirmatively. We offered substantial authority that even pure acts of omission in proper circumstances can constitute a breach of a public official's duty, *see Irwin v. Town of Ware*, 467 N.E.2d 1292, 1302-03 (1984) (and 29 cases cited for that proposition). And we offered substantial authority that an officer can certainly be liable for acts of omission which follow the officer's affirmative intervention into a situation. Certainly the traditional standards of causation are satisfied in such cases, as they are here; a reasonable jury could find that *this particular* accident would not have occurred "but for" the officer's intervention into the chain of events, which foreseeably resulted in the tragedy--thus satisfying the requirements of both actual and proximate causation.

This difficult notion of commission vs. ommission has been treated in great detail in the authorities which we cited, and it cannot be dismissed by the City by fiat. The City has said nothing to forestall the central argument that a reasonable jury could find the officer negligent for the *manner* in which he chose to implement even a protected decision, and that observation alone requires reversal.

3. *Even if the Decision Not to Take Mr. Rodriguez for Treatment Were Considered to be Protected by the Sovereign Immunity Doctrine, That Protection is Lost Because the Officers Knowingly Created a Dangerous Trap (Petitioner's Brief on the Merits at 13-14).* In *City of St. Petersburg v. Collom*, 419 So.2d 1082, 1083 (Fla. 1982),

this Court reaffirmed that the sovereign immunity doctrine has no application when the governmental entity or official in question has created a known dangerous condition and failed to warn the public "or protect the public from, the known danger." The City asserts that the officer here did nothing to create such a known danger (brief at 29), but clearly a jury could find otherwise--in the officer's callousness in leaving an intoxicated individual at the mercy of a private citizen who had absolutely no authority over him. The City also observes (brief at 28), that the "trap" theory was not asserted in the plaintiff's complaint. But no such waiver argument was raised in the district court, and thus any such contention has been waived. *See Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 9 FLW 227 (Fla. 4th DCA 1984). This point alones requires reversal of the district court's opinion.

B. THE DISTRICT COURT'S OPINION MUST BE REVERSED BECAUSE THE *EVERTON* AND *DUVALL* DECISIONS ARE WRONG.

1. *The* Everton *and* Duvall *Decisions Are Inconsistent With This Court's Repeated Distinction Between Operational-Level and Planning-Level Decisions.* At pages 14-17 of the brief, we establish that every decision on the issue by this Court and by every other district except the second district has drawn an invariant distinction between planning-level decisions, which are protected, and operational-level decisions--however discretionary--which are not. With the premise that it "will not attempt to respond to the Plaintiff's argument in great detail" (brief at 29), the City offers no rebuttal to this point.[6/]

[6/] It does assert without citation (brief at 29) that "Commercial Carrier does not provide that sovereign immunity questions are answered by determining whether the action in question was 'planning level' or 'operational level.'" Can the City be serious about this unsupported assertion? *Commercial Carrier explicitly* distinguishes "between the 'planning' and 'operational' levels of decision-making by governmental agencies." *Commercial Carrier Corp. v. Indian Rivier County*, 371 So.2d 1010, 1022 (Fla. 1979).

2. *The Rationale of* Commercial Carrier *(Brief at 17-21).* In this section, we tried to identify the basis for this Court's repeated distinction between planning and operational decisions, suggesting that it constitutes an attempt by this Court, mindful that our legislature has *waived* sovereign immunity with no exceptions--not even a discretionary-function exception like the Federal Tort Claims Act, which itself nevertheless maintains a distinction between planning and operations--to isolate from civil accountability only those governmental functions whose inhibition would constitute a threat to government itself--because it would not simply resolve a single controversy, but interfere with the broad prescriptive policies from which derive the concrete operational decisions of governmental personnel. The distinction, we suggested, is between decisions which are prescriptive in nature, because they affect more than the resolution of a single dispute or controversy on the one hand, and decisions which are non-prescriptive, because they are limited to a single event. We sought to justify this distinction in the language of this Court's decisions (brief at 18-19); we sought to demonstrate that *Everton* fails to recognize its wisdom (brief at 19-20); and we sought to argue that any conception of the sovereign immunity doctrine which would encompass non-prescriptive decisions limited to a single event would completely undermine our legislature's decision to abolish the sovereign immunity doctrine (brief at 20-22).

In response (brief at 30-32), the City contrives an argument which could only be addressed to our legislature--not to a court charged to enforce what the legislature has already adopted. It asserts that "legislative, judicial and executive processees of government cannot be characterized as tortious" (brief at 30), forgetting that our legislature has already made the decision in waiving sovereign immunity that indeed executive actions and decisions can be characterized as tortious. Second, it repeats the earlier contention that police officers are entitled to some special protection, because they are some "of the few lower-echelon public employees who perform pure governing functions"

(brief at 31). But they forget that, however important, these street-level functions are non-prescriptive in nature, governing only the resolution of discrete events--and do not partake of a sovereign, policymaking function. And in a final argument which the City would probably like to take back, it argues that acceptance of the Petitioner's position in this case will subject officers to potential liability for false arrest, which "would be intolerable" (brief at 31). As the Court is well aware, governmental entities have long been liable for false arrest in Florida, and in most other jurisdictions.[7/]

The key point to this whole discussion is that our legislature waived sovereign immunity, in a statute which created no exceptions for anybody. This Court has found in that statute implicit protection for those governmental functions which are prescriptive in nature--which make policy because they do more than resolve a single controversy; they create normative standards for the resolution of future controversies. To extend that protection to the individual street-level resolution of a single dispute would be to abolish the statute entirely. It would be to frustrate the legislature's intention, leaving no governmental functions, however negligent, amenable to suit. That is not what the legislature intended. The *Everton* and *Duvall* decisions are wrong.

3. *Decisions in Other Jurisdictions (Brief at 22-28).* In this section, we cited literally dozens of state decisions in our favor, and a number of federal decisions under the Federal Tort Claims Act--all of which overwhelmingly support our position in this case. The City ignores this discussion, making no attempt to establish any support for its contention in any other jurisdictions. We ask this Court to recognize the inherent rightness of these many decisions, and the intention of the Florida legislature, in rejecting the

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[7/] *See Harris v. Solvonic*, 386 So.2d 19 (Fla. 3rd DCA), *review denied*, 392 So.2d 1379 (Fla. 1980); *Phillips v. State*, 314 So.2d 619 (Fla. 4th DCA 1975). *See also Zimmerman v. Poindexter*, 78 F. Supp. 421 (D. Hawaii 1947); *O'Rourke v. O'Rourke*, 227 La. 262, 79 So.2d 87 (1955) (wrongful commitment); *Warner v. State*, 297 N.Y. 395, 79 N.E.2d 459 (1948) (wrongful commitment).

rationale of *Everton* and *Duvall*. That failing, we ask this Court to recognize that the officer's conduct in this case, in asserted violation of a mandatory statute, is not analogous to the arrest decisions in *Everton* and *Duvall*, and is not entitled to protection even if those decisions were.

IV
CONCLUSION

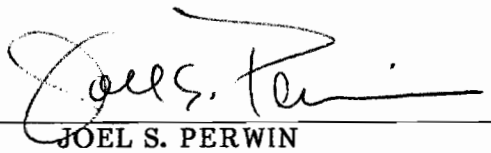
It is respectfully submitted that the opinion of the district court should be reversed, with instructions that the cause be remanded to the circuit court for trial.

V
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of January, 1985, to: GERALD PIERCE, ESQ., P.O. Box 289, Ft. Myers, Florida 33902; JOHN M, HARTMAN, ESQ., P.O. Box 2696, Ft. Myers, Florida 33902; XAVIER J. FERNANDEZ, ESQ., P.O. Box 729, Ft. Myers, Florida 33902; and to GEORGE O. KLUTTZ, ESQ., P.O. Box 2446, Ft. Myers, Florida 33902.

Respectfully submitted,

SHELDON J. SCHLESINGER, P.A.
1212 S.E. Third Avenue
Ft. Lauderdale, Florida 33335
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
1201 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

BY: 
JOEL S. PERWIN

RODRI-RBRE/amt