IN THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S COMPENSATION FUND, Petitioner, vs. JOSEPH TILLMAN, et al., Respondents and Cross-Petitioners.	)	CASE NO. 65,736

ON DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The issue presented in this case is whether Section 95.11(4)(b), Florida Statutes, bars recovery from the Florida Patient's Compensation Fund ("Fund") in medical malpractice actions brought against the Fund after the limitation period provided in that statute has expired. Adopting the dissenting opinion in Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946 (Fla. 3d DCA 1984), as its own rationale, the District Court of Appeal of Florida, Fourth District ("DCA") opined that the Fund is an insurance program and is not in privity with its member/health care providers. The DCA, therefore, concluded that Section 95.11(4)(b) does not apply to the Fund. Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984).

The Tillman decision below is the only blemish on an otherwise continuous line of cases which determined that the Fund is not an insurance program and that Section 95.11(4)(b), Florida Statutes, does apply to the Fund. See, Mercy Hospital v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979); Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA 1983); Burr v. Florida Patient's Compensation Fund, 447 So.2d 349 (Fla. 3d DCA 1984); Taddiken v. Florida Patient's Compensation Fund, 449 So.2d

956 (Fla. 3d DCA 1984); Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946 (Fla. 3d DCA 1984); Lugo v. Florida Patient's Compensation Fund, 452 So.2d 633 (Fla. 3d DCA 1984); Florida Patient's Compensation Fund v. S.L.R., 458 So.2d 343 (Fla.5th DCA 1984); Robison v. Florida Patient's Compensation Fund, 9 Fla.L.Weekly 2456 (Fla. 3d DCA, November 20, 1984); Neilinger v. Baptist Hospital of Miami, 10 Fla.L.Weekly 22 (Fla. 3d DCA, December 18, 1984); Fast v. Florida Patient's Compensation Fund, 10 Fla.L.Weekly 373 (Fla. 2nd DCA, Feb. 6, 1985); Hafel v. Florida Patient's Compensation Fund, 10 Fla.L.Weekly 559 (Fla. 3d DCA, March 5, 1985).

According to the dissenting opinion on which the DCA relied, the Fund is an insurance program rather than a unique creature of statute designed to cure a unique problem. The corrolary of that erroneous argument is that, like other insurance programs, the Fund is not protected under Section 95.11(4)(b), Florida Statutes, since a cause of action against an insurer does not even arise until a final judgment against its insured is entered. That dissenting opinion matter of factly states that "the similarities between the Fund and an insurance program clearly preponderate over the dissimilarities." Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946,949 (Fla. 3d DCA 1984). That opinion, however, is belied by Section 768.54, Florida Statutes, which creates the Fund and

outlines its nature and authority.

Failing on that front, the dissenting opinion adopted below takes the bewildering position that the Fund is not in privity with its member/health care providers, despite the contractual relationship between them that was recognized by this Court in Dept. of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815,817 (Fla. 1983).

Both arguments are without merit; not simply because of the plethora of cases that contradict them, but because of the nature of the Fund and its relationship to health care providers and their patients.

Because the DCA simply adopted the dissenting opinion in Fabal as its majority opinion in connection with the statute of limitations issue that is before this Court, it is that dissenting opinion in Fabal that should be reviewed here.

The DCA, in dictum, stated that if the action against the Fund was barred by Section 95.11(4)(b), Florida Statutes, then the judgment against the Fund member hospital would be unlimited, since the limitation on liability found in Section 768.54 was held unconstitutional in Florida Medical Center v. Von Stetina, 436 So.2d 1022 (Fla. 4th DCA 1983). Of course, that case remains in the bosom of this Court. In the event that the Court considers the Von Stetina issues in this case, the Fund hereby adopts its

briefs filed in that case and incorporates them herein by reference. A copy of a relevant portion of one of the Fund's briefs in Von Stetina is included in the Appendix at A-1.

STATEMENT OF THE FACTS

The Fund concurs with the presentation of facts in the DCA's opinion below. See Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th D.C.A. 1984).

Surgery was performed on Joseph Tillman by Dr. Bruce Waxman at St. Mary's Hospital on April 12, 1978. Id. at 1378. Post-surgery difficulties were encountered by Mr. Tillman almost immediately. Ultimately, corrective surgery was performed. Id.

On February 29, 1980, Mr. Tillman filed his initial complaint naming St. Mary's Hospital and Howmedica, Inc., as defendants. On December 2, 1980, Dr. Waxman was added as a defendant. On January 9, 1981, the Fund was added as a defendant. Id.

Subsequently, Dr. Waxman and the Fund filed motions for summary judgment based upon the two-year statute of limitations contained in Section 95.11(4)(b), Florida Statutes. Both motions were denied and the case proceeded to trial. At the conclusion of the trial, the jury found for Mr. Tillman and awarded $150,000.00 in damages. The trial court reduced the damages to $132,000.00 based on a finding that Mr. Tillman was 12% comparatively negligent. Id.

That judgment was the subject of several appeals to the DCA. On appeal, the DCA affirmed the trial court's denial of the Fund's motion for summary judgment, based exclusively on the dissenting opinion in Fabal v. Florida Keys Memorial Hosptial, 452 So.2d 946 (Fla. 3d DCA 1984). 453 So.2d at 1383. The Fund petitioned this Court seeking discretionary review of that decision. That petition was granted March 6, 1985.

In order to address the issue presented by this case, it is important to provide the Court with some background on the Fund, all of which was gleaned from Section 768.54, Florida Statutes (1977), Chapter 75-9, Laws of Florida, and decisions of the Appellate Courts.

The Nature of the Fund.

The Fund is a non-profit entity. Dept. of Insurance v. Southeast Volusia Hospital Dist., 438 So.2d 815,817 (Fla. 1983). It was established by the Legislature in an effort to arrest the skyrocketing cost of health care in Florida and eliminate the concern that health care providers might be forced into a wholesale curtailment of their health care practices, which in turn would threaten the health and general welfare of all Floridians. Preamble to Ch. 75-9, Laws of Fla.

In addition to isolating those problems and recognizing

that they had reached crisis proportions, the Legislature isolated their cause: The excessive cost of medical malpractice insurance. Indeed, by 1975 it was not uncommon for physicians to have to pay $20,000.00 or more in premiums annually. Hospitals' annual premiums were significantly higher. The health care providers could not bear that cost; nor could their patients. Preamble to Ch. 75-9, Laws of Fla.

By joining and maintaining their membership in the Fund, health care providers limit their liability for medical malpractice as a matter of law and, consequently, reduce the cost of their medical malpractice insurance. At the same time, assessments paid to the Fund by its members are used as a source of recovery by those patients who have obtained medical malpractice judgments against Fund member health care providers in excess of the members' limitation of liability. §768.54(2)(b), Fla. Stat. (1977 Supp.).

The Fund Contract.

As this Court pointed out in Dept. of Insurance v. Southeast Volusia Hospital Dist., 438 So.2d 815, 817 (Fla. 1983), Section 768.54, Florida Statutes, specifies the terms of the Fund's contract with its members. Id. at 817.

During the Fund year relevant to this case, [1] the Fund had no underwriting authority. It had to accept all Florida health care providers who elected to join. During the 1978 Fund year, members paid a fee for joining the Fund and promised to pay future assessments if necessary in order to satisfy the Fund's obligation to malpractice victims. 768.54, Fla. Stat. (1977).

In return, Fund members were provided with a statutory $100,000 limitation of liability. [2] In addition, if assessments made by the Fund proved to be excessive, the excess amount would be refunded or credited. Further, the Fund was obligated to the patients of Fund members. It was primarily responsible for paying any amount of a medical malpractice judgment against a Fund member in excess of the member's $100,000 liability. That obligation was limitless. Id.

The 1977-78 Fund membership year was separate from all

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[1] The relevant Fund year is determined by "the date when the incident occured for which the claim is filed." §768.54(2)(b), Fla. Stat. (1977). In this case the pertinent date is the date that Mr. Tillman was allegedly injured, April 12, 1978.

[2] If the health care provider has insurance in excess of $100,000 at the time of the incident giving rise to the cause of action, then he is liable to the medical malpractice claimant for the amount of that coverage, or $100,000 whichever is greater. §768.54(2)(b), Fla. Stat. (1977).

others and money collected for that particular year could not be used to pay claims attributable to a different Fund year. A claim would not be paid at all, if the health care provider did not maintain his membership (in which case he likewise lost his limitation of liability), or the Fund was not named in the claimant's suit for medical malpractice. Id.

The Fund was managed in 1977-78 by a board of governors, made up of those members of society directly effected by the creation of the Fund; ie. laypersons, health care providers, insurance industry. Id.

ARGUMENT

I. THE DCA INCORRECTLY HELD THAT SECTION 95.11(4)(b), FLORIDA STATUTES, DID NOT BAR TILLMAN'S ACTION AGAINST THE FUND

Section 95.11(4)(b), Florida Statutes, in pertinent part, states:

> An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered with the exercise of due diligence; ....The limitation of actions within this subsection shall be limited to the Health care provider and persons in privity with the provider of health care.

(Emphasis added.).

In an effort to avoid the clear applicability of the above-quoted statute to this case, Mr. Tillman maintained below that the Fund was really an insurance program, rather than a unique creature of statute designed to cure certain health care problems in Florida. Mr. Tillman argued that as with other insurers, a cause of action against the Fund could not arise until a final judgment against its Fund members was entered. Mr. Tillman also took the position "that he was in privity only with the hospital and Dr. Waxman and therefore the two-year statute of limitations was not applicable as to the Fund." Florida Patient's

Compensation Fund v. Tillman, 453 So.2d at 1182. Those arguments, as well as the dissenting opinion in Fabal on which the DCA relied, are discussed below.

A. THE FUND IS NOT AN INSURANCE PROGRAM.

The dissenting opinion on which the DCA relied stated: "The similarities between the Fund and an insurance program clearly preponderate over the dissimilarities." 452 So.2d at 949. A cursory examination of Section 768.54, Florida Statutes (1977), [3] however, indicates that the dissimilarities are predominate. Some of the more significant differences that existed in 1978 are listed below.

1. The Fund is a non-profit association, in contrast to private for profit insurance companies. Dept. of Insurance v. Southeast Volusia Hospital Dist., Id.; See Landis v. Dewitt C. Jones Co., 108 Fla. 613, 147 So. 230, 231 (1933)("Those who organize or embark in insurance business have profit in view as a recompense for the industry, ability, and capability invested and it would be a strange insurance business purposes."). The Fund is managed by a board of

[3] Again, the Court should keep in mind that the 1977 statute controls the Fund's relationship with both Mr. Tillman and the Fund member in this case.

governors, as opposed to a private board of directors obligated to make profits for private investors. See §768.54(3)(a) and (b), Fla. Stat. (1977).

2. In return for becoming a member of the Fund, and maintaining the membership, a health care provider's liability for medical malpractice is limited by operation of law to $100,000. §768.54(2)(a), Fla. Stat. (1977). No such benefit is available anywhere else, and certainly not in any insurance program.

3. Consistent with its non-profit make-up, the Fund does not exact a fixed premium from its members. Instead, it supplements an initial fee with whatever assessments are necessary in order to meet the Fund's obligations to medical malpractice victims. See §768.54(3)(c), Fla. Stat. (1977).

4. The Fund does not enjoy the luxury of having underwriting authority. Unlike insurance companies, it had to take all Florida health care providers who elected to join for 1978. See §768.54(2)(a), Fla. Stat. (1977).

5. The Fund also lacked the authority to set "policy limits for 1977." It is obligated to pay medical malpractice victims any amount of a judgment in excess of the $100,000 limitation on a health care provider's liability. That liability is actually assumed primarily by the Fund. §768.54(3)(e), Fla.

Stat. (1977).

6. One of the most significant dissimilarities is that medical malpractice claimants must join the Fund as a defendant in their lawsuit against a Fund member in order to recover against the Fund. Plaintiff's have no such burden against insurance companies because, unlike the relationship between the Fund and its members, an insurance company simply indemnifies its insureds for damages resulting from their negligent acts. See Mercy Hospital v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1984). Indeed, because of the Fund's peculiar direct, primary liability to medical malpractice claimants described above, the Fund has a duty under Section 768.54, Florida Statutes, to defend itself, not its Fund member, in medical malpractice actions. §768.54(3)(3)1, Fla. Stat. (1977).

Because of those dissimilarities, the First, Second and Third District Courts of Appeal have recognized that the Fund is not insurance program. See, e.g., Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA 1983); Burr v. Florida Patient's Compensation Fund, 447 So.2d 349 (Fla. 2nd DCA 1984); Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956 (Fla. 3d DCA 1984); and Mercy Hospital v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979). Owens, Burr and Taddiken involve the same

question presented here. On the basis of their conclusion that the Fund was not an insurance company, they held that Section 95.11(4)(b), Florida Statutes, applied and barred proceedings against the Fund in cases where the limitation period had run. See, page 2, supra, for additional cases that followed Owens, Burr, and Taddiken.

Although the Menendez court was not reviewing the applicability of Section 95.11(4)(b) to the Fund it did consider whether the Fund was analogous to an insurance program. The dissenting opinion on which the DCA relied, takes the position that because the ultimate issue in Menendez did not involve the applicability of Section 95.11(4)(b), Menendez is irrelevant. 452 So.2d at 948. The contrary is true. The Fund is not a chameleon that changes its character depending on the issue presented. The Fund is the Fund, incapable of changing, except by legislative edict.

According to the Menendez court:

> It is apparent from a reading of the medical malpractice reform act that the Legislature did not set up an insurance Fund with obligations to the health care provider. The plan is one in which the Fund has obligations primarily to the plaintiff in a medical malpractice action.

371 So.2d at 1079. (Emphasis added.).

The dissenting judge in Fabal attempted to dilute the significance of Menendez, Owens, and Taddiken by comparing

the Fund to the standard definition of an "insurer" found in Black's Law Dictionary. 452 So.2d at 949. The dissenter paraphrased Black's definition of "insurer" as "one who contracts to indemnify against specific perils." Id. According to the dissenter, the Fund indemnifies Fund members for their liability to their patients and consequently fits the definition of an insurer. But, as indicated in the Menendez quote above, that is not so.

The contract of indemnity is an undertaking by which one party agrees to protect a second party against loss or damage by reason of the second party's liability to another person. 12 Fla. Jur. 2d, Contribution, Indemnity and Subrogation, §9 (1979); Royal Indemnity Co. v. Knott, 101 Fla. 1495, 136 So. 474 (1931). A Fund member, however, according to Section 768.54, Florida Statutes (1977), is not liable to its patient who is damaged by malpractice in excess of $100,000. As a matter of law, the Fund member is not liable for that excess amount and the Fund is.

In an action against an insured and its insurance company, if the insurance company is for some reason unable to meet its judgment debt at the time or in the manner that the plaintiff might desire, the plaintiff could collect completely against the insured leaving it to the insured to seek recovery from its insurance company.

That scenario is totally dissimilar to a malpractice

action brought against a Fund member and the Fund. The plaintiff in such a case can only look to the Fund member for the first $100,000 in damages, regardless of whether the Fund is delayed in meeting its obligation.

Because of the Legislature's redistribution of medical malpractice liability directly to the Fund, it is no wonder that a claimant is required to name the Fund in any action where the claimant seeks to recover against it. And it is no wonder that the Fund, for purposes of Section 95.11(4)(b), has been treated by the First, Second and Third District Courts of Appeal as any other defendant in a medical malpractice lawsuit that is directly liable to the plaintiff.

B. THE FUND IS IN PRIVITY WITH ITS FUND MEMBER HEALTH CARE PROVIDERS

In pertinent part, Section 95.11(4)(b), Florida Statutes, states:

> The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care.

(Emphasis added.).

The Taddiken and Burr courts directly reached the issue of whether the Fund is in privity with its Fund member health care providers for purposes of Section 95.11(4)(b), Florida Statutes. Both courts decided that the necessary privity existed. Burr, 447 So.2d at 351; Taddiken, 449 So.2d at 957. The line of cases following the Fabal majority and the Owens decision, of course, impliedly reached the same result on the privity issue since they both determined that Section 95.11(4)(b), Florida Statutes, protects the Fund from tardy lawsuits.

Consistent with the Taddiken opinion, the dissenting opinion on which the DCA relied recognizes that no definition of privity can be applied uniformly. 452 So.2d at 950. Indeed, the meaning varies depending on the purpose for which theory is used. Taddiken, 449 So.2d at 957. The one certainty, however, is that parties who have contracted with one another, like the Fund and its members, are in

privity with each other. The Fabal dissenter's own example of Strathmore Riverside Villas v. Paver Development Corp., 369 So.2d 971 (Fla. 2nd DCA 1979), emphasizes that point.

In Strathmore, the court determined that the original purchaser of a newly constructed condominium home was in privity with the developer, but a subsequent purchaser was not. The reason for that result is simple and is expressed in the opinion. The original purchaser enjoyed a contractual relationship (purchase-contract indeed) with the developer, while subsequent purchasers contracted with the preceeding purchaser, not the developer. Absent such a contractual relationship, there was no privity between subsequent purchasers and the developer. 369 So.2d at 973.

The dissenting judge's discussion of privity does not attempt to seriously combat the Fund's contractual privity with its members. Instead, his opinion takes an O.'Henrian twist. Indeed, it ends abruptly with the incongruous and unsupported conclusion that the "privity provision" in Section 95.11(4)(b), Florida Statutes, applies only to a successor to a health care provider. 452 So.2d at 950. According to the Fabal dissenter, such a successor is one who "becomes invested with rights and assumes burdens of health care provider." Id. at 950, n.6. For instance, if a hospital corporation was directly liable for an act of malpractice and another corporation became associated with

it, and thereby became directly liable for the same malpractice, then that second corporation would have the benefit of Section 95.11(4)(b) in like manner as the first corporation.

Assuming, arguendo, that the dissenting judge's interpretation is correct, the Fund squarely satisfies the successor definition to the extent that a malpractice judgment against a Fund member exceeds $100,000. The Fund is no different than that "second corporation" described in the preceeding paragraph.

Because of the Fund's special direct primary liability for the medical malpractice of its members, the Burr court held that since the Fund is "connected with the incident" giving rise to the action, it must be sued directly, and it must be sued within the limitation period established in Section 95.11(4)(b). 447 So.2d at 351. Indeed, because of the Fund's special liability for the medical malpractice of its members and because it must be sued directly in a suit against a member health care provider, pursuant to Section 768.54(3), Florida Statutes, it would be illogical to have different statutes of limitations applied to the Fund and its members. [4]

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[4] The corollary to the holding in Burr is that if a Fund member is a governmental institution and is entitled only to a four year statute of limitation, then the Fund is likewise only entitled to the four year statute. Florida Patient's Compensation Fund v. S.L.R., 458 So.2d at 343.

The discussion of privity in the Fabal dissenter's opinion is no more sensical than Mr. Tillman's contention below that he was in privity only with the hospital and Dr. Waxman and therefore the two-year statute of limitations was not applicable to the Fund. Florida Patient's Compensation Fund v. Tillman, 453 So.2d at 1382. The only authority on which Mr. Tillman relied for that proposition was Gonzales v. Jacksonville General Hospital, 365 So.2d 800 (Fla. 1st DCA 1978), reversed on other grounds, 400 So.2d 965 (Fla. 1981).

Without any support, and acknowledging that Section 95.11(4)(b) was subject to a different interpretation, the Gonzales court stated that the "privity" language of the medical malpractice statute of limitations was intended to limit the applicability of the provision to actions:

> Wherein privity exists between the claimant and the health care provider and any other persons (or corporations) claimed by the claimant to be liable and with whom there exists a privity relationship.

365 So.2d at 803.

The Burr court expressly rejected the Gonzales interpretation of the "privity" language because, at the very least, the Gonzales view was inconsistent with the plain meaning of Section 95.11(4)(b). Indeed, that statute, in pertinent part, states that the "limitation of action

within this subsection shall be limited to ... persons in privity with the provider of health care," (emphasis added), not persons in privity with the claimant. 447 So.2d at 351.

Reading the statute of limitation as it, in fact, reads, without substituting the Gonzales language for that which the Legislature enacted, it is manifest that the Fund is in privity with St. Mary's Hospital, because of their contractual relationship. See Dept. of Insurance v. Southeast Volusia Hospital Dist., 438 So.2d at 817.

Gonzales, of course, did not involved the Fund. In any event, it is interesting to note that if the Gonzales construction of Section 95.11(4)(b), Florida Statutes, was correct, the Fund would probably still fit within that statute. The Gonzales misinterpretation of the "privity language" simply requires that the Fund be in privity with the medical malpractice claimant, and that the claimant allege that the Fund is, at least in part, liable for the medical malpractice. See 365 So.2d at 803. Mr. Tillman, of course, alleged in his amended complaint joining the Fund that the Fund was obligated to Tillman. And, of course, the Menendez court pointed out that the Fund is directly obligated to the victims of medical malpractice. Indeed, if that obligation were not present, there would never be a

cause of action by a medical malpractice claimant against the Fund. [5]

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[5] It is interesting to note that the First District decided both Owens and Gonzales. As suggested in the discussion above, those two decisions are not necessarily inconsistent. In fact, on rehearing in Owens, Gonzales was the paramount authority brought to the attention of the court. See App. at 9. By summarily denying rehearing, the court obviously found no inconsistency between the two cases.

CONCLUSION

Mr. Tillman, the DCA and the Fabal dissenting judge's opposition to the Owens, Burr, and Taddiken line of cases evolved no doubt from a frustrated effort to "pigeon hole" the Fund, rather than accepting its peculiar nature. Indeed, the dissenting judge in Fabal even suggests that the Fabal majority should put on a "legislative hat" and rewrite Section 768.54, Florida Statutes, so that the Fund is like an insurance company; so that the square pegged Fund fits in the round hole of insurance jurisprudence:

> That the liability of the actual tort feasor is limited because he has contracted with the third party for excess damages should not preclude a plaintiff from obtaining a judgment against the tort feasor for the full amount of his damages. It should be the health care provider's obligation to limit its liability by bringing the Fund into the action by way of a third party complaint.

452 So.2d at 951. (Emphasis added).

Of course, the Fabal dissenter's suggestions are precisely what the Legislature intended to avoid, believing that therein was a cause of the excessive medical malpractice insurance rates that were present in 1975, which increased the cost of medical care and generally threatened the health and welfare of Floridians. Ch. 75-9, Laws of Fla.; See Statement of Facts, p. 6, supra. And, if the

Legislature was wrong, it is within the Legislature's province to correct the error.

For the reasons set forth above, the decision of the DCA, should be reversed.

DATED this 25th day of March, 1985.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief and the attached Appendix has been furnished by U.S. Mail to MICHAEL B. DAVIS, ESQ., WALTON, LANTAFF, SCHROEDER & CARSON, Post Office Box 2966, West Palm Beach, FL 33402; DAVID F. CROW, ESQ., PAXTON, CROW, BRAGG & AUSTIN, Forum III, Suite 600, 1655 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401; EDNA L. CARUSO, EDNA L. CARUSO, P.A., Suite 4-B, Barristers Building, 1615 Forum Place, West Palm Beach, FL 33402; PHILLIP HOUSTON, KOCHA & HOUSTON, P.A., Post Office Box 1427, West Palm Beach, FL 33402; and to ROBERT M. KLEIN, DEBRA LEVY NEIMARK, STEPHENS, LYNN, CHERNAY & KLEIN, One Biscayne Tower, Suite 2400, Miami, FL on this 25th day of March, 1985.

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