IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

CASE NO. 65,986

ALLEN L. FOWLER, ENTERPRISE LEASING COMPANY, KENDRA A. MORRISON and THE TRAVELERS INSURANCE COMPANY,

Respondents.

RESPONDENT, ENTERPRISE LEASING COMPANY AND TRAVELERS INSURANCE COMPANY'S ANSWER BRIEF

Discretionary Review of the Opinion of the
District Court of Appeal,
First District

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent generally agrees with the Petitioner's statement of the case and facts except as noted below:

In resolving the issues of this appeal it is important for this court to be aware of the fact that the lower court litigation consisted of two actions, consolidated and proceeding together.

The primary tort action was a suit by the plaintiff, Allen L. Fowler who sued Kendra Morrison, driver of the vehicle, Allstate Insurance Company, her insurance carrier, Enterprise Leasing Company, owner of the vehicle, and Travelers Insurance Company. Travelers Insurance Company provided two liability insurance policies purchased by Enterprise Leasing Company. One specifically provided coverage to drivers of leased vehicles and Enterprise Leasing Company (thereby including Kendra A. Morrison). The other was an excess insurance policy insuring only Enterprise Leasing Company. (R-25)

For clarity, the underlying Travelers policy ($10,000) will be referred to as the "Travelers Basic Policy", Allstates policy ($250,000) will be referred to as the "Allstate Policy", and the policy insuring only Enterprise will be referred to as the "Travelers Excess Policy."

For the Courts information, since Petitioners filed their initial brief in this matter, the underlying tort action has been settled for $72,500, $10,000 paid under the Travelers Basic Policy and $62,500 under the Allstate Policy. Whether

Allstate should be reimbursed through the Travelers Excess Policy for the $62,500 it has paid is the remaining issue in the case.

* * *

One of the points overlooked by the First District Court of Appeal, and important in trying to resolve the issues herein, is that this tort claim alleged only vicarious liability on the part of Enterprise Leasing Company as owner of the motor vehicle operated by Kendra Morrison. The Amended Complaint alleged active negligence on the part of Kendra Morrison but did not allege or suggest any active negligence on the part of Enterprise Leasing Company in leasing the vehicle to Ms. Morrison. The only basis in the Amended Complaint for Enterprises' liability was the vicarious liablity an owner has for the negligent actions of the vehicle's driver. Had the case gone to trial there was no claim in the pleadings that Enterprise was actually negligent.

The foregoing point is important because for some reason the First District Court of Appeal felt it necessary to remand the case to the trial court for evidence and disposition of the issue of active negligence on the part of Enterprise, an issue not raised by the plaintiffs in the first instance.

Also note that Ms. Morrison could have raised this issue against Enterprise Leasing Company had Ms. Morrison or Allstate felt there was a factual basis for arguing active negligence

on the part of Enterprise Leasing Company. They did not choose to raise the issue either.

The fact that neither the plaintiffs nor Enterprises' co-defendants felt a need to raise the issue, combined with Petitioner's assertions in its brief, seem conclusive to the point that the issue upon which the First District Court of Appeal ordered remand of this case does not exist as an issue.

Should this court agree with the First District Court's interpretation of the law of Florida, the order of priority of the insurance policies can be determined without need for remand.

* * *

The second part of this litigation was the Declaratory Judgment action by Allstate Insurance Company seeking to determine the priority of insurance coverage for this accident.

No party disagrees that the Traveler's Basic Policy which insured both Kendra Morrison and Enterprise Leasing Company for $10,000 and which fulfilled the obligations of Enterprise under Financial Responsibility, is primary.

The Allstate Policy was a policy issued to Kendra Morrisons' parents and provided coverage for the automobiles owned by Ms. Morrison's parents and also provided coverage to Ms. Morrison and her parents when they operated non-owned vehicles. In the context of this case Kendra Morrison was insured by Allstate

while driving the vehicle owned by Enterprise Leasing Company. Early in the litigation Allstate contested the applicability of its coverage to Ms. Morrison on the basis of a question regarding Ms. Morrison's place of residence at the time of this incident. This issue was resolved with Allstate acknowledging coverage to the extent its policy is applicable.

On the other hand, the Travelers Excess Policy specifically provided coverage only for Enterprise Leasing Company and its officers and directors (R-25). It specifically did not provide coverage for persons operating those owned vehicles (such as Kendra Morrison). The obvious purpose of the excess policy was to provide excess coverage for the corporate entity "Enterprise Leasing Company" in instances where all underlying coverage necessary to comply with financial responsibility laws and coverage and available to the drivers of their vehicles was exhausted.

ARGUMENT

I. THE OPINION OF THE DISTRICT COURT DOES NOT CONFLICT WITH INSURANCE COMPANY OF NORTH AMERICA V. AVIS RENTAL CAR SYSTEMS, INC.

There is an inherent flaw in the Petitioner's logic and in their argument that the opinion of the First District Court of Appeal conflicts with Insurance Company of North America v. Avis Rental Car Services, Inc., 348 So.2d 1149 (Fla. 1977). Perhaps this is due to an inherent flaw in some interpretations of INA v. Avis, supra, that have arisen because of the complex facts and many issues addressed by the Court.

Petitioners argue that it is Allstate's right to be governed by the language in their policy:

> "If a person insured is using a substitute private passenger auto or non-owned auto, our liability insurance will be excess over other collectible insurance." (Allstate Policy R-17).

Allstate suggests that this policy language should govern because it is "stronger language" than any language contained in the Travelers Excess Policy. Allstate infers that this court is somehow being asked to:

> "Deprive the parties of their ability to contract between themselves to shift the burden of loss." (Petitioner's Brief at p. 11).

Petitioners never explained how a contractual relationship exists between Allstate Insurance Company and Travelers Insurance Company where they have each agreed to abide by the other's

policy language and be governed accordingly. The fact is that there is no contractual relationship in this case between Allstate Insurance Company and Travelers Insurance Company.

On the other hand, there is a contractual relationship between Enterprise Leasing Company and Kendra Morrison where Enterprise's insurer, Travelers agreed to provide minimum financial responsibility limits to Kendra Morrison in its Basic Policy (which it did). Kendra Morrison had a separate contractual relationship with Allstate Insurance Company where Allstate agreed to provide her with insurance coverage in instances where she incurred liability because of her own negligence.

Enterprise Leasing Company, in a similar manner, had a contractual relationship with Travelers Insurance Company to provide Excess Insurance coverage should one of its vehicles be involved in an automobile accident. This coverage was not a part of the lease agreement as it, by its terms, does not insure lessees of Enterprises' vehicles.

All primary obligations were met by the Travelers Basic Policy which provided the first $10,000 in coverage. Travelers Excess Policy by its specific policy language, did not provide insurance coverage to Kendra Morrison.

How can petitioner claim that there is some form of contractual relationship between Allstate Insurance Company and the Travelers Insurance Company (with respect to The Travelers Excess Policy)? The only thing they have in common

is that they both could provide insurance benefits to the same plaintiff because of the coincidence of the Allstate insured driver and the Travelers insured automobile being involved in the same accident.

In effect, Allstate attempts to turn this case into a contest between drafters of insurance policies for insurance companies that have no relationship to each other. If layers of insurance coverage were determined by reading the excess clauses in the respective policies in cases where there is no relationship or common insured, insurance companies would invest even more time and effort attempting to draft policy clauses to avoid coverage.

Fortunately, there is no need in this case to escalate this war between insurance companies and to prolong resolution of claims brought by innocent third parties because of conflicts between insurers created by insurers attempting to avoid coverage by writing themselves out of liability. This trend seems to be away from determination of fault and responsibility and towards rewarding the cleverest wordsmith. The innocent injured third party ends up losing.

Respondent does not suggest by these arguments that so-called "excess" language in policies is superfluous. Certainly when all other things are equal (such as policies insuring the same entity) and there is no other way to settle a dispute between insurance companies, the policy language can be referred to as it was the language which governed

the contract between the insured and his insurance company.

In most cases with accidents involving separate owners and drivers, both the owner's policy and the driver's policy specifically provide coverage to the driver. Even under the instant facts, both the Travelers Basic Policy and the Allstate Policy provided coverage to the alleged negligent driver, Kendra Morrison. Since both policies cover the same, allegedly actively negligent tortfeasor, there is simply no other way to determine the priority of the insurance policies other than by first applying Financial Responsibility Laws, and second applying policy language. As between Allstate and the Travelers Basic Policy, Financial Responsibility Law required the Travelers policy to be primary.

The fact that the Travelers Excess Policy does not insure the driver in this case is the single most important distinguishing factor and the reason why other principles apply to the resolution of this case.

INA v. Avis, supra, discusses the question of financial responsibility and the fact that the Financial Responsibility Law takes precedence over any other theory of recovery. This court then went on to say:

> "But neither of these financial responsibility principles bear on the allocation of risk between owners and operators in excess of minimum statutory coverage, or on the right of indemnification which derives from the common law principle that fault attracts primary responsibility." (At 1153).

Equally important, the court addressed the question

of lessors such as Enterprise Leasing, insuring only themselves against loss as opposed to providing coverage to both themselves and their drivers:

> "We see nothing in the statute or in the public policy of the state which would require the purchase of co-extensive coverage for lessees (or other operators) and their lessors, or which would prohibit an owner from insuring only itself against economic loss in excess of statutory minimums and the amounts available to others." (At 1154)

It is because of the existence of the principle of indemnification, and the availability of indemnity, that the order of insurance coverage was established in INA v. Avis. This court said that:

> "Going beyond INA's liability to that of Camp Ocala, we hold that nothing in the present financial responsiblity statute or in the common law of this state would bar Liberty Mutual from bringing suit for indemnification against the negligent driver or the lessee of the car, or their carriers, for the $50,000 it was obliged to pay after the lessee's insurance had been exhausted. . . . Although Avis and Liberty Mutual are prohibited from seeking indemnification for the first $100,000 of insurance provided through the rental agreement, the public policy which bars indemnnification to that extent has no effect on the traditional tort doctrine of indemnification by the wrongdoer." (Emphasis supplied at 1154).

As will be discussed in more detail later in this brief, the combination of the existence of a right of indemnification by Enterprise Leasing Company against Kendra Morrison on the Travelers Excess policy and the pleadings which do not create an issue of active negligence on the part of Enterprise

Leasing Company, together with the principle that unnecessary litigation should be avoided, mandate that the layers of coverage issue can, and should be settled as a matter of law as they were by the trial court in this instance.

It is interesting that the result in INA v. Avis, as determined by this Court, is exactly the same result which Respondent would seek in the instant case. The only difference between the instant case and the insuring situation in INA v. Avis is that in the instant case the underlying coverage is $10,000 in contrast with the $100,000 underlying coverage in INA v. Avis.

As the Petitioner points out, the restrictions in the Financial Responsibility Law require the owners' underlying coverage to be primary. General principles of indemnification prohibit Travelers in the instant case from seeking indemnification from the driver for that first $10,000 as it would require Travelers to sue its own insured under the Basic Policy. This problem does not exist with the layers of insurance coverage above the first layer because once that layer is paid, financial responsibility is met and the companies are free to seek indemnification if appropriate and otherwise allowable.

In the instant case, The Travelers Excess Policy does not insure the driver, Kendra Morrison, and Travelers can therefore seek indemnity from her. It is because of this principal that the layers of coverage should be determined

based on the more general and overriding principle of "fault attracts primary liability". Fault in this case falls with the driver of the vehicle, not the owner. The owner's liability is technical and vicarious. It makes good sense for the driver's insurer to bear the responsibility for the loss in excess of the financial responsibility limit prior to the liability of the owner and its insurer.

One of the reasons this is the more logical and appropriate approach is that it will reduce much of the litigation, such as this, that ensues after an accident occurs. In almost every instance, where the driver and owner of a vehicle are different legal entities, there will exist a viable right of indemnity in favor of the owner against the driver. In only a very few instances will there be a suggestion of active negligence on the part of the owner which conceivably could support a cause of action for contribution (not indemnity - how could a driver at fault in an accident be only vicariously negligent?).

In other words, if the rule applicable after financial responsibility is satisfied is that fault attracts primary responsibility, litigation will generally end on these complex layer of coverage cases. If, however, the rule is as suggested by the petitioners, then in every instance where the one insurer's "wordsmiths" have outwritten the other insurer's "wordsmiths", there will be (1) litigation over policy language, then (2) the litigation on indemnity based upon the vicarious

liability of the owner and the active negligence of the driver. This will mean that the insurer of the owner will, by judicial mandate, have to pay the judgments in those instances, and then proceed with additional litigation to get their money back from the other insurer who will of course, delay paying as long as possible to their financial advantage.

In summary, the important principle is to see that the innocent third party is compensated and that disputes by insurance companies do not cause unnecessary delays in that compensation. By statute, financial responsibility laws insure that there is never a dispute over the first layer of coverage (as there was no dispute here). The next principle to be applied should be that fault attracts primary responsibility (as this court has held numerous times in the past). Only when all other things are equal and where indemnity principles do not apply, should it be necessary to look to the policy language in the respective policies to determine how coverage should be applied.

In this case, there is no contractual relationship between the parties with respect to Enterprises' decision to purchase excess insurance coverage for contingencies outside of its own control. It seems incredibly obvious that in an instance such as this the person guilty of the negligence should be the one whose insurance pays not the innocent lessor of the vehicle.

II. THE DISTRICT COURT WAS CORRECT IN RULING THAT ALLSTATE'S POLICY SHOULD PROVIDE THE LAYER OF COVERAGE BEFORE THE COVERAGE AVAILABLE UNDER TRAVELERS EXCESS POLICY.

Florida law as well as the law of other jurisdictions including the federal courts, have consistently held that insurance policies issued to insureds that are only vicariously liable, or liable because of some technical, or derivative theory, will follow insurance policies that provide coverage to the actively negligent party.

Florida law, unfortunately, has become confused on this issue because of the widely varying factual situations in the many cases that have touched upon this issue.

As the District Court correctly points out, the case of Hartford Accident and Indemnity Company v. Kellman, 375 So.2d 26 (Fla. 3d DCA 1979) comes the closest to setting forth an appropriate and rational rule under for these circumstances.

As this court is aware, Kellman involved multiple layers of insurance coverage for the driver, his employer, and the lessor of the automobile. The Court in Kellman after discussing some other Florida cases, Truck Discount Corporation v. Serrano, 362 So.2d 340 (Fla. 1st DCA 1978) and National Indemnity Co. v. Home Insurance Co., 345 So.2d 1077 (Fla. 3d DCA 1977) said:

> "In each of these cases, it was determined that the insurer of a driver who is an active tortfeasor had primary responsibility for the payment of the injured party. This is based upon the fact that the

> owner of a dangerous instrumentality is ordinarily entitled to indemnity from his permittee." (Emphasis supplied, Kellman at 30).

Several of the insurance companies in Kellman attempted to make the same arguments as Allstate makes in the instant case. They tried to rely on the language contained in their policies to govern the order of the insurance policies. Because of the existence of rights of indemnity, and because there were insurance policies insuring only the owner of the vehicle and only the driver's employer, both of whom had "rights of indemnity", the court said it was not necessary to look to the language in the policies because the policies did not insure the same "classes of responsibility". The Court said:

> "The companies involved have relied on the other insurance and excess clauses in their contracts in arguing for their respective positions. We have not followed these arguments in this decision because we think that the order of responsibility is determinable through the basic principle that the driver is responsible first." (Kellman at 30).

The Court went on and said:

> "We simply find it unnecessary, as did the trial judge, to decide this appeal upon the particular provision of any policy. In other words, within the class of responsibility, the policy provisions should be considered, but no provision cited is sufficient to change that policy's class. (Kellman at 30).

The Court was talking about classes of responsibility such as the class of actively negligent drivers versus the

class of derivatively liable owners or derivatively liable employers. The Court correctly ruled that within these classes of responsibility, if there was conflict, it might be necessary to go to the policy provisions to determine the order of coverage, but from one class to the next, the basic principle that "the driver [actively negligent person] is responsible first" applies.

A number of other jurisdictions have held likewise in factual situations more similar to the instant case than Kellman.

In Pacific Employers Insurance Company v. Hartford Accident and Indemnity Company, 228 F.2d 365 (U.S.C.A. 9th Cir., 1955) the underlying action, as here, was one insurer suing another for declaratory relief on the issue of the order the insurance policies should apply. There, as here, one policy insured a derivatively liable entity (Neil Corporation) and the driver of a Neil vehicle, where the other policy provide coverage only to the corporation whose liability, like that of Enterprise, was vicarious. The question was framed as follows:

> "Pacific's theory is that where two insurers cover a given risk, but one policy provides extended coverage so as to insure the ultimately liable individuals, while the other covers the only named insured, whose liability is vicarious, and the named insured has a right of recovery over against the persons primarily or ultimately liable, then the insurer of the named insured is subrogated to the rights of the named insured and has a right of recovery against those ultimately liable and against the insurer providing extended coverage." (At 369-370).

The Court held that the rule to be followed would be:

> "An insurer providing extended coverage is ultimately liable as against an insurer providing coverage only to the named insured, where the named insured's liability is vicarious only, and that named insured has a right of recovery over against the person or persons primarily liable, to whom coverage has been extended only by the extended coverage provision of the first insurer". (At 371).

As applied to the instant case, where Enterprise's liability is only vicarious, the extended coverage provided by Allstate for the actually negligent tortfeasor, becomes primary over the policy providing coverage to the vicariously liable Enterprise Leasing Company.

A number of state court opinions have held similarly. In Dairyland Insurance Company v. Concrete Products Company, 203 N.W.2d (Iowa 1973) the Court came to the same conclusion as the court in the above-referenced federal case. The Court pointed out that an important consideration in this type ruling is the need to avoid circuity of action. Circuity of action is avoided by placing the policies in the order that they would fall under the general theory of indemnification. This court held:

> "It follows as to these insurance carriers there should be no proration. As between them, Dairyland's policy [which insured an actively negligent employed], to the extent of its limits, should be first subjected to Swenson's damages before resort is made to the Fireman's Fund policy [which only insured the employer of the negligent employee].

> Numerous decisions from other jurisdictions, to avoid circuity of action, have recognized the order of liability of the insurers follows the relative liability of the insureds and have held the non-negligent employer's insurer entitled to full indmenification from the negligent employee's insurer." (At 564, 565)

It should be noted that to hold otherwise would have caused further unnecessary legal action in the form of protracted litigation between the insurers on the indemnity claims when those issues were determinable by the pleadings. It is the same in the instant case.

The Superior Court of New Jersey in Maryland Casualty Company v. New Jersey Manufacturers Insurance Company, 137 A.2d 577 (S.C.N.J. 1958) involved an insurance policy issued by Maryland Casualty insuring a vicariously liable defendant only and Manufacturers Insurance Company insuring both the vicariously liable party and the actively negligent party. The policy language in each contained "other insurance" clauses which under New Jersey law would have required proration of their limits of liability. The Court held:

> "The clause does not apply here because the policy issued by plaintiff [Maryland Casualty] insured only the Port Commission. It was therefore not called upon to share any liability of Cherry [actively negligent driver] arising out of his negligence." (At 585).

The Court went on to hold:

> "Full indemnification and recovery should be allowed plaintiff [Maryland Casualty] to prevent circuity of action. Were we to restrict plaintiff [Maryland Casualty] to recovery of only part of the sum paid

> Kelly in settlement of this claim, there would eventually have to be another action brought by plaintiff [Maryland Casualty] against Cherry to recover the balance. In such a subsequent action defendant Manufacturers would be responsible for the payment of any recovery against Cherry, their insured under the omnibus clause. Circuity of action is to be avoided." (Emphasis supplied, at 585).

As applied to the instant case, the intent of these rulings is to avoid additional litigation between insurance companies when that additional litigation is unnecessary.

In United States Fire Insurance Company v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, 165 California Reporter 726, 107 Cal.App. 3d 456 (C.A. 2d District, 1980) the Court found:

> "The nonowned aircraft coverage under National's policy was expressly limited to the vicarious liability of the named insured, U.S. West Investments. As such, it was secondary to any coverage of Morgan individually as negligent operator of the aircraft.
>
> * * *
>
> Having concluded that United's policy is the primary coverage, it is unnecessary to reach National's contention that liability should be prorated." (At 732).

See also Barrois v. Service Drayage Company, 250 So.2d 135 (C.A. La. 4th Cir., 1971) for a similar result.

III. THE OPINION OF THE DISTRICT COURT IS NOT INCONSISTENT WITH SENTRY INSURANCE V. AETNA INSURANCE COMPANY, 450 So.2d 1233 (Fla. 2 DCA 1984) OR AETNA CASUALTY & SURETY COMPANY V. MARKET INSURANCE, 296 So.2d 555 (Fla. 3d DCA 1974).

Contrary to the opinions expressed in Petitioners Brief, Sentry Insurance Company v. Aetna Insurance Company, supra, can be distinguished from the instant case. Note that even in Sentry, the court recognized that the Kellman decision was reasonable and equitable under the facts.

As the Sentry court points out the lessor/owner in Kellman, as here, was a distant leasing company not involved in any way in the activities leading up to the negligent acts causing the accident. Contrarily, in Sentry, the employer of the driver directed the activities which resulted in the accident. Because of these facts, not present in the instant case, there was some hesitation on the part of the Second District to follows Kellman. The Court pointed out that an owner's liability is even more remote than liability of an employer for the acts of his employee under the doctrine of respondeat superior. The issue in Sentry involved liability of an employer's insurer not liability of an owner's insurer as in the instant case.

Aetna Casualty & Surety Company v. Market Insurance Company, supra, is a bit more subtle. Unfortunately, the District Court failed to specify in its opinion exactly who was insured by Market Insurance Company. The court said that "Market defended its insured, National Car Rentals,

Inc., and under protest, Mrs. Morse". Mrs. Morse was the operator of the rental vehicle. Primary coverage was afforded by National Car Rentals as a self-insured. Market would have no legal reason or basis to defend Mrs. Morse unless its policy provided coverage to Mrs. Morse as an operator operating the vehicle with the consent of National Car Rental, Inc. This is the distinguishing fact from the instant case. The Market and Aetna policies must have both included Mrs. Morse as an insured.

As previously stated, because the Travelers Excess Policy does not provide any coverage to the operator of the rental vehicle, and only provides coverage to the owner for the owner's excess liability, there exists separate and distinguishable classes of insureds which allows the ranking of policies in the manner which will avoid additional litigation.

CONCLUSION

Several basic principles make the opinion of the District Court correct except for its order of remand.

Under the pleadings, Enterpise Leasing Company was a defendant solely on the theory that an owner is vicariously or derivatively liable when the owner's vehicle is involved in an accident. At no time has there been any suggestion by either the injured plaintiff, Mr. Fowler, or the driver of the vehicle, Kendra Morrison, that Enterprise Leasing had liability other than the vicarious liability of the owner of a vehicle.

Second, the Travelers Excess Policy insured only Enterprise Leasing Company and specifically did not provide coverage to the negligent driver, Kendra Morrison.

Because the Allstate policy insured the actively negligent tortfeasor, Kendra Morrison, and the Travelers Excess Policy did not, an inherent right of indemnification exists in favor of Enterprise Leasing Company.

The important principle of avoiding circuity of action, together with insurance policies insuring different classes of insureds, mandated both the trial court and the underlying Appellate Court to reach the decision that Allstate Insurance Company's Policy should come before the Travelers Excess Policy.

It is only where two policies cover the same entities (such as two policies insuring the active tortfeasor) that

it may be necessary for the court to look to the language in the policies to see if one was intended to be excess over the other.

A clear decision of the Florida Supreme Court setting forth the same principles delineated by other jurisdictions, and supporting the rational in Kellman, would go a long way to accomplish two main objectives: first, to direct financial liability into the hands of those directly responsible, and, second, to reduce circuity of action and unnecessary litigation.

Respectfully submitted,

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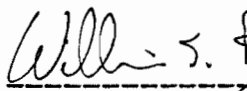

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to John M. McNatt, Jr., 1500 American Heritage Life Building, Jacksonville, Florida 32202; Henry Clay Mitchell, Esquire, P. O. Box 12308, Pensacola, Florida 32581; Albin C. Thompson, Esquire, P. O. Box 711, Fernandina Beach, Florida 32034; and S. Thompson Tygart, Jr., Esquire, 609 Barnett Regency Tower, Jacksonville, Florida 32211 this 5TH day of December, 1984.

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