IN THE SUPREME COURT OF THE STATE OF FLORIDA

L. ROSS, INC., a Florida Corporation,

Petitioner,

-vs-

R. W. ROBERTS CONSTRUCTION COMPANY, INC., TRANSAMERICA INSURANCE COMPANY, B. E. McCALL and THOMAS ADAIR,

Respondents.

CASE NO. 66,607

APPEAL FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE

The Petitioner, L. ROSS INC., challenges the amount of attorney's fees awarded at trial pursuant to §627.756, Fla. Stat. (1983). At the time this suit was filed, §627.756 limited attorney's fees to 12.5 percent of the judgment but, during the pendency of this suit, the limitation was removed. Petitioner prevailed and sought the award of attorney's fees pursuant to the amended statute without the "fee cap". However, the trial judge applied the statute as it existed on the date the suit was filed and limited Petitioner's recovery to 12.5 percent of the judgment.

On appeal, the Fifth District Court of Appeal affirmed the trial court [1] noting direct conflict with the Fourth District in American Cast Iron Company v. Foote Brothers Corporation, 458 So.2d 409 (Fla. 4th DCA 1984).

Upon petition for discretionary review, this Court accepted jurisdiction on June 10, 1985, pursuant to Article V, §3(b)(3) of the Florida Constitution and Rule 9.320 of the Florida Rules of Appellate Procedure.

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1. L. Ross, Inc. v. R. W. Roberts Construction Company, Inc., 466 So.2d 1096 (Fla. 5th DCA 1985).

STATEMENT OF THE FACTS

On February 26, 1981, Petitioner, L. ROSS, INC., and R. W. ROBERTS CONSTRUCTION COMPANY, ("Roberts"), entered into a subcontract agreement by which Petitioner was to provide labor and materials for an addition to the Halifax Medical Center in Daytona Beach, Florida. (R. 28-29). The total amount of the subcontract agreement was $150,000.00.

Pursuant to the requirements of the contract between Roberts and the Medical Center, and to insure the performance of the contract, Roberts as principal, and Defendant, TRANSAMERICA INSURANCE COMPANY ("Transamerica"), as surety, entered into performance and payment bonds.

Petitioner began work on the project on or about February 15, 1981, provided the labor and materials required under the subcontract agreement, and made periodic requests for payments totalling $79,462.50 (R. 29). Roberts, however, paid only $8,850.00 of the amounts due to Petitioner and, on or about May 18, 1981, notified Petitioner that the subcontract agreement had been terminated.

On June 3, 1981, Petitioner notified Transamerica that Roberts was breaching his subcontract agreement and called on Transamerica to rectify the problem. No action was taken by Transamerica in this regard and this lawsuit was filed shortly thereafter. The complaint named Roberts and Transamerica as defendants, as well as B. E. McCALL, President of Roberts, and THOMAS ADAIR, Project Superintendent for Roberts. Neither Roberts nor the two individual defendants are involved in this appeal.

On December 17, 1981, Petitioner filed an Amended Complaint alleging in substance, that Petitioner had performed work pursuant to a written subcontract agreement with Roberts, and under a payment bond with Transamerica, for which Petitioner had not been paid. (R. 28-33).

The two corporate defendants and the two individual defendants answered the Amended Complaint together raising numerous affirmative defenses and counterclaims. (R. 34-82). The defenses which related to inflated costs claimed by the defendants for completion of Petitioner's subcontract required extensive discovery. Moreover, major difficulties arose in the course of discovery which eventually led to the trial court's striking the defenses of Roberts and McCall.

In late 1983, Transamerica conceded to Petitioner's claim for money damages and stipulated to Petitioner's entitlement to an award of attorney's fees pursuant to §627.756 and §627.428, Fla. Stat. (1983). (R. 23). However, Transamerica contested the procedure for computing the amount of fees.

Transamerica asserted that, at the time suit was filed, §637.756, Fla. Stat. (1981), imposed a maximum fee in the amount of 12.5 percent of the judgment.[2]

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2. Section 627.756, Fla. Stat. (1981) provided in part:

> Section 627.428 (attorney fee) shall also apply as to suits brought by owners, subcontractors, laborers and material men against a surety insurer under payment or performance bonds written by the insurer under the laws of Florida to indemnify such owners, subcontractors, laboreres and material men against a pecuniary loss by breach of a building or construction contract; except, that the amount to be so recovered for fees or compensation of such a plaintiff's attorney shall not be more than 12.5 percent of the amount which the judgment or decree awards such plaintiff under the bond . . .(emphasis supplied).

Although this limitation was removed by the legislature,[3] Transamerica argued that this amendment was a "substantive" change which could not be applied "retroactively" in this case. (R. 24).[4]

Petitioner argued that he already had the "right" to an award of fees, and the removal of the 12.5 percent fee limitation was merely "remedial" in nature. Because the amendment did not affect Transamerica's "vested interests", the award of attorney's fees should be made pursuant to the statute, as amended, as it existed on the date of the final judgment. (R. 104-105).

The evidence submitted during the December 14, 1983 attorney's fee hearing revealed that the amount of $21,572.05 was a "reasonable" hourly fee under the

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3. Chapter 83-243, Florida Laws, [now §627.756, Fla. Stat. (Supp 1984).] provides as follows:

> Section 627.428 applies to suits brought by owners, subcontractors, laborers and material men against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. Owners, subcontractors, laborers and material men shall be deemed to be insureds or beneficiaries for the purposes of this section.

4. The underlying attorney's fee statute, §627.428, Fla. Stat. Remained unchanged throughout these proceedings. Section 627.428(1) provides:

> Upon the rendition of a judgment or decree by any of the courts of this state against an unserer and in favor of an insured or the named beneficiary under a policy or contract executed by the insurer, the trial court, or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court, shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sun as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

circumstances. (R. 8). However, the trial judge imposed the fee cap and awarded exactly 12.5 percent of the judgment, or a total of $6,809.95. Final Judgment in this case was rendered on January 5, 1984. (R. 125).

SUMMARY OF THE ARGUMENT

POINT I. THE AMENDMENT IS NOT BEING APPLIED RETROACTIVELY. The right to an attorney's fee, under this particular statute, does not come into existence until ther is a "final judgment". A plaintiff may have a cause of action against a surety, and may even recover a large amount of money from the surety, but neither of these incidents give rise to the award of any fees under §627.756 and §627.428. The statute is not applied until there is a final judgment, and upon obtaining a judgment, the plaintiff must submit evidence and prove the amount of fees which are reasonable. Accordingly, nothing "accrued" until the final judgment was entered, and the trial court should have applied the statute, as amended, on the date the judgment was entered.

POINT II. THE AMENDMENT TO §627.756 MAY BE APPLIED RETROACTIVELY AS A REMEDIAL STATUTE. Assuming that this case does involve the retroactive application of §627.756, the amendment merely modified a pre-existing right to attorney's fees, and this does not create or destroy any substantive rights. Thus, the statute is "remedial" in nature and may be applied retroactively.

POINT III. THE OPINION OF THE FOURTH DISTRICT IS LEGALLY SOUND AND SHOULD BE ADOPTED AS THE LAW IN FLORIDA. Although the opinion of the Fifth District in the case sub judice is thoughtful and progressive, it does not cite any substantive authority for its reasoning. The sound decision of the Fourth District in American Cast Iron Pipe Company v. Foote Brothers Corporation, follows more traditional Florida Jurisprudence in resolving this issue. As a result, the opinion of the Fourth District should be adopted as the controlling law in the

State of Florida.

POINT IV. THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FAILING TO AWARD PETITIONER'S APPELLATE ATTORNEY'S FEES. If Petitioner is successful on appeal, he would be entitled to an award of attorney's fees incurred during the appeal to the Fifth District as well as the appeal before this Court.

ARGUMENT

POINT I.

SECTION 627.756, FLORIDA STATUTES, IS NOT BEING APPLIED RETROACTIVELY IN THIS CASE.

The essence of the District Court's opinion in this case is an analysis of the proper standard for the retroactive application of §627.756, Fla. Stat. (1983). However, the Court never clearly examined whether the amended statute was in fact being applied retroactively. The opinion merely makes the assertion in the first sentence that "[t]his case involves the retroactive application of a statutory amendment. . ." [5] The Court reasoned that the right to attorney's fees is merely incidental to the underlying cause of action, therefore, the right to attorney's fees "always accrues at the time the other, underlying, cause of action accrues." [6]

This reasoning overlooks the clear language of this particular statute and attempts to generalize all attorney's fees statutes. Section 627.428, Florida Statutes, is the provision which actually grants the right to attorney's fees, and §627.756 extends this right to subcontractors and certain other individuals who recover against a surety. Section 627.428 provides that the right to attorney's fees does not exist until there is a judgment against the surety. "Upon the rendition of a judgment . . . the trial court . . . shall adjudge or decree . . . a reasonable sum as attorney's fees . . .". [7] Accordingly, the "essential fact" which is required for an

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5. L. Ross, Inc. v. R. W. Roberts Construction Company, Inc., 466 So.2d 1096, 1097 (Fla. 5th DCA 1985).

6. Id. at 1098.

7. Section 627.428, Fla. Stat. (1983).

award of attorney's fees under 627.428 is not the accrual of the right to sue under a surety bond. Neither the filing of a suit under a surety bond nor the recovery of a substantial sum in a settlement will give one the right to recover fees under this statute. American Home Assurance Co. v. Keller Industries, 347 So.2d 767, 772 (Fla. 3d DCA 1977); Midwest Mutual Insurance Company v. Santiesteban, 287 So.2d 665, 667 (Fla. 1974). The rendition of a judgment is a jurisdictional requirement, and the trial court is without power to award a fee under this statute without such a judgment. Travelers Indemnity Co. v. Chisolm, 384 So.2d 1360, 1361 (Fla. 2d DCA 1980).

Accordingly, if the District Court's reasoning in the case at bar were correct, and the crucial date for "vesting" of the right to attorney's fees was the date the underlying action accrued, then no further "facts" would be required to occur in order to recover fees. Not only is it required that a plaintiff obtain a judgment before fees are available, but there must also be substantial competent evidence submitted in order to prove the value of the services rendered in any given case. As reflected by the statutory language, (e.g. the court shall "adjudge or decree" a reasonable fee agaist the surety, etc.) the petition for fees in in many ways a separate cause of action.

Compare the language of §627.428 with §768.56, Fla. Stat. (1983) which has received considerable attention from this Court in the recent past.[8] Section

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8. See Young v. Altenhaus, and Matthews v. Pohlman, ____ So.2d _____ Nos. 64,504 and 64,589 (Fla. May 2, 1985), Florida Patient's Compensation Fund v. Rowe, _____ So.2d _____ Nos. 64,459 (Fla. May 2, 1985), and Florida Patient's Compensation Fund v. Von Stentina, _____ So.2d _____, Nos. 64,237, 64,251, and 64,252 (Fla. May 16, 1985).

627.756 awards fees only to prevailing plaintiffs (insureds), whereas §768.56 awards a reasonable fee to the "prevailing party" in medical malpractice actions. Moreover, there is no statute requirement in §768.56 that a judgment be entered, and there is no mention of a "judgment or decree" be entered for attorney's fees.

Similarly, §713,29, Fla. Stat. (1983), provides for the award of a reasonable fee in mechanic's lien actions "which shall be taxed as part of [the loosing party's] costs . . .". Perhaps a fee award under this statute could be considered to be "incidental" to the underlying suit, and it was perhaps this type of statute which the Court equated with §627.428. However, since the jurisdictional prerequisite of a judgment must exist before a court can make an award under §627.428, a court should look to the statute as it exists on the date of the judgment.

In Florida Glass & Mirror Company of Orlando, Inc. v. Economy King Equipment Company, 353 So.2d 596 (Fla. 4th DCA 1977), the Court examined the application of a statutory amendment to §713.29, Fla. Stat. (1975) which, during the pendency of the appeal, extended the right to attorney's fees to include the appellate fees. The Court, per Chief Judge Alderman, specifically held that the law which is in effect at the time of the disposition of the appeal is controlling. Because the amended version of the statute took effect prior to the appellate disposition of the case, the Court awarded appellate fees. The Court never even considered when the underlying cause of action accrued or when the suit was filed. The statute was applied as it existed on the date the case was decided, according to logic and sound principles of statutory construction.

Perhaps if Petitioner were attempting to enforce the statutory amendment after the final judgment, the appellate courts would be required to examine the

retroactive application of the amendment. However, Transamerica was well aware of the statutory amendment in this case prior to the entry of the judgment which it consented to. Transamerica has merely attempted to elude the full impact of the statute as the legislature intended. The entitlement to attorney's fees in this case did not "accrue" until January 4, 1984, when the trial court signed the Final Judgment. At that point, and only at that point, did the statute have any relevance or effect. Accordingly, the trial court should have awarded the Petitioner's fees in accordance with the law as of the date of the judgment.

POINT II.

SECTION 627.756 MAY BE APPLIED RETROACTIVELY AS A REMEDIAL STATUTE

As a general rule, absent a clear legislative expression to the contrary, a law is presumed to operate prospectively. Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239, 241 (Fla. 1977). The underlying theory of this rule is that retroactive application of legislation would impair vested rights of persons litigating in the subject matter area before the new legislation was enacted. Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981). However, there is a noted exception to this rule.

> Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, the general rule against retrospective operation of statutes. City of Lakeland v. Catinella, 129 So.2d 133 (Fla. 1961).

A remedial statute statute confers a remedy, and "a remedy is the means employed in enforcing a right or in redressing an injury." Grammer v. Roman, 174 So.2d 443, 446 (Fla. 2d DCA 1965). Thus, if a statute is found to be remedial, and does not impair substantive rights, it may be applied to pending cases. Village of El Portal v. City of Miami Shores, 362 So.2d 275, 278 (Fla. 1978).

It is clear from the plain reading of the statute that the amendment involved herein is only a remedial or procedural modification to the pre-existing right to attorney's fees. Section 627.756 does not even award fees but relies upon §627.428 for the actual award. The original version of §627.756 set forth procedural guidelines for the award of fees. Not only were the maximum fees set forth, but the award could not be less than $50., and if the judgment was over $500., the

award could not be less than $100. These guidelines were clearly a legislative attempt to remove the arbitrary application of the attorney's fee statute and to provide some consistency in the amount of awards. Accordingly, the amendment to §627.756 merely removed the procedure for calculating the fee award, and was therefore not a substantive change in the statute.

The argument that the removal of the 12.5 percent fee limitation was merely procedural because it only affected the amount, rather than the entitlement to fees was dismissed by the Fifth District in this case. The Court theorized:

> This argument fails to recognize that substantive rights do not exist in an absolute binary world but are often a matter of degree and that damages always follow the right and that any change in a substantive right normally changes the amount of damages resulting from a breach of that substantive right. Therefore, it cannot be reasoned that a statutory change that affects and changes the measure of damages is merely "remedial" and thus, procedural, and, therefore is not a change in the substantive law giving the substantive right which is the basis for the damages. 466 So.2d 1097-1098.

Through a thoughtful reasoning process, the Court equated the increase in the amount of fees recoverable with the creation of the right to recover fees. Thus, the amendment to §627.756 was held to create a "substantive" right. Id. at 1098.

The Court also found that principles of due process prohibit substantive rights from being "adversely affected" or "increased" after the facts (in the underlying cause of action) have occured. Id. at 1098. "[T]he legislature cannot constitutionally increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred." Id. However, the greater weight of authority does not support the application of this reasoning.

The Supreme Court has retroactively applied several statutes, which increased

the amount of recovery available to a plaintiff.

In Tel Service Co. v. General Capital Corporation, 227 So.2d 667 (Fla. 1969), the usury law in effect at the time of the trial entitled the Plaintiff to recover both principal and interest. Plaintiff had prevailed at trial and Defendant appealed. During the appeal, the statute was amended and the allowable recovery was limited to interest only, without recovery of the principal amount. This Court ruled that the statute created no vested substantive right to recover the principal, and the statute was applied retroactively to limit the Petitioner's recovery to interest only.

In Village of El Portal v. City of Miami Shores, supra, the Court examined the Uniform Contribution Among Tortfeasors Act, §768.31, Fla. Stat. (1975). The Act clearly "affected" the rights of the tortfeasors as well as the rights of the plaintiffs. As this Court stated it "lessens the ultimate liability of each tortfeasor by providing equitable distribution of the common burden". Id. at 278. Even though the act affected the rights of the parties, it affected only the remedies available in a cause of action which already existed, and the retroactive application of the statute was permitted.

More recently, in Florida Patient's Compensation Fund v. Von Stentina, ____ So.2d ____, Nos. 64,237, 64,251, and 64,252 (Fla. May 16, 1985), this Court considered the retroactive application of §768.54(3)(e)3, Fla. Stat. (Supp. 1982). The original statute required the "Fund" to pay all claims over $100,000, but the payments were not required to exceed $100,000 per year. The amendment removed the limitation, and this Court examined the statute to determine whether any substantive rights were involved which would prohibit the retroactive application of

the amendment. Just as in the case sub judice, the amendment resulted in an increased burden on the defendant, but it was specifically held that the amendment did not "impair any existing rights" and it was given retroactive application.

Similarly, the Third District Court of Appeal found that treble damages may be imposed upon a defendant who commited a criminal conversion prior to the enactment of the civil penalty. Senfeld v. Bank of Nova Scotia Trust Company, 450 So.2d 1157 (Fla. 3rd DCA 1984).

Finally, it must be emphasized that there are no contractual rights of any nature involved in this case. The award of attorney's fees is based entirely on §627.756, Fla. Stat. (1983) as a statutory right. If the payment bond in this case provided for the payment of fees, the limiting provisions of §627.756 would be irrelevant and the court would have been compelled to award the full "reasonable fee". R. W. King Construction Company, Inc. v. City of Melborne, 384 So.2d 654, 655 (Fla. 5th DCA 1980). Thus, the "vested rights" of Transamerica, if any, must arise from the statute.

Clearly, the alteration of the amount, or the "measure" of damages, as was done in the case at bar, does not modify any fundamental substantive right. Walker & LaBerge, Inc. v. Halligan, supra, at 243. The amendment to §627.756 only changes the method of computing a "reasonable" fee to standards more in keeping with current fee schedules. Moreover, there are no additional rights, no additional parties and no additional damages imposed by this amendment. There is merely a potential for an increase in fees. This does not create or destroy any vested right, and the amendment should accordingly be applied retroactively to all pending cases.

POINT III.

THE OPINION OF THE FOURTH DISTRICT IS LEGALLY SOUND AND SHOULD BE ADOPTED AS THE LAW IN FLORIDA.

There is a clear and direct conflict in this state on the proper application of Section 627.756, Florida Statutes (1983). The Fourth District, in American Cast Iron Pipe Company v. Foote Brothers Corporation, 458 So.2d 409 (Fla. 4th DCA 1984), held that the amendment to §627.756 was "a remedial statute which may be applied retroactively". However, the Fifth District in the case sub judice held that, because money is substance, an increase in the amount of money which could be recovered is a substantive amendment which may not be applied retroactively.

Petitioner agrees that the right to attorney's fees is a substantive right which may only be applied prospectively. Young v. Altenhaus, and Matthews v. Pohlman, ____ So.2d _____ Nos. 64,504 and 64,589 (Fla. May 2, 1985). However, Petitioner respectfully sdubmits that the Fifth District strayed off course when it reasoned that the removal of a limitation on attorney's fees affected the substantive rights of the parties. Although money may be "substance", there is a great difference between "substance" and a "substantive law" or a "substantive right".

The opinion of the Fifth District, although rich in philosophy, is unsupported by authority. In fact only two cases are cited in the text of the opinion. The first is the American Cast Iron case, and the second is Parrish v. Mullis, 458 So.2d 401 (Fla. 1st DCA 1984). Parrish v. Mullis involved §768.56, Fla. Stat. (1983), which created a right to attorney's fees. The statute provided that it shall not apply to any action "filed" prior to July 1, 1980, but the First District found that the

statute could not be applied to any cause of action which "accrued" prior to July 1, 1980. The Fifth District failed to make the distinction between the creation of the substantive right to attorney's fees and the removal of a limitation on the pre-existing right to fees, and announced that the removal of the 12.5 percent limitation would not apply to any cause of action which accrued prior to the effective date of the statute.

The Fourth District in the American Cast Iron Company case clearly noted this distinction. The Court distinguished Tuggle v. Government Employees Insurance Company, 220 So.2d 355 (Fla. 1969), and stated:

> The amendment considered in Tuggle, however, was not a remedial measure affecting only the measure of damages. It granted parties the right to collect attorney fees when they prevailed in appellate proceedings. The grant of this right, which did not exist prior to amendment, accomplished a change in the substantive law which could not apply retroactively. Appellant, however, previously had the substantive right to recover attorney's fees, Section 627.756, Florida Statutes (1981). The repealer act affected only the amount of money appellant could collect pursuant to that right.
>
> Therefore, we hold that the amendment to Section 627.756 is a remedial statute which may be applied retroactively . . . Id. at 410-411.

The Fourth District examined the relevant Florida authorities and concluded that the removal of the 12.5 percent limitation falls under the established definition of a remedial statute. This well-reasoned opinion is in sharp contrast with the over-generalized statements of the Fifth District in the case at bar. For this reason, the opinion of the Fourth District should be adopted as controlling law, and the Fifth District should be reversed.

POINT IV.

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FAILING TO AWARD PETITIONER'S APPELLATE ATTORNEY'S FEES.

Petitioner filed a Motion for Appellate Attorney's fees pursuant to 9.400 of the Florida Rules of Appellate Procedure. This motion was denied without opinion. Section 627.428 provides that "the appellate court, shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as attorney's fees" in the event that the insured or beneficiary "prevails" on an appeal. As noted in the previous arguments, Section 627.428 is given effect in this particular case through Section 627.756 Florida Statutes (Supp. 1984). In the event that Petitioner persuades this Court that the Fifth District Court of Appeal was in error, Petitioner would be the prevailing party on appeal and would therefore be entitled to an award of a reasonable attorney's fee.

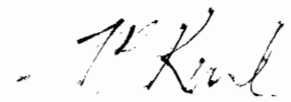
In remanding this cause to the District Court of Appeal, and to the trial court for an award of a "reasonable attorney's fee", the lower courts should consider the "federal loadstar approach" as expounded by this Court and Florida Patient's Compensation Fund v. Rowe, _____ So.2d _____ Nos. 64,459 (Fla. May 2, 1985). This Loadstar Approach would include the computation of fees on a considerably higher rate because of the "contingency risk factor" encountered by the Petitioner as a result of the contingency fee agreement in this case.

Accordingly, this case should be remanded to the District Court of Appeal for a determination of the reasonable amount of appellate attorney's fees due the Petitioner in this cause.

CONCLUSION

BASED UPON the authorities, statutes and arguments set forth in the foregoing brief, Petitioner respectfully requests that this Honorable Court (1) reverse the decision of the Fifth District Court of Appeal; (2) reverse the limited award of attorney's fees by the trial court; (3) remand the case to the trial court for an award of a reasonable fee consistent with the law as of the date of the award; (4) remand the case to the District Court with instructions to award a reasonable appellate attorney's fee under the law applicable at the time the award is made; and (5) award a reasonable attorney's fees to Petitioner for this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to H. DAVID LUFF, ESQ., P.O. Box 753, Orlando, FL 32802, this 1st day of July, 1985.

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