IN THE SUPREME COURT OF THE
STATE OF FLORIDA

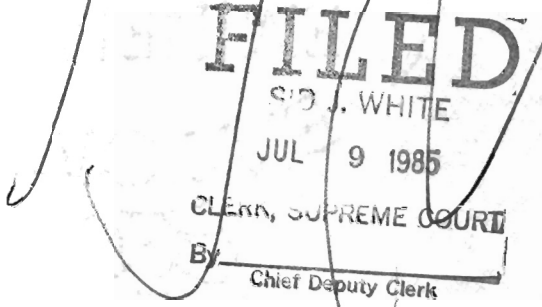
SUPREME COURT CASE NO. 67,059
4TH DCA CASE NO. 84-2041
TRIAL COURT CASE NO. 84-1321

IN RE: ESTATE OF

RANDOLPH A. SKURO,

Deceased.

_____/



ON APPEAL FROM THE DISTRICT COURT
OF APPEAL, FOURTH DISTRICT OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND OF THE FACTS

Appellee agrees with Appellant's statement of the case and of the facts. However, Appellant omits one important point. On page 1 of Appellant's brief, she states that "Prior to his death, Decedent entered into a Contract for Sale for the sale of the Coral Springs home". An issue was raised in the Circuit Court as to the date that the Decedent entered into the contract. The Court's attention is directed to Section 10 of the Stipulated Statement. At the Circuit Court hearing, there was testimony concerning the factual issue as to when Decedent actually signed the contract. There was evidence presented that the Decedent may not have signed the contract prior to his death. However, this factual issue became moot, since Judge Hare did not agree with Appellant's legal argument and decided that the Coral Springs home (hereinafter referred to as the "Property") was homestead. In Section 11 of the Stipulated Statement, the parties to this appeal agreed that if the District Court of Appeal decided as a matter of law that the Property lost its status as homestead, then the District Court of Appeal should order that further proceedings be had in the Circuit Court on the factual issue of whether or not the Decedent did in fact, prior to his death, enter into a contract to sell the Property. Appellee submits that Section 11 of the Stipulated Statement binds the parties in the proceedings before this Court. Thus, if this Court decides as a matter of law that the Property lost its status as homestead, then this Court should order that further proceedings be

had in the Circuit Court on the factual issue of whether or not the Decedent did in fact, prior to his death, enter into a contract to sell the Property.

THE PROPERTY REMAINED HOMESTEAD EVEN THOUGH THE DECEDENT ENTERED INTO A CONTRACT TO SELL IT PRIOR TO HIS DEATH

Our research has failed to reveal any Florida cases dealing with whether real property subject to a contract of sale is homestead for purposes of the descent of homestead under Section 732.401 of the Florida Statutes. However, there are cases applying Florida law dealing with the issue of whether homestead property loses its constitutional protection against forced sale merely because a contract is entered into to sell the homestead. These cases (hereinafter discussed) held that the homestead retains its status as such, thereby entitling it to the constitutional protection against forced sale.

In Beensen v. Burgess, 218 So.2d 517 (Fla. 4th DCA 1969), the plaintiff Burgess purchased real property from Mr. Dunn. The defendants were creditors of Mr. Dunn who had judgments against him which were recorded several years prior to the sale by Mr. Dunn to the plaintiff. The plaintiff sued the defendants to quiet title to the real property. Defendants made several arguments that the real property lost its entitlement to the homestead exemption, thus allowing their liens to attach to the property. The facts of the case reveal that Mr. Dunn and the plaintiff went to contract in August, 1964 and closed in October, 1964. However, Mr. Dunn moved out of the property in September, 1964 and allowed the plaintiff to take possession of the property

at that time. The Fourth District held that this vacating of the property approximately five (5) weeks prior to the closing did not constitute an abandonment of the homestead so as to deprive it of its status as such. The surrender of the property was merely part of the overall sales transaction.

The facts of Brown v. Lewis, 520 F.Supp. 1114 (M.D. Fla. 1981) are similar to those of Beensen v. Burgess, supra. A judgment was entered against Lester D. Brown and Frances M. Brown in 1974. The judgment was recorded. The Browns owned real property which all parties concede was homestead at all times prior to March 7, 1979. On that date, Mrs. Brown (who became the sole owner of the property when Mr. Brown died on June 30, 1978) entered into a contract to sell the property. The sale closed on May 15, 1979. Prior to closing, Mrs. Brown moved to Michigan and established a permanent residence there. The judgment creditors argued that the property lost its status as homestead when Mrs. Brown vacated the property and established permanent residence in Michigan and, therefore, their liens attached prior to the closing of the sale and conveyance of the deed. The Court, citing Beensen v. Burgess, supra, held that the property was protected by the homestead exemption when title was conveyed on May 15, 1979 and, therefore, the judgment never attached to the property.

Both of these cases deal with the homestead status of real property subject to a contact of sale. Both hold that the mere entry by the owner into a contract to sell the property does not affect the homestead status of the property. If it was homestead

before the contract, then it is homestead after the contract. These cases arose because some time after contract, but prior to closing, the owner vacated possession of the property. Both Courts held that a vacating of the property arising as part of a sales transaction does not constitute an abandonment of the property so as to terminate its homestead status.

As stated in 29 Fla. Jur. 2d, Homesteads, §66, citing among other cases this Court's opinion in Barlow v. Barlow, 156 Fla. 458, 23 So.2d 723 (1945):

> "A homestead may be waived only by abandonment or by alienation in the manner provided by law."

Beensen v. Burgess, supra and Brown v. Lewis, supra, clearly hold that the mere entry into a contract to sell does not constitute an abandonment of the homestead. In the case before this Court, the Decedent continued to occupy the Property from the date of contract until the date of his death. It is undisputed that Decedent had not abandoned the Property prior to his death.

As stated in 29 Fla. Jur. 2d, Homesteads, §73, citing this Court's opinion in Menendez v. Rodriguez, 106 Fla. 214, 143 So. 223 (1932):

> "When the estate or interest of the owner in the homestead land terminates the homestead exemption therein of the owner necessarily ceases. Hence, as a general rule, a homestead right is extinguished by a conveyance of the premises by the claimant."

In the case before this Court, the Decedent had not made a conveyance of the Property prior to his death. He had several rights in the Property, such as legal title and the right to

possession. It is undisputed that Decedent did not alienate the Property prior to his death.

The parties have stipulated that, but for the contract of sale, the Property would have been homestead at the Decedent's death (See the last sentence of Section 9 of the Stipulated Statement). The entry into the contract of sale did not constitute an abandonment of the Property; nor did it constitute an alienation of the Property. These are the only grounds upon which homestead property can lose its status as such. The Property was homestead at the date of the Decedent's death.

SINCE THE PROPERTY IS HOMESTEAD FOR PURPOSES OF FORCED SALE, IT IS ALSO HOMESTEAD FOR PURPOSES OF DESCENT

The cases discussed above deal with homestead in the context of its exemption from forced sale. The case before this Court deals with homestead in the context of its devise and descent. The Florida Statutes do not define a homestead for purposes of descent. However, the creditor exemption criteria for homestead are controlling in determining whether property is homestead for purposes of descent and distribution. See Boyer, Florida Real Estate Transactions, Volume 1, Section 21.03, pages 21-67 through 21-68. See also Engel v. Engel, 97 So.2d 140 (Fla. 2d DCA 1957), a case involving the descent of property alleged to be homestead where the Court made the following statement at page 142:

> "We apply the same criteria as would have been applied if a creditor had sought a forced sale of the premises involved and the testator had asserted his homestead exemption. No court would ever have held that it was otherwise than exempt."

See also, Holden v. Estate of Gardner, 420 So.2d 1082 (Fla. 1982), where, at page 1085, this Court held that the use of the

term "homestead" in Section 732.4015 of the Florida Statutes refers to homestead as that term is used in the Florida Constitution. Therefore, the holdings by the Fourth District in Beensen v. Burgess, supra, and by the United States District Court in Brown v. Lewis, supra, that the properties described therein were homestead means that they have that status not only for purposes of exemption from forced sale, but also for purposes of devise and descent as well.

HOMESTEAD STATUS CANNOT BE LOST BY APPLICATION OF THE DOCTRINE OF EQUITABLE CONVERSION

The law is clear that homestead status is lost only by abandonment or by alienation. In this case, neither of these events had occurred at the relevant time (i.e., the date of Decedent's death). Appellant argues that this Court should expand the list of events causing property to lose its status as homestead to include application of the doctrine of equitable conversion. She justifies this result on the basis that homestead status can only inure to a real property interest, that after entry into the contract of sale, the Decedent's interest in the Property was in the nature of personalty, as per the doctrine of equitable conversion, and homestead status cannot attach to personalty. However, Appellant ignores the fact that homestead status can attach to personalty. This Court has held in Orange Brevard Plumbing & Heating Co. v. La Croix, 137 So.2d 201 (Fla. 1962) that for purposes of protection from forced sale, the cash realized from the voluntary sale of homestead real property assumes the character of exempt homestead real property assuming a bona fide intent of the seller to reinvest the cash in another

homestead within a reasonable time. Just because property is classified as personal property rather than real property does not automatically deprive the property of its status as homestead. The Decedent's rights in the Property, after his entry into the contract of sale, certainly would fall within the classification of what Appellant calls "a real property interest" at page 2 of her brief. At the time of his death Decedent had the right to possession of the Property. He also had legal title to the Property. See 29 Fla. Jur. 2d, Homesteads, §19, citing this Court's decision in Hill v. First National Bank, 73 Fla. 1092, 75 So. 614 (1917), where it is stated that:

> "Mere possession without any title whatever is sufficient to support the claim of homestead, where such possession is lawful, as where it is with the consent and on the agreement of the owner."

Also see 29 Fla. Jur. 2d, Homesteads, §18, citing this Court's opinions in Menendez v. Rodriguez, supra; Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 27 So.2d 832 (1946); and Hill v. First National Bank, supra, where the following appears:

> "Although the Constitution limits the quantity of homestead property that may be exempted, it does not define or limit the estates therein to which the exemption may apply. It is established that the claimant need not hold a fee simple title in the property, nor even a freehold estate therein. Indeed, the homestead exemption extends to any right or interest the head of a family may hold in land, including the right of beneficial, peaceful and uninterrupted use and enjoyment of the property."

Appellee acknowledges the doctrine of equitable conversion in the State of Florida. At 22 Fla. Jur. 2d, Equitable Conversion, there appears the following definition of equitable conversion:

> Equitable conversion is that constructive alteration in the nature or character of property whereby, in equity, real estate is for certain purposes considered as personalty, or whereby personalty, for similar considerations is regarded as real estate, and in either instance, it is deemed to be transmissible or descendible in its converted form. The doctrine of equitable conversion was adopted for the purpose of giving effect to the intention of the testator, settlor or contracting parties, and is not a fixed rule of law but proceeds on equitable principals that take into account the result to be accomplished. (27 Am. Jur. 2d, Equitable Conversion §1).

Note that the doctrine of equitable conversion is applied for certain purposes. It has been applied to determine the rights of a buyer and a seller of real property during the period after contract and before closing. See 44 Fla. Jur. 2d, Real Property Sales and Exchanges, §121, which states that:

> "Under ordinary common law principles, the doctrine of equitable conversion becomes operative on the execution of an agreement to convey title to realty. The purchaser immediately becomes the beneficial owner, and the seller retains only naked legal title as security for payment of the purchase price. For example, on the theory that the doctrine of equitable conversion is applicable to an executory contract for the purchase and sale of land, in which the land is taken later by eminent domain, execution of such contract has the effect of vesting the equitable estate in the purchaser, leaving in the seller the naked legal title, held in trust for the purchaser and as security for the deferred purchase price."

As discussed in Boyer, Florida Real Estate Transactions, Volume 1, Section 4.01 at pages 4-2 to 4-4, from the doctrine of equitable conversion, there is derived the principle of law that the buyer bears the loss or destruction of a building or other improvement that occurs prior to the delivery of the deed but after the contract, in the absence of statute or agreement to the contrary. The doctrine also provides the basis for the proposition that a contract vendee's interest descends to his heirs upon

his death and does not pass into his estate. See 17 Fla. Jur. 2d, Decedents' Property, §44.

The doctrine of equitable conversion has never been applied to deprive property of its status as homestead. It should not be so applied. The doctrine is designed to give effect to the intention of the parties. The intention of the parties is not a relevant factor in determining whether or not property is homestead, absent any issue as to abandonment. Homestead is a status conferred on property if certain conditions are present. All of these conditions are present in this case (at least prior to the contract of sale), as stipulated by all parties in Section 9 of the Stipulated Statement. Homestead status is lost only by abandonment or alienation. Neither event occurred here. As stated by this Court in Holden v. Estate of Gardner, supra, at page 1084:

> "The concept of homestead rights did not arise in common law; rather these rights, which restrict the alienability of private property, are a creation of constitutional and statutory law."

Therefore, common law concepts such as equitable conversion should not be allowed to override the laws of this State involving homestead, expressed in the Florida Constitution and in its duly enacted statutes. As stated by Judge Glickstein, in his concurring opinion in this case:

> "Third, the fact that homestead status is conferred by the Constitution and statute is most significant, in my view. The former is the ultimate living expression of an organized society. The latter is the voice of that society's surrogates. Equitable conversion is not the collective voice of Floridians exercising their rights by way of the ballot and its purpose is entirely different and viewed from a different plane."

THE CASES CITED BY APPELLANT DO NOT SUPPORT THE PROPOSITION THAT THE ENTRY INTO A CONTRACT FOR SALE OF HOMESTEAD CAUSES THE PROPERTY TO LOSE ITS STATUS AS HOMESTEAD

The Appellant cites Buck v. McNab, 139 So.2d 734 (Fla. 2d DCA 1962) for the proposition that a court can grant a vendee specific performance of a contract for the sale and purchase of real property even though the vendor dies prior to closing but after entering into the contract. However, Buck has nothing to do with the issue for resolution before this Court. That issue is whether the Property retained its status as homestead in light of the contract entered into by the Decedent and the buyer. The Buck case did not involve homestead property. It involved vacant lots. The Buck case deals with the Florida claims statute and the doctrines of laches and estoppel. The Buck case may be relevant to the issue of whether the contract entered into by the Decedent is enforceable by the buyer in view of the Decedent's death. However, that issue is not before this Court. This Court need not and should not concern itself with that issue in determining the homestead question.

The case of Arko Enterprises, Inc. v. Wood, 185 So.2d 734 (Fla. 1st DCA 1966) deals with the rights of various parties to a real estate contract where prior to closing the property was acquired by a governmental agency under its power of eminent domain. The property involved was not homestead. It was commercial real estate. Apparently, the contract between the parties did not deal with the issue of condemnation. The court held, under the principals of equitable conversion, that the condemnation of the property did not justify the rescission of

the contract by the vendee. Therefore, the vendee was liable to the vendor.

That portion of the Arko opinion quoted by the estate in its brief at pages 3 and 4 sets forth the various rights acquired by a contract vendee under the doctrine of equitable conversion. The First District states that the interest acquired by the vendee would have been sufficient to support a claim for homestead. Whether or not that may be true, it is irrelevant to the case before this Court because, in this case, the issue is whether the vendor retains his homestead rights, not whether the vendee acquired homestead rights by entering into the contract. The issue of whether a vendor retains his homestead rights upon entering into a contract to sell homestead property has already been decided in Florida (in the affirmative) in Beensen v. Burgess, supra, and in Brown v. Lewis, supra. Further, the underlined portion of the Arko opinion quoted by the Appellant is dicta. It is not relevant to the facts of the case, nor necessary to support the Court's decision. Nor does the First District cite any authority for its statement.

In Estate of Sweet, 254 So.2d 562 (Fla. 2d DCA 1971), the decedent's will disposed of all of her real property to her son. Prior to her death, she entered into a contract to sell her condominium apartment for cash. It should be noted that there is nothing in the facts to indicate that the condominium apartment was homestead prior to the contract. She died before closing. The sale was closed after her death by her personal representative. The issue before the Second District was whether the cash

passes to the son under the provision of the will devising real property, or does it pass as part of the residuary bequest to other beneficiaries. The Court held that the cash passed as part of the residuary. The decision of the Second District in Sweet is based on effectuating the decedent's intent. This is expressed by the Second District as follows at pages 563-564:

> "The testator contracted to sell the property before her death, and the contract was enforceable against her and binding upon her heirs, devisees and personal representatives. Upon consummation of the sale, she may have increased her son's testamentary gifts or may have conferred other benefits upon him; we have little ground for speculation. One thing is clear: she intended to convert a particular item of real property into money, and she expressed no intention that her son should have any money outright. Had she managed to close the sale and collected the purchase money the day before she died, the devise to her son would have not carried with it the sales proceeds. In the absence of a controlling statute [emphasis supplied] we find no substantial reason why it should do so when the closing was interrupted by her accidental death and her contract obligation had to be discharged by her personal representative."

Note the underlined portion. The facts before this Court deal with a controlling statute, i.e., Section 732.401. The issue in the case before this Court is whether Decedent's action of agreeing to sell homestead property causes that property to lose its status as such. The Appellee has argued that the Property retained its status as homestead at the time of Decedent's death. In Sweet, the Court was interpreting a provision in the decedent's will. Sweet has no relevance to the issue before this Court which is the construction of a constitutional and statutory provision and not the construction of a will. It should be noted that Section 732.606(2)(a) of the Florida Statutes appears to change the result reached by the Court in Sweet.

None of these three cases involved homestead property, or decided the issue of whether or not property is homestead, or deal with any rights arising out of the status of property as homestead. The one mention of homestead in the Arko case had nothing to do with the issues before the Court in that case and addressed the homestead rights of the vendee. It is the homestead rights of the vendor that is the issue before this Court. The Appellee does not quarrel with the decisions reached in any of these three cases. However, the Appellee contends that the cases have no relevance to the issue before this Court and do not give this Court any guidance regarding its resolution. We believe that such guidance is provided by the cases and reasoning set forth earlier in this answer brief.

JUDGE LETTS' DISSENT IGNORES THE WELL ESTABLISHED PRINCIPLE OF LAW THAT EXCEPTIONS TO THE HOMESTEAD EXEMPTION SHOULD BE STRICTLY CONSTRUED AND CONSTITUTIONAL LIMITATIONS ON ALIENATION OF HOMESTEAD MUST BE STRICTLY CONSTRUED IN FAVOR OF THE HOMESTEAD CLAIMANT

Homestead status affects a property owner's rights concerning the ability to encumber, alienate and devise the property. The homestead provision is to be construed liberally for the benefit of those whom it was designed to protect. M.O. Logue Sod Service, Inc. v. Logue, 422 So.2d 71, 72 (Fla. 2d DCA 1982), rev. denied, 430 So.2d 451 (Fla. 1983). Exceptions to the exemption should be strictly construed. Constitutional limitations on alienation of homestead must be strictly construed in favor of the homestead claimant. Graham v. Azar, 204 So.2d 193 (Fla. 1967); Heath v. First National Bank in Milton, 213 So.2d 883 (Fla. 1st DCA 1968). Judge Letts would allow the doctrine of

equitable conversion, a doctrine created by case law, for purposes entirely different from those sought to be accomplished by the homestead exemption, to be used to create an exemption to the constitutionally mandated homestead status. Such a result would be contrary to this Court's prior holdings concerning limitations on exceptions to the homestead exemption.

DECEDENT'S INTENT AS EXPRESSED IN HIS WILL IS IRRELEVANT TO A DETERMINATION OF THE ISSUE BEFORE THIS COURT

The Florida Constitution is clear. It provides that homestead shall not be subject to devise if the owner is survived by minor children. To devise means to dispose of property by will. See Fla. Stat. §731.201(8). Fla. Stat. §732.4015 also provides that the homestead shall not be subject to devise if the owner is survived by minor children. Fla. Stat. §732.401 provides that if not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property. Fla. Stat. §732.103(1) provides that if there is no spouse then the entire intestate estate passes to the lineal descendents.

Appellant concedes that the Property was homestead prior to the Decedent's entry into the contract. Presumably Appellant would agree that the Property would be divided among all of the Decedent's four children (both minors and adults) had Decedent died prior to signing the contract, notwithstanding the attempted devise of the Property set forth in the will. Conceding, for purposes of argument only, that Decedent wanted the minor children to get the benefits of the Property when he died to the exclusion of the adult children, the Decedent was prohibited by

the Florida Constitution from accomplishing this in the manner that he sought to do so, i.e. by devise. This is the consequence of homestead status. It prohibits the Decedent from doing what he wanted to do. In arguing, as do Judge Letts and the Appellant, that homestead status should not apply to the Property because it upsets the Decedent's testamentary scheme, they lose sight of the fact that if the Property is homestead it is not subject to any testamentary scheme. Exceptions to homestead status should not be created to give effect to a decedent's intent as expressed by his or her will. To do so would destroy the very essence of the doctrine.

No one would quarrel with the policy of upholding the intent of a testator. However, testator intent is meaningless where the testator seeks to dispose of property the devise of which is prohibited by the Florida Constitution. The making or writing of a will by a testator is not a common law right, but exists by virtue of statute. The power to dispose of property by will is not an inherent right, but is one derived from legislation. The right is at all times subject to legislative control and regulation. Broad and comprehensive as the right to dispose of property by will is, the same authority that bestows the right may take it away altogether, or may limit and circumscribe it. Persons making wills are chargeable with knowledge of the law limiting testamentary rights. See In re Hatfield's Estate, 153 Fla. 817, 16 So.2d 57, 58 (1943).

The Florida Constitution prohibits the devise of homestead. To argue that the result reached in this case by the District

Court of Appeal should be reversed because it upsets the Decedent's intent ignores the fact that the Decedent never had the right to dispose of the Property. The doctrine is designed to defeat the Decedent's will.

CREATING THE EXCEPTION TO HOMESTEAD STATUS CALLED FOR BY THE APPELLANT WOULD BE CONTRARY TO THE INTENT OF PROTECTING THE FAMILY.

There is nothing in the law that supports Appellant's statement made on page 6 of her brief that

> "The prohibition against the devise of homestead property contained in the constitution is clearly intended to protect those family members residing in the 'home' and dependent upon the head of the household for support."

Fla. Stat. §732.401 and §732.103(1) provides that all lineal descendents (assuming there is no surviving spouse) inherit the homestead. It does not leave the homestead only to the minor lineal descendents.

The result reached by the District Court of Appeal does not destroy the family unit as the Appellant states at page 6 of her brief. It enhances the family unit by treating all persons who bear an identical relationship to the decedent in an equal manner. The issue in this case has been found by the District Court of Appeal to be one of great public importance. The result called for by the Appellant would operate to create an exception to homestead status which could achieve the undesirable result of allowing creditors to seize the property and allowing a testator to devise the property to persons outside of the family unit. Judge Barkett's footnote in her opinion in the District Court of Appeal makes pertinent observations on this point.

"The dissent suggests that the doctrine of equitable conversion should be applied to defeat the homestead status of the property in order to exclude the adult siblings and allow the minor children to inherit the property pursuant to the will. The error in this approach is that the means suggested would not necessarily achieve the desired result in this case, and, more importantly, would achieve the undesired result in future cases. If equitable conversion were to be applied, there would be no real property for the minor children to inherit. As the dissent points out 'the seller's [decedent's] remaining interest until the closing, is considered to be mere personalty . . . As such, it would be includable in the probate estate and have no homestead status as real estate.' Since it would be a part of the probate estate, it would be subject to the creditors of the estate. The record in this case leaves us in the dark as to whether any estate creditors exist. In any case, where creditors do exist, the application of the doctrine would not ensure that the homestead property or proceeds therefrom would be shared only by the siblings. Indeed, in addition to subjecting the proceeds to creditors' claims, which might diminish or eliminate such proceeds, they would be subject to the decedent's will, which might leave the property or proceeds to anyone other than the decedent's spouse or children. To hold, as the majority does, that equitable conversion does not apply to homestead property at least ensures that the property or proceeds are preserved even though in some cases they must be shared by all the lineal descendents of the deceased instead of only the minor descendents. It is our view that this was the intent of the constitutional and statutory homestead provisions."

CONCLUSION

At the time of his death, the interest of the Decedent in the Property was homestead, notwithstanding that the Decedent entered into a contract to sell the Property. The Property should pass to the Decedent's four children pursuant to Section 732.401 of the Florida Statutes and not pursuant to the terms of his will. The order of the Circuit Court and the opinion of the District Court of Appeal should be affirmed.

CERTIFICATE OF SERVICE

I certify that a true and complete copy of the Appellee's Answer Brief was mailed on the 5 day of July, 1985, to HANS FEIGE, ESQ., Feige & Cramer, 10191 West Sample Road, Suite 211, Coral Springs, Florida 33065 and to RICHARD G. COKER, JR., ESQ., 1107 Southeast 4th Avenue, Fort Lauderdale, Florida 33316.

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