IN THE SUPREME COURT OF FLORIDA

CASE NO. **67,081**

DONALD RASMUSSEN,

Petitioner,

-vs-

SOUTH FLORIDA BLOOD SERVICE, INC.,

Respondent.

BRIEF OF AMICUS CURIAE
DADE COUNTY MEDICAL ASSOCIATION,
FLORIDA MEDICAL ASSOCIATION
and AMERICAN MEDICAL ASSOCIATION

B.J. ANDERSON
KIRK JOHNSON
American Medical Association
535 North Dearborn Street
Chicago, Illinois 60610

JOHN THRASHER
Florida Medical Association
801 Riverside Avenue
Jacksonville, Florida 32203

LAW OFFICES OF ROGER G. WELCHER
1033 City National Bank Bldg.
25 West Flagler Street
Miami, Florida 33130

TALBURT, KUBICKI, BRADLEY & DRAPER
701 City National Bank Building
25 West Flagler Street
Miami, Florida 33130

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STATEMENT OF THE CASE AND FACTS

This case arises out of an automobile accident which took place in 1982. Donald Rasmussen sued William Deloatche and Leonee Levia Monterroso for personal injuries sustained in that accident.

While hospitalized for his injuries sustained in the accident, RASMUSSEN received fifty-one units of blood from the South Florida Blood Service. He was later diagnosed as having acquired immune deficiency syndrome [hereinafter AIDS] and died as a result of the disease.

In the underlying litigation, Petitioner seeks to prove that the source of RASMUSSEN'S disease was the blood transfusions. To that end, RASMUSSEN has obtained the expert testimony of Dr. Kenneth Katzen that in his opinion the AIDS was caused by the multiple blood transfusions received by RASMUSSEN.

In an attempt to bolster this expert opinion, RASMUSSEN served a subpoena duces tecum on SOUTH FLORIDA BLOOD SERVICE, INC. [hereinafter SFBS] which sought the names and addresses of the fifty-one blood donors. SFBS moved to quash the subpoena or for a protective order. The trial court denied the motion and ordered production of the records. On petition for certiorari, the Third District Court of Appeal quashed the order of the trial court. South Florida Blood Service v. Rasmussen, 467 So.2d 798 (Fla. 3d DCA 1985).

The court below ruled that the privacy interests of the donors, when combined with the societal interest in maintaining a healthy volunteer blood donation system, outweighed the interest of RASMUSSEN in obtaining the discovery. Pursuant to Article V, Section 3(b)(4) of the Constitution of the State of Florida, the court certified the following question to this court as being one of great public importance:

> Do the privacy interests of volunteer blood donors and a blood service's and society's interest in maintaining a strong volunteer blood donation system outweigh a plaintiff's interest in discovering the names and addresses of the blood donors in the hope that further discovery will provide some evidence that he contracted AIDS from transfusions necessitated by injuries which are the subject of his suit?

The Dade County Medical Association, the Florida Medical Association and the American Medical Association[1] filed a motion with this Court to grant them leave to file a brief as Amicus Curiae which was granted by order of this court dated June 25, 1985.

1/ The three associations will be referred to hereafter as ASSOCIATIONS.

POINTS INVOLVED ON APPEAL

POINT I

WHETHER THE THIRD DISTRICT COURT OF APPEAL PROPERLY BALANCED THE POTENTIAL HARM IN DISCLOSURE OF DONORS' IDENTITIES AGAINST RASMUSSEN'S CLAIMED NEED FOR THE DISCOVERY.

POINT II

WHETHER THE INTEREST OF DONORS IN PRIVACY MAY BE PROTECTED BY THE COURTS; IDENTITY OF DONORS NEED NOT BE REVEALED BEFORE COURT MAY PROTECT THOSE RIGHTS.

POINT III

WHETHER RASMUSSEN HAS DEMONSTRATED AN INTEREST SUFFICIENT TO OUTWEIGH THE SOCIETAL OR PRIVACY INTERESTS IN DENYING THE DISCOVERY.

SUMMARY OF ARGUMENT

The Third District Court of Appeal properly applied a balancing test to weigh the privacy interests of the donors and society's interest in maintaining a healthy blood supply against the interest of RASMUSSEN in obtaining the names and addresses of blood donors. The court correctly determined that RASMUSSEN'S interest did not outweigh the privacy and societal interests implicated by the discovery sought.

The majority below properly considered and weighed the interest of society in maintaining a healthy and stable volunteer blood donation system. Allowing the disclosure of the names and addresses of the blood donors in this or any similar case could foreseeably have an adverse impact on the integrity of an all volunteer blood donation system.

The health of Florida's citizens depends, in large part, on a healthy and stable blood supply. Any threat to the blood supply is a direct threat to the public health. There is no question that an all volunteer blood donation system is a vital part of maintaining a safe blood supply.

Neither RASMUSSEN nor the dissent below directly addressed the concerns of the majority that allowing the discovery in this case could have an adverse impact on the stability of the blood supply. The arguments supporting the disclosure of the names and addresses of blood donors do not take into account the hysteria demonstrated by the public where AIDS is concerned. Because of this hysteria, the probability

of a "chilling effect" on the volunteer blood donation system cannot be discounted. This concern should not be discounted merely because the fears are hypothetical as asserted by the dissent below. The magnitude of the potential harm to society is too great to allow the discovery and constitutes an unjustifiable risk to the health of the population.

The Third District Court of Appeal correctly held that the individual blood donors who were strangers to the litigation had legitimate privacy interests which were ripe for adjudication and which warranted protection. Courts in Florida and elsewhere have recognized that strangers to the litigation warrant protection from intrusive discovery.

In this case, it is clear that any meaningful discovery to RASMUSSEN would necessarily include an inquiry into intimate details of each donor's life, including sexual preferences and practices and possible drug usage. Any such probe to determine whether one of the donors is in a "high risk group" would be unjustified. The types of personal intimacies obviously implicated by such an inquiry would encroach upon the zone of privacy entitled to protection from governmental intrusion. Because of the nature of the disease and the ramifications flowing from a suspicion that one is a carrier of AIDS, the only adequate protection available is a complete denial of the discovery.

RASMUSSEN has failed to demonstrate an interest in the discovery which would outweigh the privacy and societal interests addressed by the majority below. The evidence sought is not sufficiently probative to justify the intrusive discovery.

ARGUMENT

POINT I

THE THIRD DISTRICT COURT OF APPEAL PROPERLY BALANCED THE POTENTIAL HARM IN DISCLOSURE OF DONORS' IDENTITIES AGAINST RASMUSSEN'S CLAIMED NEED FOR THE DISCOVERY.

The Third District Court of Appeal was correct when it balanced the interests of the plaintiff against the public's interest in maintaining the integrity of a voluntary blood donation system and the privacy interests of the donors in determining the propriety of the lower court's discovery ruling. See Dade County Medical Association vs. Hlis, 372 So.2d 117 (Fla. 3d DCA 1979). Such a balancing is appropriate and necessary where there are competing interests of the nature presented in this case. North Miami General Hospital v. Royal Palm Beach Colony, Inc. 397 So.2d 1033 (Fla. 3d DCA 1981); Segal v. Roberts, 380 So.2d 1049 (Fla. 4th DCA 1979); Hlis, supra.

The majority below recognized that allowing the requested discovery in this case could have an adverse impact on the integrity of an all volunteer blood donation system. This combined with the privacy interests of the donors involved was found to outweigh RASMUSSEN'S interest in the discovery sought. South Florida Blood Service, Inc. v. Rasmussen, 467 So.2d 798, 804 (Fla. 3d DCA 1985).

The ASSOCIATIONS have a pertinent interest in maintaining a healthy and stable blood supply, and in ensuring the

highest standards for the nation's blood banks. There is no question that the continuing availability of a healthy blood supply is of vital importance to the health of South Florida and the nation. See National Blood Policy, 39 Fed. Reg. 32701 (Sept. 10, 1974); Fla. Stat. §381.601(4)(1983). There is no known substitute for blood from a healthy human being. It can neither be produced in a laboratory, nor can it be manufactured outside of the human body. While white blood cells may be stored, it is impossible to store red blood cells. There is no question that blood transfusions save the lives of many patients every year. Without an adequate source of blood, a physician's available options in the course of medical treatment would be severely limited. Without blood transfusions, many patients, including hemophiliacs and victims of anemia and cancer, would die needlessly. No doubt, many more would suffer.

In this regard, it is also important to maintain a steady and adequate local blood supply. If the blood service is unable to maintain a steady local blood supply from volunteer donations, then it would be forced to again rely on paid donors. There is no question that this would increase the risk inherent in blood transfusions, since there is a greater risk that the blood of paid donors would be contaminated with infectious diseases. National Blood Policy, 39 Fed. Reg. at 32702. Even in a paid donor system, however, it is doubtful that many willing donors would be found if they knew that they could be

contracted AIDS or another infectious disease.

The only alternative to a paid donor system would be to rely on other communities or other countries for blood. However, the medical systems in other countries are not comparable to those in the United States. It would be impossible to control the quality and continuing availability of blood from those sources. Under either of these alternatives, the health of the population would be at risk.

The majority below recognized and relied upon the fundamental premise that the health of the nation depends upon a stable and adequate blood supply. This premise has not been disputed.

The dissent below, and RASMUSSEN here, take issue with the majority's finding that allowing the discovery in this case could have an adverse affect on the volunteer blood system. Rasmussen, supra at 806. Neither the dissent nor RASMUSSEN, however, have directly addressed, much less answered, the concerns of the majority.[2]

The dissenting opinion totally discounts the possible chilling effect which allowing inquiry into the private affairs of donors would have on the volunteer blood donation system. The dissent accuses the majority of presenting "a parade, indeed a carnival of horribles." Rasmussen, supra at 806. The

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2/ MIAMI HERALD totally ignored these concerns in its amicus brief.

dissent's position does not take into account the enormity of the hysteria surrounding the disease. The dissent and RASMUSSEN also overlook widely-publicized documented drops in the blood supply which resulted from an unfounded rumor that AIDS could be contracted by donating blood. CCBC Newsletter (February 1, 1985) at 4; Public Health Service, Department of Health and Human Services, "Donate Blood Regularly" (December 1984).

RASMUSSEN has argued that the names and addresses of donors have been disclosed in past litigation and that this fact somehow precludes the SFBS from resisting discovery in this case. Brief of RASMUSSEN, p.8-9. The three cases relied on by RASMUSSEN are clearly distinguishable and cannot serve as precedent for the discovery sought. See Tufaro v. Methodist Hospital, Inc., 368 So.2d 1219 (La. App. 1979); Moore v. Underwood Memorial Hospital, 147 N.J. Super. 252, 371 A.2d 105 (1977); Gilmore v. St. Anthony Hospital, 598 P.2d 1200 (Okla. 1979).

First, in each of the three cited cases, unlike this case, the blood bank was a party, and the procedures utilized by the supplier in collecting blood were directly in issue. Id. Since the blood supplier was a party to the action, the donors, if questioned at all,[3] were deposed or questioned about the procedures of the blood supplier in collecting blood and not about the intimate details of the donor's sexual

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3/ In Gilmore, supra at 1202, the court notes that the donor was identified as a "paid donor," but there was no evidence to show whether the donor was in a "high risk group" for hepatitis.

preferences and possible drug abuse. See, e.g., Tufaro, supra. In this case, the SFBS is not a party to the litigation, and there has been no allegation of negligence on the part of the blood service. In light of this fact, the charges now leveled by RASMUSSEN and the HERALD that the SFBS is acting out of some "self-motivated interest" in avoiding questioning regarding its procedures ring hollow. See Brief of RASMUSSEN, p.9; Brief of MIAMI HERALD, p.19.

Secondly, in all three cited cases, there was no issue addressed regarding the propriety of the production of donor identities. Each opinion is silent as to the circumstances surrounding the disclosure of the donors names within the litigation. It is not even known whether the disclosure by the blood supplier was voluntary or compelled. Moreover, since the supplier was a defendant in each of those cases, the identities of the donors were of particular relevance. The disclosure of the identities of donors, whether voluntary or compelled by a trial court, within the context of a lawsuit against a blood supplier cannot serve as precedent for compelling the same disclosure in this case.

Furthermore each of the three cases relied on by RASMUSSEN involved a paid-donor blood collection system. None of the cases deal with disclosure of the identity or questioning of a volunteer blood donor with altruistic motives in donating blood. RASMUSSEN has posed the rhetorical question: "Why should we now imagine such a threat [of a chilling effect]?" Brief of RASMUSSEN, p.9. Quite simply, the potential for a

chilling effect on the voluntary blood system is present in this case, as opposed to others, because the hysteria surrounding the AIDS crisis today is unmatched in modern history. If volunteer blood donors thought that they could later be questioned, deposed, or otherwise investigated by civil litigants as a result of their altruistic act of giving blood, this prospect could foreseeably act as a deterrent to those who would normally donate blood. This when coupled with the implication that the donor is a carrier of AIDS, whether true or not, could effectively shut off volunteer donations.[4] Any obstacle to voluntary blood donation could easily result in a drastic reduction of the nation's blood supply and therefore should be avoided at all costs.

Finally, none of the cases relied upon by RASMUSSEN deal with an issue as emotionally charged and hysteria-producing as AIDS. This fact alone distinguishes any prior case where the identities of donors have been made public within the scope of the litigation.

In any event, the gravity of the potential harm in allowing the disclosure of donor identities is so great that allowing the discovery because the consequences are deemed "hypothetical" would constitute an unjustifiable risk to the health of the citizens of the state. Rasmussen, supra at 807. (Dissenting opinion.)

4/ The public's ostracism of anyone suspected of having AIDS has been well documented. See Rasmussen, supra at 800.

The preservation of human health and the institution of blood banking must be given paramount consideration in determining whether the records sought should be produced to a civil litigant. The importance of these concerns clearly outweighs any interest of RASMUSSEN in obtaining the names and addresses of blood donors.

POINT II

INTEREST OF DONORS IN PRIVACY MAY BE PROTECTED BY THE COURTS; IDENTITY OF DONORS NEED NOT BE REVEALED BEFORE COURT MAY PROTECT THOSE RIGHTS.

Florida courts have held that the privacy interests of strangers to the litigation warrant protection. Argonaut Insurance Company v. Peralta, 358 So.2d 232 (Fla. 3d DCA), cert. denied, 364 So.2d 889 (Fla. 1978); American Health Plan, Inc. v. Kostner, 367 So.2d 276 (Fla. 3d DCA 1979); Leikensohn v. Cornwell, 434 So.2d 1030 (Fla. 2d DCA 1983). Courts in other jurisdictions have likewise recognized that strangers to the litigation, such as the donors in this case, may be protected from intrusive discovery. See e.g., Ziegler v. Superior Court of County of Pima, 134 Ariz. 390, 656 P.2d 1251 (App. 1982); Marcus v. Superior Court of Los Angeles County, 18 Cal. App.3d 22, 95 Cal. Rptr.545 (1971); Parkson v. Central DuPage Hospital, 105 Ill. App.3d 850, 435 N.E.2d 140 (1982).

In Marcus v. Superior Court of Los Angeles County, supra, the court held that a discovery order compelling production of the names and addresses of other patients to whom the defendant doctor had given certain testing was improper. The court noted that "the issue [was] of some importance not so much to the parties as to third persons whose privacy is at stake." Despite the fact that the plaintiff in that case urged that he sought only the names and addresses of other patients,

the court found:

> In substance, the purpose of giving plaintiff this information is to enable his investigators to seek out and interrogate Dr. Marcus' other patients and try to persuade them to discuss their experiences with the doctor.

Although the decision was grounded on the physician/patient privilege, the court ruled that the only way to protect the privacy interests of the other patients was to enter a writ of prohibition ordering that the discovery not be had.

Despite the attempts of the Miami Herald to show otherwise, it is abundantly clear that petitioner does not seek only the names and addresses of the donors, but rather wishes to conduct more extensive inquiry. In this regard, RASMUSSEN states: "Plaintiff's primary source of contrary evidence _begins with_ the discovery of names and addresses of his donors." Brief of RASMUSSEN, page 2. Also, the dissent states:

> ... I can think of no reason why the fifty-one persons would have any objection whatsoever to Rasmussen's relatives having their names - if they are not within one of the risk groups, _a fact which would likely immediately become obvious to the plaintiff's lawyer without any further inquiry or intrusion of any kind._ (emphasis supplied.)

Rasmussen at 805. However, the dissent does not elucidate on how one can determine from a name and address whether or not a

person belongs to a high-risk group. Certainly, sexual preferences and intravenous drug usage is not something which can be gleaned from a name and address.

The nature of the disease makes it clear that any "meaningful" discovery to RASMUSSEN includes the opportunity to question the blood donors, perhaps at length, about their past. This inquiry would necessarily include exploring sexual preferences and practices, as well as possible drug usage. Since the blood in question was given more than three (3) years ago, these donors would be subject to present scrutiny concerning behavior in the distant past. Assuming arguendo, that one of the donors was or is a member of a "high risk group," that would mean that fifty (50) persons would have been subjected to needless embarassment.

The MIAMI HERALD vehemently argues that there are no "personal intimacies" in this case sought to be disclosed. Brief of MIAMI HERALD, p.13. The names and addresses of blood donors, however, would be absolutely worthless to petitioner without the opportunity to depose or otherwise investigate the backgrounds of the donors. Given the probability that these donors will be deposed if petitioner is allowed the requested discovery, then there is a privacy interest which is ripe and warrants judicial protection.

The disclosure obviously sought in this case is not just disclosure of the decision to give blood; rather, the implications of the discovery sought go directly to the types

of personal matters protected from governmental intrusion by the courts, the Constitution and the legislature. See, Whalen v. Roe, 429 U.S. 589, 598-600, Florida Board of Bar Examiners Re: Applicant, 443 So.2d 71, 76 (Fla. 1983); Argonaut, supra; Art. I, §23, Fla. Const.

Significantly, the legislature has recognized the privacy rights of persons who may suspect that they have AIDS. Fla. Stat. §381.606 (1985). This statute recognized the potential for discrimination against AIDS victims and seeks to prevent this by attaching a criminal penalty to the disclosure of results of seriological testing. Furthermore, the statute penalizes the use of such test results in determing insurability or suitability for employment. Fla. Stat. §381.606(5) (1985). By the enactment of this statute, the legislature has recognized and provided protection for privacy interests similar to those asserted here on behalf of the donors.

Adequate protection of strangers to the case may well require the complete denial of the requested discovery. See, e.g., Argonaut, supra. In the instant case, the majority properly held that a complete denial of discovery was "necessary to ensure the protection of both the donors' privacy interests and society's interest in a strong and health blood donation program." Rasmussen, supra at 809.

In this case, no probe into the donors' private lives is justified. Moreover, there are no protective measures available which would be adequate to protect the donors. Even if it

is held that the privacy interests of the individual donors may not be asserted by any other party,[5] in the interest of judicial economy, it does not make sense to require that fifty-one (51) motions for protective order be filed (assuming the donors are aware of their right to so file) before the privacy interests are adjudicated. See Brief of MIAMI HERALD, p.20.

5/ But see, Argonaut, supra.

POINT III

RASMUSSEN HAS NOT DEMONSTRATED AN INTEREST SUFFICIENT TO OUTWEIGH THE SOCIETAL OR PRIVACY INTERESTS IN DENYING THE DISCOVERY.

RASMUSSEN and the HERALD submit that the discovery is necessary to petitioner's recovery. They have failed, however, to make a showing of why the discovery is critical, aside from saying "they need it because they need it."

The majority below recognized that the probative value of the discovery sought by RASMUSSEN was dubious at best. Rasmussen, supra at 801. The majority noted that since the SFBS has already determined that none of the fifty-one (51) donors has been diagnosed as having AIDS, the only possible value of the requested discovery would be to demonstrate that one or more of the donors is in a "high risk group."[6] This alone would not prove that DONALD RASMUSSEN contracted AIDS from blood donated by one in a "high risk group" since not all members of a risk group are carriers of AIDS. Furthermore, not all persons who are silent carriers of AIDS necessarily belong to one of the obvious high risk groups. With fifty-one donors, the combination of possibilities is endless: There is absolutely no way to prove that one or more of the donors gave blood which eventually caused DONALD RASMUSSEN to contract

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6/ Identified by the majority below as homosexual or bisexual males and intravenous drug users. Other groups identified as being at risk: hemophiliacs, heterosexual partners of AIDS victims and blood transfusion recipients. Rasmussen, supra at 800.

AIDS. The only way to affirmatively exclude the possibility that any one of the donors is an AIDS carrier is to require the fifty-one persons to submit to blood tests to determine the presence or absence of AIDS antibodies. However, even this intrusion would not produce probative evidence which would assist plaintiff in the prosecution of his case. Even assuming that plaintiff can prove that one or more of the donors presently is a carrier of AIDS antibodies, this would not prove that the same person was a carrier of AIDS over three years ago when the blood in question was donated. Therefore, even if plaintiffs were allowed to pursue the inquiry to its logical extreme, the evidence produced would not be sufficiently probative to justify the intrusive discovery or to outweigh the societal and privacy interests outlined above.

The majority further noted that RASMUSSEN already has the benefit of expert medical testimony regarding the probable cause of RASMUSSEN'S AIDS. Rasmussen, p.801. Petitioner and the MIAMI HERALD obviously discount the weight of the testimony of this expert, for this fact was mentioned in neither brief. With causation already established by way of expert testimony, there is absolutely no justifiable reason to compel the production of the names and addresses of the individual donors, much less to allow any further inquiry.[7].

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[7]/ There is no question that requiring the disclosure of the identities of the fifty-one donors for the purpose of "double-checking" the determination by the SFBS that none of the donors has been diagnosed as an AIDS victim would be unjustified. North Miami General Hospital v. Royal Palm Beach Colony, supra; Williams v. Thomas Jefferson University, 343 F.Supp. 1131 (E.D. Pa. 1972).

CONCLUSION

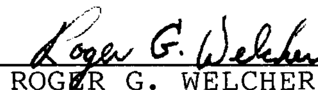
The interest of society in maintaining a healthy blood supply when coupled with the privacy interests of the individual donors outweighs any interest of RASMUSSEN in the disclosure of the names and addresses of the fifty-one blood donors. The question certified by the Third District Court of Appeal should be answered in the affirmative.

Respectfully submitted,

B.J. ANDERSON, ESQUIRE
KIRK JOHNSON
American Medical Association
535 North Dearborn Street
Chicago, Illinois 60610

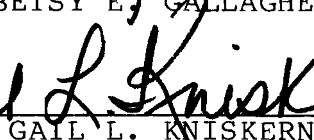
JOHN THRASHER, ESQUIRE
Florida Medical Association
801 Riverside Avenue
Jacksonville, Florida 32203

LAW OFFICES OF ROGER G. WELCHER
1033 City National Bank Building
25 West Flagler Street
Miami, Florida 33130

BY: 
ROGER G. WELCHER

TALBURT, KUBICKI, BRADLEY & DRAPER
701 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
Phone: (305) 374-1212

BY:
BETSY E. GALLAGHER

BY: 
GAIL L. KNISKERN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae Dade County Medical Association, Florida Medical Association and American Medical Association was mailed this 11th day of October, 1985 to:

GEORGE C. BENDER, ESQUIRE
Bender, Bender & Chandler, P.A.
5915 Ponce de Leon Boulevard
Suite 62
Coral Gables, Florida 33146

RICHARD J. OVELMAN, ESQUIRE
The Miami Herald Publishing Co.
One Herald Plaza
Miami, Florida 33101

EDWARD SOTO, ESQUIRE
Law Offices of Edward Soto, P.A.
Southeast Financial Center
Suite 4310
200 South Biscayne Boulevard
Miami, Florida 33131-2355

THOMAS J. GUILDAY, ESQUIRE
RALPH A. DeMEO, ESQUIRE
Akerman, Senterfitt & Edison
Post Office Box 1794
Tallahassee, Florida 32302

B.J. ANDERSON, ESQUIRE
KIRK JOHNSON, ESQUIRE
American Medical Association
535 North Dearborn Street
Chicago, Illinois 60610

ROGER G. WELCHER, ESQUIRE
1033 City National Bank Bldg.
25 West Flagler Street
Miami, Florida

DIANE H. TUTT, ESQUIRE
Blackwell, Walker, Gray,
Powers, Flick & Hoehl
2400 AmeriFirst Building
One S.E. Third Avenue
Miami, Florida 33131

CHRISTINA W. FELPS, ESQUIRE
H. ROBERT HALPER, ESQUIRE
O'Connor & Hannan
1919 Pennsylvania Avenue, NW
Suite 800
Washington, D.C. 20006-3483

MICHAEL H. CARDOZO, ESQUIRE
Suite 1004
1001 Connecticut Avenue, NW
Washington, D.C. 20036

JOHN THRASHER, ESQUIRE
Florida Medical Association
801 Riverside Avenue
Jacksonville, Florida 32203

TALBURT, KUBICKI, BRADLEY & DRAPER

BY:
BETSY E. GALLAGHER