IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,687

SUZANNE TAYLOR SANDERSON, Individually, and as Personal Representative of the Estate of STEPHEN A. TAYLOR,

Petitioner,

vs.

FREEDOM SAVINGS & LOAN ASSOCIATION, CLIFF JACKSON, CLARENCE HILL and ALEX SPARR,

Respondents.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

KERRIGAN, ESTESS & RANKIN
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-and-
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BY: JOEL S. PERWIN

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I
STATEMENT OF THE CASE AND FACTS

The bank's entire brief is an attempt to knock down a strawman, because it proceeds from the initial assumption (brief at 2) that Mrs. Sanderson's complaint alleged nothing more than "inadequate warning and a failure to warn of a dangerous condition on the premises." Thus (brief at 2-3), the bank isolates and quotes out of context a number of passages from the complaint which characterize the bank robbery as a "condition" of the premises. That may be true--and we are assuming here ***arguendo*** that the robbery was in fact a "condition" of the premises--but Mrs. Sanderson's complaint was not based upon the bank's failure to warn Officer Taylor of the bank robbery. Officer Taylor ***knew*** about the bank robbery. He was a police officer called to the scene of the bank robbery. It would be absurd to file a lawsuit based on the claim that the bank failed to warn Officer Taylor of the robbers, because the bank **did** warn him of the robbers by triggering the burglar alarm.

Instead, Mrs. Sanderson's complaint explicitly alleges that bank-officer Sparr made the dangerous condition of the robbery ***more dangerous***, by committing the affirmative act of carelessly warning the bank robbers that the officers were about to enter through the front door, thus allowing one of them to circle around from the back door and kill Officer Taylor ***(see*** R. **14-16).** That is the explicit allegation of Mrs. Sanderson's complaint, and the sufficiency of that complaint must be tested against that allegation. The bank can hardly avoid its obligation to address this central issue by rewriting Mrs. Sanderson's complaint. As Justice Frankfurter wrote once, the bank's "problems are not rendered non-existent by disregard of them." ***Textile Workers Union v. Lincoln Mills,*** **353 U.S. 448, 462, 77 S.** Ct. **912, 1** L. Ed.2d **972, 984 (1957)**(Frankfurter, J, dissenting).

II
ARGUMENT

THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE PLAINTIFF'S COMPLAINT

AGAINST THE BANK AND SPARR UNDER THE FIREMAN'S RULE.

A. The Distinction Between Invitees, Uninvited Licensees and Trespassers is Relevant Only to a Condition of the Premises: a Landowner Owes All Persons of Whom He Has Actual or Constructive Knowledge a Duty of Reasonable Care in His Own Affirmative Conduct (Initial Brief at 4-10).

Under Florida law, the concept of a licensee has meaning only with respect to a pre-existing condition of the defendant's property. It has no meaning with respect to an act of negligence by the landowner contemporaneous with his knowledge or constructive knowledge of the plaintiff's presence on his property. In that context, the landowner owes the plaintiff a duty of reasonable care--that is, a duty not to engage in some contemporaneous act which might foreseeably injure the plaintiff. Even if that act is ***related*** to some pre-existing condition of the premises--like the landowner's negligent activation of his sprinkler system in ***Bolton v. Smythe,*** 432 So.2d 129, 130 (Fla. 5th **DCA),** ***review denied,*** 440 So.2d 353 (Fla. 1983)--the landowner still owes a duty of reasonable care, because he is and should be accountable for his contemporaneous conduct in increasing the risk to the plaintiff beyond that occasioned by the pre-existing condition of the property.

Thus, the bank is simply wrong in asserting (brief at 19) that in all of the cases which we cited, "the defendants were charged with creating a hazard which would have occurred regardless of any condition existing on the premises where the accident occurred . . . ." The sprinkler system in *Bolton* was a "condition existing on the premises," and the accident in question, caused by the landowner's negligent activation of that system, was certainly not unrelated to that condition. Nevertheless, the landowner was liable for ordinary negligence, not because he had created the pre-existing condition, but because he negligently activated that condition at a time contemporaneous with his constructive knowledge of the plaintiff's presence near the property. **As** the district

court noted in *Billen v. Hix,* 260 So.2d 284, 286 (Fla. 4th DCA 1972), *aff'd,* 284 So.2d 209 (Fla. 1973)--in an opinion explicitly adopted by the Supreme Court--"where the presence of the injured person is known to the landowner, and ***the injury is caused by the active conduct or affirmative negligence of the landowner, as distinguished from the condition*** of ***the premises,*** the great weight of authority and better reasoning is that the landowner may be liable for ordinary negligence to the injured person" (emphasis in original).

Thus, the bank has said nothing to undermine the fundamental premise upon which our argument is based--that the entire concept of "licensee" under Florida law is operative only relative to pre-existing conditions of the defendant's property, but not to his contemporaneous acts of negligence when he knows or should know of the plaintiff's presence.

B. The Fireman's Rule is a Legal Construct Defining Certain People as Licensees; it Does Not and Should Not Expand the Legal Context to Which the Duties Owed to Licensees are Confined (Brief at 10-23).

Instead of a reasoned response to the arguments raised in our initial brief, the bank offers sixteen pages of case summaries (brief at 6-21) purporting to describe the major Florida decisions on this question. It is difficult to know what to do with these summaries, because they merely state the facts and holdings of these cases, without addressing the analytical context in which they obviously fall--a context discussed in great detail in our initial brief. We have no choice but to return to our original analysis, and to revisit to these cases in the context of that analysis.

1. The Fireman's Rule in Florida (Brief at 10-11). As we noted, at least as originally formulated, the fireman's rule in Florida--consistent with its adoption of the licensee concept--was properly limited to "a dangerous condition created by the negligent manner in which the owner has maintained his premises." ***Romedy v.*** *Johnston,* 193 So.2d 487, 491 (Fla. 1st DCA 1967). It was only in that context that the rule stated

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by the bank (*e.g.*, brief at **6)** evolved--the rule that the owner's duty was to refrain from wanton or willfull misconduct and to warn the officer of any latent dangers in the property. The bank does not deny or even address the point, and thus agrees by its silence that as originally formulated, the rule was limited to pre-existing conditions of the defendant's property.

2. ***The Policies Behind the Rule (Brief at 11-14).*** As we noted, this formulation of the rule is entirely consistent with its underlying objective--to relieve the landowner of any obligation to ***prepare*** his property for the unanticipated arrival of a policeman or fireman--that is, to relieve him of liability, in all but the most egregious cases, for conditions which pre-existed the officer's presence on the property. In response (brief at **7-11),** the bank devotes a full five pages to the mere repetition of this very point--that policemen and firemen assume the risk that they may encounter dangerous pre-existing conditions of the properties which they enter, and that it would not be reasonable to require landowners to prepare their properties for the occasional unanticipated presence of a police officer or fireman. But the bank does not even bother to address our demonstration (brief at **12-13)** that these important policies are simply not implicated when the owner commits a contemporaneous affirmative act of negligence after he knows or should know of the officer's presence on his property. Although the officer should anticipate that some pre-existing condition of the property may be dangerous--either because of the owner's pre-existing carelessness or because of some other cause--he certainly does not anticipate that after the owner knows that the officer is on the property, the owner will commit some contemporaneous affirmative act of carelessness which **increases** those risks which the officer would otherwise encounter. That kind of danger is simply not within the scope of the officer's duties. And on the other hand, there is nothing at all unreasonable in requiring the landowner not to prepare his property for the officer's presence, but to refrain from doing something careless to injure the

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officer after he knows or should know of his presence there.[1/]

Thus, as we noted (brief at 13), the court was right to hold in ***Whitlock v. Ehlich,*** **409** So.2d 110 (Fla. 5th DCA 1982), that the landowner was liable for ordinary negligence because of her affirmative contemporaneous act of negligence in removing a flashlight which the officer had used to keep a window partially opened, as he helped the defendant get into her condominium. The bank contends (brief at 19-20) that ***Whitlock*** is distinguishable because "the officer in Whitlock did not encounter a risk of the type usually dealt with by police and which was the cause of his presence and the source of his injury." In a sense, we might agree with that. Although police officers do routinely help people get into their locked apartments, they do not typically confront additional dangers occasioned by the contemporaneous negligent acts of the people they are attempting to assist. But precisely the same thing can be said about the instant case. Although police officers do routinely encounter the risk of bank robbers, they do not routinely encounter the risk that a bank official will do something careless to increase the danger of the robbery beyond that which the officer usually encounters. The instant case and *Whitlock*, therefore, are precisely analogous, as the district court certainly recognized in certifying the instant case as in conflict with *Whitten*. Thus, if the ***Whitlock*** decision, which the bank now supports, is to be accepted by this Court, then the district court's decision in the instant case must be reversed.

3. ***Other Jurisdictions (Brief at 14-16).*** As we noted, the overwhelming majority of cases in other jurisdictions has adopted a harmonious construction of the fireman's rule, limiting that rule to the traditional concept of a licensee, and holding the defendant

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[1/] The bank asserts (brief at 18)--again setting up and knocking down its own strawman--that public policy would be undermined if landowners were required to *warn* policemen or firemen of dangers on their property. That is not our position. We agree entirely that landowners have no such duty of warning. Our position is that landowners have a duty of reasonable care in their own contemporaneous affirmative conduct. The bank has suggested no public policy offended by the enforcement of such a duty.

responsible for contemporaneous affirmative acts of negligence after he knows or should know of the officer's presence on his property. The bank offers no response whatsoever to our demonstration that Mrs. Sanderson's position before this Court represents the overwhelming majority rule in America. We also refer the Court to the amicus briefs filed by the Police Benevolent Association and the Academy of Florida Trial Lawyers, which survey a number of the other decisions in other jurisdictions.

4. ***The Florida Cases Cited by the District Court (Brief at 16-22).*** As we noted, the district court cited three Florida cases for the proposition that the fireman's rule in Florida has already been expanded beyond its original parameters. The first is ***Rornedy v. Johnston,*** **193** So.2d **47** (Fla. 1st DCA **1967),** which concerned the danger of smoke inhalation while fighting a fire. As we demonstrated (brief at **17),** neither in its holding nor in its discussion does ***Romedy*** remotely represent an expansion of the traditional notion of the fireman's rule. The bank devotes over three full pages to its summary of the ***Rornedy*** decision (brief at **9-12),** which discussion only serves to emphasize our central point--that the fireman's rule is limited to pre-existing conditions of the premises, employing the concept of a "licensee" only in that context.

The second case cited by the district court is ***Whitten v. Miami-Dade Water & Sewer Authority,*** **357** So.2d **430** (Fla. 3rd DCA), ***cert. denied,*** **364** So.2d **894** (Fla. **1978),** which we discussed at pages **18-21** of our initial brief, demonstrating that the ***Whitten*** holding is entirely defensible within the traditional parameters of the fireman's rule, as a subsequent district-court decision explicitly held.?' Indeed, we noted, the alternative

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2/ ***Price v. Morgan,*** **436** So.2d **1116, 1120** (Fla. 5th DCA **1983), *review denied,*** **447** So.2d **887** (Fla. **1984)** ("In applying the 'fireman's rule' to fact situations, such as the one before us here, where the fireman is outside the premises when he is injured in the discharge of his duties, there is no need to depart from those cases which hold police and fire personnel to be licensees when they enter upon premises in the discharge of their duty"). Thus, the bank's assertion (brief at **14)** that ***Whitten's*** "'discharge of duty' concept of the Fireman's Rule was approved by the Fifth District Court of Appeal in Price v. Morgan" is flatly incorrect--as we pointed out in the initial brief (p. 20). ***Price*** explicitly

"discharge of duty" concept adopted by the ***Whitten*** court was not only unnecessary but erroneous, because it limits the fireman's rule only to those conditions which induced the officer's presence on the property, and would not extend the rule to pre-existing conditions of the property which may be unrelated to the officer's reason for being there. **As** we emphasized, that construction of the rule is simply wrong. There are numerous decisions ***(see*** our initial brief at **pp. 20-21** n.10) which properly applied the fireman's rule to pre-existing dangerous conditions of the property which had nothing to do with the officer's reason for being on it.

For example, in ***Smith v. Markowitz,*** **486** So.2d **11** (Fla. **3rd DCA), *review denied,*** **494** So.2d **1153** (Fla. 1986), the fireman's rule was properly applied where the police officer tripped over a water pipe while chasing a criminal suspect across the defendant's property. **As** the court noted in ***Romedy v.*** *Johnston,* **193** So.2d **487, 489** (Fla. 1st **DCA** 1967), the fireman's rule should apply to all "pitfalls, booby traps, latent hazards, or other similar dangers" which an officer may encounter on the property in question. **As** the cases which we cited point out, the fireman's rule ***should*** apply to ***all*** pre-existing conditions of the property which the officer encounters in the discharge of his duties. The purposes of the rule, discussed earlier, can only be served by such a construction (at least when the pre-existing conditions in question are not open to the public in general). Thus, as we demonstrated (brief at **20-21** n.10), the formulation adopted by the ***Whitten*** court was not only an unnecessary expansion of the fireman's rule, but was an erroneous expansion as well.

The bank devotes two full pages to the ***Whitten*** decision (brief at **12-13),** summarizing its holding, but does not bother to address any aspect of our discussion of that case. To the contrary, the bank simply accepts at face value ***Whitten's*** holding that

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disapproves of the ***Whitten*** formulation, noting that its holding is perfectly-defensible through the traditional formulation of the fireman's rule. The bank's representation to the contrary is inexcusable.

"the applicability of the Fireman's Rule is determined by whether the risk which resulted in the fireman's or policeman's injury was the reason for their being at the scene in their professional capacity" (brief at 13). And the bank repeats this formulation of the rule over and over in its brief (*e.g.*, pp. 4, 7 (3 times), 10, 15 (twice), 16, 17, 18, 21)--without once attempting to defend it in a principled way. As we have noted, the bank's formulation is simply incorrect, and the *Whitten* court was incorrect in saying so. Indeed, there are numerous Florida cases which properly hold otherwise.

Moreover, even if the fireman's rule were so limited, Mrs. Sanderson's complaint nevertheless would state a cause of action under that rule, because her complaint alleges that she was injured not simply by the condition to which Officer Taylor responded (the bank robbery), but by an act of stupidity on the part of the bank officer in alerting the robbers to his presence. That act of stupidity was certainly not the reason for Officer Taylor's presence on the property.3/

Finally, the district court relied upon ***Rishel v. Eastern* Airlines, *Inc.*,** 466 So.2d 1136 (Fla. 3rd DCA 1985), in which, as we noted (brief at 21-22), the fireman's rule properly applied to the plaintiff officer's allegation that the airline should have warned him of the dangerous propensities of the intoxicated passenger whom the officer was called to apprehend. But as we noted, that passenger was the very dangerous "condition"

3/ In this light, the bank is wrong in asserting (brief at 17) that "[w]ithout question, Officer Taylor was injured by the very risk which necessitated his presence on the scene." That is simply incorrect. Officer Taylor may have understood that he might be injured by the dangerous condition of the bank robbery to which he responded, but he certainly did not anticipate that after knowing of his presence on the property, a bank officer would carelessly alert the robbers to his presence, thereby causing his death. Officer Taylor did not assume that risk anymore than the police officer in ***Whitlock v. Ehlich*, *supra*,** 409 So.2d 110, assumed the risk that after he came to the homeowner's assistance, and the homeowner knew him to be on the property in her aid, she would commit a contemporaneous act of negligence which would injure the officer. That was not "the very risk which necessitated [the officer's] presence on the scene" (respondents' brief at 17), anymore than the bank officer's carelessness was the risk which necessitated Officer Taylor's presence at the bank. And as we noted, the bank now agrees with the holding in *Whitlock*, even though it was the basis for this Court's conflict jurisdiction.

which occasioned the officer's presence, just like the bank robbery in the instant case, and the officer certainly should have known that such an intoxicated passenger might be dangerous. Because there was no additional allegation in *Rishel* that the airline had committed any affirmative act of negligence *contemporaneous* with the officer's presence on the plane, the district court was right to approve dismissal of the complaint under the fireman's rule.

As it does with all the other cases, the bank discusses *Rishel* at length (brief at 8-9, 18), without acknowledging or addressing this critical point. To the contrary, the bank twice admits that the claim in *Rishel* was that the airline "failed to warn" the officers of the intoxicated passenger's dangerousness (respondent's brief at 8, 18). In the instant case, as we have emphasized, and as the bank has simply forgotten, Mrs. Sanderson's complaint is not based on the bank's failure to warn her husband of the bank robbery, or that bank robbers are dangerous--because he certainly knew that already--but on the contemporaneous affirmative act of negligence in warning the bank robbers of Officer Taylor's approach to the bank. That is a fundamental distinction between the instant case and *Rishel*, which the bank completely ignores.4/

What the bank does say about this critical question of contemporaneous affirmative misconduct enhancing the risk to the officer (brief at 20-21), is that there are a number of Florida cases in which the fireman's rule was properly applied even though the

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4/ In addition to the three cases cited by the district court, the bank cites a fourth for the proposition that Florida courts have expanded the fireman's rule (brief at 16)-- *Preferred* Risk *Mutual Ins.* Co. *v. Saboda,* 489 So.2d 768 (Fla. 5th DCA), *review denied,* 501 So.2d 1283 (Fla. 1986). We discussed *Preferred* Risk--the case in which the fireman's rule barred an action against a deranged homeowner--at p. 22 n.11 of our initial brief. As we noted, *Saboda* is a difficult case to integrate into this analysis from either side's perspective, but it certainly offers no support for the bank's position. On the one hand, *Saboda* is easily distinguishable from this case, on the assumption that the deranged homeowner in that case was himself a "condition" of the premises to which the officers responded, just like the intoxicated passenger in *Rishel.* On the other hand, he was also the owner of the premises, committing an affirmative act of negligence or worse, and thus arguably should have been liable.

defendant was charged with having committed an affirmative act which made the premises unsafe for the officer. In *Rishel* itself, for example, the airline may have been negligent in giving the passenger too much to drink, resulting in his intoxicated condition. Likewise in ***Price v. Morgan,*** **436** So.2d **1116** (Fla. 5th DCA **1983),** ***cert. denied,*** **447** So.2d **887** (Fla. **1984),** the defendant was alleged to have negligently stored combustible materials in his building and to otherwise have contributed to the fire which ensued. And in *Romedy* ***v. Johnston,*** **193** So.2d **486** (Fla. 1st DCA **1967),** the landowner allegedly was negligent in the way he constructed the building, which allowed the fire to spread more rapidly. In all of these cases, the bank argues, the landowner was indeed charged with an affirmative act of negligence, but nonetheless was entitled to the protection of the fireman's rule.

These three cases are a perfect illustration of our own position, and of the bank's unwillingness to confront that position. In all three cases, the landowner may have acted in a negligent affirmative manner in creating an unsafe condition, but his negligent conduct was not ***contemporaneous*** with the officer's presence on the property (after the landowner knew or should have known of the officer's presence). These were all cases in which at some earlier time, the landowner had negligently created an unsafe ***condition*** of the premises, and the fireman's rule appropriately protected the landowner, because it was that ***pre-existing condition*** of the premises, and not a ***contemporaneous act of negligence*** by the landowner, which caused the officer's injury. That is precisely the kind of situation in which the fireman's rule is supposed to operate, because a landowner is not required to anticipate the presence of an officer on his property at some future time.

In the instant case, in contrast, as we have said ***ad nauseam,*** the plaintiff is charging not that the bank failed to prepare its property for the officer, or to warn him of its dangerous condition, but that the bank acted negligently in a manner contemporaneous with his presence there, after it knew or should have known of his presence there,

and that he was injured as a result. As we have stressed repeatedly, that is the critical distinction between those cases properly enforcing the fireman's rule, and the improper application of that rule in the instant case. The bank has repeatedly failed to come to grips with that central distinction.5/

5. ***Conclusion.*** At bottom, although the bank has offered us a survey of the cases in this area, and has haphazardly thrown out a few concepts through which it hopes to characterize the fireman's rule in Florida, the bank has failed woefully to come to grips with our central thesis. That thesis is that the fireman's rule operates only in the context of the traditional concept of a licensee, and that this concept has always been limited to pre-existing conditions of property--not to affirmative contemporaneous acts of negligence by landowners after they know or should know of the plaintiff's presence on their property. This traditional limitation of the fireman's rule makes sense, because the expansion of the rule adopted by the district court would not serve any of the purposes of that rule. It would not be consistent with those risks which a police officer ordinarily assumes in the course of his duties, and it would not be consistent with the notion that it is unfair to require a landowner to prepare his property for unanticipated events. Neither policy is implicated in the slightest by the district court's admitted expansion of the fireman's rule, and the bank has not even attempted a principled defense of that expansion.

This is a critical omission in the bank's position--the omission of even the attempt to show that some important public policy would be served by protecting landowners from the consequences of their own affirmative contemporaneous acts of negligence after they know or should know of an officer's presence on their property. Since no

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5/ The bank also cites one other district-court decision on this point, ***Preferred Risk Mutual Ins. Co. v. Saboda,*** 489 So.2d 768 (Fla. 5th **DCA),** ***review denied,*** 501 So.2d 1283 (Fla. 1986), which we discussed in note 4, ***supra,*** and in the initial brief (p. 22 n.11).

policy is served by such a rule, its only effect is to deny police officers their viable causes of action, and to make them second-class citizens in this context for no reason. It seems to us that when a common-law right of action is taken away, it ought to be taken away for some reason, and the party which would take it away ought to have some burden of showing why. The bank has foresaken that burden; it has not even attempted to explain how any public objective could be served by its suggested expansion of the rule.

C. Even if the Fireman's Rule Did Apply in This Case, the Trial Court Erred in Dismissing the Complaint, Which Does State a Cause of Action Under the Fireman's Rule (Brief at 24-26).

Our point here is that even if the fireman's rule did apply in this case, Mrs. Sanderson's complaint does allege facts which would permit a reasonable jury to conclude that the bank through its officers acted in a willfull and wanton way. We cited a number of cases for this proposition, all of them ignored by the bank. Instead, the bank relies solely upon the decision in ***Price v. Morgan,*** **436** So.2d **1116, 1121** (Fla. 5th **DCA 1983),** ***cert. denied,*** **447** So.2d **887** (Fla. **1984),** attributing to ***Price*** the holding that a cause of action for wantonness and recklessness was not stated even though the "complaint alleged [that the] defendant was wantonly negligent by, among other things, starting the fire which caused the plaintiff's injury" (respondent's brief at 22). But the defendant in ***Price*** was not charged with having deliberately started the fire. The defendant in ***Price*** was charged with "allowing numerous flamable and combustible substances on the premises, presenting a serious fire hazard"; failing "to adequately inspect the store to determine if the substance has presented a fire hazard"; failing "to adequately warn the decedent of the danger presented by the flammable substances"; failing "to secure the premises to prevent unknown persons from entering and starting a fire"; and ***negligently*** starting the fire in some unspecified way. The court properly held that the facts alleged did not show wanton and willfull conduct.

In the instant case, in contrast, a reasonable jury could find, in light of the significant risk to human life, that it is not simply negligent but reckless to assume that a burglar alarm is a false alarm before taking some action which might alert a bank robber to the presence of a police officer on the property. As we noted (brief at 25), the amount of care required increases with the dangerousness of the activity involved. Here the stakes could not have been higher; they were the lives of these police officers. In that context, we respectfully submit, a reasonable jury could find that even if the fireman's rule did apply in this case, the bank and its officers are responsible for their wanton and willfull conduct.

III
CONCLUSION

It is respectfully submitted that the opinion of the district court should be reversed, and the cause remanded with instructions to remand the case to the trial court for further proceedings upon the plaintiff's amended complaint.

IV
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of March, 1987, to: J. CRAIG KNOX, ESQ., P.O. Box 1739, Tallahassee, Florida; SALLY DOERNER, ESQ., Floyd, Pearson, Richman, Greer, Weil, Zack & Brumbaugh, P.A., One Biscayne Tower, 25th Floor, Miami, Florida 33131-1868; PAUL McDUFFEE, ESQ., 3321 Henderson Boulevard, Tampa, Florida 33609; and to BOB PELTZ, ESQ., 19 West Flagler Street, Miami, Florida 33130.

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