IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,545

ELLEN M. CARR and GEROW F. CARR, as parents and natural guardians of JON TIMOTHY CARR, a minor; and ELLEN M. CARR and GEROW F. CARR, individually,

Petitioners,

vs.

BROWARD COUNTY d/b/a BROWARD GENERAL MEDICAL CENTER; NORTH BROWARD HOSPITAL DISTRICT d/b/a BROWARD GENERAL MEDICAL CENTER; JAMES WEAVER, M.D.; ROBERT GRENITZ, M.D.; JOSEPH RAZIANO, M.D. LAUDERDALE GYNECOLOGIC ASSOCIATES; TERGHOS, GRENITZ, HUNTSINGER, CARUSO & RODRIGUEZ, P.A.,

Respondents.

_____/

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

STANLEY M. ROSENBLATT, P. A.
11TH AND 12TH FLOORS CONCORD BUILDING, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

TABLE OF AUTHORITIES

CASES: PAGE

STANLEY M. ROSENBLATT, P.A.
11TH AND 12TH FLOORS CONCORD BUILDING, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

STATUTES:

OTHER AUTHORITIES:

STANLEY M. ROSENBLATT, P.A.
11TH AND 12TH FLOORS CONCORD BUILDING, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

INTRODUCTION

PETITIONERS ELLEN M. CARR and GEROW F. CARR, individually and as parents and natural guardians of JON TIMOTHY CARR, hereby offer their Reply to the Answer Briefs of Respondents LAUDERDALE GYNECOLOGIC ASSOCIATES, ROBERT GRENITZ, M.D. and JOSEPH RAZIANO, M.D. ("Lauderdale") and JAMES WEAVER, M.D. ("Weaver"), joined by BROWARD COUNTY d/b/a BROWARD GENERAL MEDICAL CENTER ("Medical Center"). All argument of Petitioners will respond to Respondents collectively, unless otherwise indicated. All emphasis has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The facts, as stated in Petitioners' Initial Brief, are uncontroverted by Respondents. For purposes of this Reply Brief, Petitioners supplement their Statement of the Case and Facts as follows:

The only issue raised in the October 16 Motion to Dismiss filed in the trial court by Respondent Lauderdale (R.24) and the Motions to Dismiss filed by Respondents Weaver and Medical Center on November 1 (R.4) and December 13, 1985 (R.65) respectively, was the issue of whether Petitioner's Complaint was time-barred under section 94.11(b)(4), Florida Statutes (1975). The only issue on which the court heard argument on November 22 and January 2, and the sole basis of dismissal, was the determination that Petitioners' Complaint, on its face, was time-barred under section 94.11(b)(4). (R.51; 55; 73).

STANLEY M. ROSENBLATT, P.A.
11TH AND 12TH FLOORS CONCORD BUILDING, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

POINTS ON APPEAL

I.

WHETHER THIS COURT HAS JURISDICTION TO REVIEW THE RULING OF THE FOURTH DISTRICT COURT OF APPEAL IN THE CAUSE BELOW

II.

WHETHER THE MEDICAL MALPRACTICE STATUTE OF REPOSE, AS APPLIED TO PETITIONERS, FAILS THE KLUGER TEST FOR CONSTITUTIONALITY

III.

WHETHER RESPONDENTS' ANALYSIS OF CASE LAW FAILS TO SUPPORT THEIR CONCLUSION THAT PETITIONERS' ACTION IS TIME-BARRED

IV.

WHETHER PETITIONERS' ALLEGATIONS OF FRAUD ARE SUFFICIENT AND CANNOT BE BARRED BY THE SEVEN-YEAR STATUTE OF REPOSE

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ARGUMENT

I.

THIS COURT HAS JURISDICTION TO REVIEW THE RULING OF THE FOURTH DISTRICT COURT OF APPEAL IN THE CAUSE BELOW

In its opinion of April 8, 1987, the Fourth District Court of Appeal certified that its decision in this case, Carr v. Broward County, finding section 95.11(4)(b), Florida Statutes (1975), constitutional as applied to a cause of action that accrues after the repose period, conflicts with the decision of the Third District Court of Appeal in Phelan v. Hanft, 471 So.2d 648 (Fla. 3d DCA 1985). In Phelan, the Third District ruled in the alternative that under certain circumstances the statute of repose was unconstitutional, and remanded for a factual determination in the trial court; therefore, the Third District did not declare a state statute invalid, as contemplated by Article V, Section 3(b)(1), Florida Constitution. Accordingly, this Court dismissed the appeal. Hanft v. Phelan, 488 So.2d 531 (Fla. 1986). Respondent Weaver submits that the Third District's alternative ruling in Phelan v. Hanft provides no conflict with the case at bar.

In Phelan v. Hanft, the Third District reversed a trial court's dismissal of plaintiff's medical malpractice action and remanded for further proceedings to determine when the plaintiff knew or should have known of the existence of her cause of action. Although the opinion suggests three alternative findings available to the trier of fact, the opinion declares unequivocally that:

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> If the fact-finder concludes that Ms. Phelan did not discover and should not have discovered a cause of action until, as she contends, August 4, 1981, then the statute of repose would unconstitutionally deny Phelan access to the courts and cannot be used against her to bar her claim.

Thus, without determining whether, in fact, Ms. Phelan had been unconstitutionally denied her constitutional rights of access to the courts of this State, the opinion of Judge Pearson, writing for the Third District Court of Appeal, expresses direct and express conflict with the opinion of the Fourth District in the case at bar.

The Fourth District recognized the conflict with Phelan and certified that conflict to permit the parties to present this important issue to the Supreme Court of Florida. The Fourth District further declared, "But for the conflict, we would have certified the question." The question of whether the statute of repose can be applied constitutionally to bar a cause of action accruing after the repose period is one of great public importance. This Court has jurisdiction under both sections 9.030(a)(2)(A)(v) and 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure.

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II.

THE MEDICAL MALPRACTICE STATUTE OF REPOSE, AS APPLIED TO PETITIONERS, FAILS THE KLUGER TEST FOR CONSTITUTIONALITY

Respondents assert that Petitioners' cause of action, brought ten years after his physical injury, is time-barred under section 95.11(4)(b), Florida Statutes (1975). In Kluger v. White 281 So.2d 1 (Fla. 1973), this Court set forth a two-pronged test for determining whether petitioners can be deprived of their constitutional right of access to the courts of this State by strict application of the statute of repose. The test requires a showing of "overwhelming public necessity" and a finding that no alternative method of meeting such public necessity exists. Respondents assert that the first prong of the Kluger test is met by the legislative preamble to the Medical Malpractice Reform Act of 1975, which declares the need to provide relief from the medical malpractice insurance crisis. This Court has not found an "overwhelming public necessity" to affirm the continued existence of medical mediation panels created in the same act of the legislature. In Aldana v. Holub, 381 So.2d 321 (Fla. 1980), petitioner challenged the jurisdictional time limitations which made him, through no fault of his own, unable to avail himself of the benefits of the medical mediation statute. This Court declared its desire to construe the statute in such a way as to render it constitutional, if possible, but found that no saving construction was available. Finding that application of the rigid jurisdictional period had proven arbitrary and

STANLEY M. ROSENBLATT, P. A.
11TH AND 12TH FLOORS CONCORD BUILDING, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

capricious in operation, yet enlarging the jurisdictional periods or permitting continuances would constitute a denial of access to the courts, this Court declared that the Medical Mediation Act, as applied, is intractably and incurably defective.

Jon Timothy Carr, through no fault of his own, was unable to avail himself of his right of access to the courts because of the time limitations of the medical mal-practice statute of repose. This Court's holding in Aldana v. Holub rejected the notion that an "overwhelming public necessity" justifies such deprivation. Respondents correctly observe that the medical malpractice insurance crisis is alive and well in 1978; they fail to recognize that the statute of repose has done nothing to remedy the "overwhelming public necessity," as they perceive it. As Respondent Weaver observes at pages 19-20 of his Answer Brief, the Fourth District's decision failed to find that there was no alternative method of meeting their perceived public necessity. That alternatives were available to Respondents is clear from the fact that the legislature subsequently enacted the Comprehensive Medical Malpractice Act of 1985 and the Tort Reform and Insurance Act of 1986. The fact that one provision was struck down by this Court in Smith v. Department of Insurance, 12 FLW 189 (Fla. S.Ct. Case Nos. 69,551, 69,703, and 69,704); opinion filed April 23, 1987), in no way negates the fact that alternatives were available, are available and will be available when the Governor convenes the special session of the legislature next September. Critically important here is the fact that no alternative is available to the Petitioners.

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Recognizing that application of the statute of repose to Petitioners here cannot be justified under the Kluger v. White analysis, Respondent Weaver suggests that the Kluger test was modified in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985). The Pullum opinion adopts Justice McDonald's dissent in Battilla v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980), without any objection to the application of the Kluger test in Overland Construction Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979); this Court's opinion in Battilla adopted the rationale of Overland. In Battilla, Justice McDonald distinguished between statutes of repose for manufactured products and for improvements to realty, observing that he perceived a rational and legitimate basis for the distinction in the two repose periods. Nothing in Justice McDonald's dissent in Battilla, adopted as the majority opinion in Pullum, serves to modify the Kluger analysis.

This Court recently applied the two-pronged Kluger test, as originally promulgated, and declared its continuing vitality in Smith v. Department of Insurance, 12 FLW 189 at 191-92. This Court reiterated that a constitutional right may not be restricted simply because the legislature deems it rational to do so. Rationality only becomes relevant if the legislature provides an alternative remedy or abrogrates or restricts the right based on a showing of overwhelming public necessity and the absence of an alternative method of meeting that necessity. Smith involved a constitutional challenge to the cap on recovery for non-economic damages. The cap is part of the 1986 Tort Reform and Insurance Act. The preamble of

STANLEY M. ROSENBLATT, P. A.
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the Act expresses a desire to remedy the financial crisis in the liability insurance industry and to remedy the insurance crisis. This Court, applying the Kluger test, declared that it is only speculation, an act of faith, that somehow the legislative scheme will benefit the tort victim. On such nebulous reasoning, this Court declined to limit the constitutional right of access to the courts for the purpose of redressing injuries, including non-economic damages.

The interest of the legislature, as expressed in the preamble to the 1986 Act, is the same as that in the Medical Malpractice Reform Act of 1975. This Court should decline to limit Petitioners' right of access to the courts based on such speculative and nebulous reasoning.

III.

RESPONDENTS' ANALYSIS OF CASE LAW FAILS TO SUPPORT THEIR CONCLUSION THAT PETITIONERS' ACTION IS TIME-BARRED

A. THE FOURTH DISTRICT'S ANALYSIS

The Fourth District's analysis of case law properly observes that, under Bauld, Purk, Overland and Cates, the statute of repose is constitutional on its face and can be raised to bar an action where the plaintiff had a reasonable time within which to file. It is the Fourth District's attempts to distinguish cases that depart from the general rule which creates the problem.

STANLEY M. ROSENBLATT, P.A.
11TH AND 12TH FLOORS CONCORD BUILDING, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

Regarding Pullum v. Cincinnati, Inc., the Fourth District acknowledged that Richard Pullum was not denied his access to courts, yet it doggedly attempts to justify its applicability to the case at bar on the basis of this Court's gratuitous equal protection argument. In fact, Richard Pullum was denied no protection. If, as the Fourth District and the Respondents here assert, Pullum heralded a recognition of the perogative of the legislature to define a cause of action, then Pullum is no longer good law. Exercising its undisputed perogative after the Pullum decision became final in November, 1985, the legislature rushed to vitiate the harsh and unjustified effects by repealing the statute as soon as possible.

Regarding Diamond v. E. R. Squibb & Sons, Inc., 397 So.2d 671 (Fla. 1981), the Fourth District relies upon the fact that Nina Diamond's symptoms were not observable until after the repose period. This Court's opinion in Diamond contains no latent/patent distinction. The opinion of five concurring justices simply declares that this Court's earlier holding in Overland Construction Company v. Sirmons applies to Nina Diamond. The special concurrence of Justice McDonald does state that Nina Diamond had an accrued cause of action that was not recognizable because the injury had not "manifested" itself. The concurrence goes on to state:

> When an injury has occurred but a cause of action cannot be pursued because the results of the injury could not be discovered, a statute of limitation barring the action does, in my judgment, bar access to the courts and is constitutionally impermissive.

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11TH AND 12TH FLOORS CONCORD BUILDING, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

Jon Timothy Carr had problems from the beginning; however, it was unclear, for many years, just how extensive was his disability and how caused. Like Nina Diamond, Carr's cause of action could not be pursued. Thus, the barring of his action, which denies him access to the courts of this State, is constitutionally impermissive. Nothing in the Diamond opinion suggests a "narrow exception." That phrase derives from footnote 1 of the Pullum opinion; however, it is Pullum, not Diamond, which constitutes a narrow exception to the general rule.

Like the Fourth District, Respondents have difficulty in fitting the case of Universal Engineering Corp. v. Perez, 451 So.2d 463 (Fla. 1984) into the Pullum analysis. In Perez, this Court found that petitioner's cause must be analyzed in terms of the reasoning in Overland and its clarification of Bauld. The Fourth District recognized that section 95.11(3)(c) would be unconstitutional as applied if it operates as an absolute bar to appellants bringing an action. The Fourth District's opinion speculates that the preamble to section 95.11(3)(c) in Chapter 80-322, Laws of Florida, "cured" the Kluger problem, and the question of whether the statute of repose impermissibly extinguished appellants' cause of action under the circumstances would depend on whether section 9.11(3)(c) or section 95.031(2) applies. The flaw in this analysis is found in footnote 3 to the Perez opinion which declares:

> This court questions the applicability of 95.11(3)(c) to the facts of this particular case, but as to the issue in this case [whether the S.O.R. unconstitutionally denies access to the courts] the result would be the same under either §95.11(3)(c) or §95.031(2).

STANLEY M. ROSENBLATT, P.A.
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Finally, Respondents argue that Phelan v. Hanft, 471 So.2d 648 (Fla. 3d DCA 1985), decided by the Third District Court of Appeal, was invalid under Pullum. This Court had the opportunity to so declare in Hanft v. Phelan, 488 So.2d 531 (Fla. 1986). Judicial economy would have required as much. Instead, this Court remanded for factual determination "without prejudice to any future appeal in this matter should the District Court eventually find section 95.11(b)(4) unconstitutional."

B. THE PRE-PULLUM/POST-PULLUM ANALYSIS

As an alternative to the Fourth District's analysis of the applicable case law, Respondent Weaver suggests a pre-Pullum/post-Pullum analysis. Just as he asserted that Pullum had modified the Kluger test, so also Respondent Weaver asserts that Pullum receded from Overland Construction. As previously discussed, the Kluger test has never been modified or abolished. Since Richard Pullum conceded that application of section 95.031(2) did not deny him his right of access to the courts, this Court did not apply the Kluger test. Rather, this Court engaged in an equal protection analysis which was, as Petitioners explained in their Initial Brief, both gratuitous and inappropriate under the circumstances.

Both Pullum and Battilla involved the same statute of repose for products liability. The fact that Battilla was originally reversed on the authority of Overland does not support Respondent Weaver's contention that Pullum recedes from Overland as well. On the contrary, the footnote in Pullum accepting the result in Diamond, which was based on Overland Construction, demonstrates the

STANLEY M. ROSENBLATT, P. A.
11TH AND 12TH FLOORS CONCORD BUILDING, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

principle that Overland remains viable. Thus, a pre-Pullum/post-Pullum analysis does not provide a basis for denying Petitioners their day in court.

C. ANALYSIS OF FOREIGN CASE LAW

Respondents attempt to support their position with foreign case law that is neither controlling nor persuasive. Relying on Rosenberg v. Town of North Bergen, 293 A.2d 662 (N.J. 1972), Respondents assert that after seven years Petitioners have an injury for which the law affords no redress. Rosenberg was an action for injuries sustained by a pedestrian who tripped on a crack in pavement that had existed for thirty-four years. It involved a ten-year statute of repose for construction defects. No fraud was involved; no fiduciary relationship or constitutional guarantees of access to courts were implicated. The New Jersey statute passed muster under due process and equal protection analyses. While the New Jersey court has determined that petitioner Rosenberg has an injury for which there is no remedy, this Court, the sole exponent of law in this state, has declared:

> It is basic to our scheme of justice that a person aggrieved by fundamental unfairness in the judicial process have the right and opportunity to remedy that unfairness.
> Aldana v. Holub at 236

Moreover, the unique restriction imposed by our constitutional guarantee of right of access to courts makes it irrelevant that the statute of repose may be valid under state or federal due process or equal protection clauses. Overland at 575.

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Colton v. Dewey, 231 N.W.2d 913 (Neb. 1982), involving a ten-year statute of repose applicable to professional negligence, and relying on the due process and equal protection clauses of the Nebraska and U. S. Constitutions, is inapplicable for the same reasons. See also Austin v. Litvak, 682 P.2d 41 (Colo. 1984), in which the Colorado Supreme Court, applying a "rational basis" test, declared that two exceptions to the three-year statute of repose for medical malpractice claims violate the equal protection provisions of the state constitution.

The remainder of the foreign cases cited by Respondents are also distinguishable on both the facts and the law. Several involve ten-year limitations for construction or design defects. See, e.g., Burnmaster v. Gravity Drainage District No. 2, 366 So.2d 1381 (La. 1978); Anderson v. Fred Wagner and Roy Anderson, Jr., Inc., 402 So.2d 320 (Miss. 1981); Yarbro v. Hilton Hotel Corp., 655 P.2d 822 (Colo. 1982); and Freezer Storage, Inc. v. Armstrong Cork Co., 382 A.2d 715 (Pa. 1976). The comparable Florida law has recently extended the limitation period for twelve to fifteen years. One case, Lamb v. Volkswagenwerk, A.G., 631 F.Supp. 1144 (S.D. Fla. 1986), is a federal diversity case barring a product liability claim against the automobile manufacturer brought more than twelve years after the car was delivered to its original purchaser. Applying Florida law in March, 1986, the court found that the plaintiff, who was rendered paraplegic in the car accident, was precluded from redressing his injuries by Pullum; the products liability limitation was repealed two months later. Applying Lamb to the case at bar merely heaps injustice upon injustice.

STANLEY M. ROSENBLATT, P. A.
11TH AND 12TH FLOORS CONCORD BUILDING, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

IV.

PETITIONERS' ALLEGATIONS OF FRAUD ARE SUFFICIENT

A. THE PLEADINGS

Paragraph 12 of Petitioner's Complaint declares that Ellen M. Carr was unable to discover the facts and circumstances surrounding the negligent care rendered to her and her son, while the Respondents, who knew or should have known, fraudulently concealed the truth. The Complaint contains an extensive list of negligent conduct that was concealed from Petitioners. Taken together, these allegations satisfy the requirements of rule 1.120(b), Florida Rules of Civil Procedure, which declares that a complaint must state, with such particularity as the circumstances may permit, those facts which give rise to a cause of action for fraud. In any event, Petitioners have waived no rights by failing to request leave to amend their Complaint, since the sufficiency of their pleadings was not addressed in the trial court. The sole issue raised by Respondents on their motions to dismiss, and the sole basis of the court's order granting dismissal, was the applicability of the statute of repose to Plaintiff's cause of action. Thus, Respondents' argument of insufficiency and waiver is a mere camouflage for the basic issue.

The facts of this case are comparable to those in Moore v. Morris, 475 So.2d 666 (Fla. 1985). Like Megan Moore, Jon Timothy Carr turned blue and developed seizures shortly after birth; like Megan Moore, he had to be transferred to a special medical facility. There is nothing about these facts that leads conclusively to the conclusion that the physicians were negligent. Moore at 668.

STANLEY M. ROSENBLATT, P. A.
11TH AND 12TH FLOORS CONCORD BUILDING, 66 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-6131

This Court can take judicial notice that it is difficult to determine the extent and the permanency of an infant's disabilities. As a result, several states, including Massachusetts and Texas, provide an extended limitations period for causes of action involving children. If it was difficult for Petitioners to determine the nature and extent of Jon Timothy Carr's injury, it was impossible, without information from the Respondents, to determine that the injuries were caused by Respondents' negligence. Their cause of action should not be barred because Respondents successfully concealed the facts until the period of repose had run.

B. THE SEVEN-YEAR STATUTE OF REPOSE PERIOD CANNOT BAR PETITIONERS' ACTION WHICH DID NOT ACCRUE WITHIN THE REPOSE PERIOD

Section 95.11(4)(b), Florida Statutes (1975), extends the period of repose to seven years in cases in which it can be shown that fraud prevented the discovery of the injury within the four-year period of limitations. Respondents maintain that the seven-year limitations must be applied strictly to Petitioners' cause of action. It does not contravene the constitution or case law, to limit the time within which an injured party can bring a cause of action, provided there is a reasonable time to commence that cause of action. See Bauld, Purk, Overland and Cates. Nevertheless, the unique restriction imposed by our constitutional guarantee of a right of access to the courts makes the seven-year limitation unconstitutional where, as here, it precludes a party, who was unable to learn of the injury before the running of the repose period, from bringing his action at all. Thus, to pass constitu-

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tional muster, Florida Statute 95.11(4)(b) must be read to set a limit of seven years for commencing a cause of action only where the claimant is on notice of the invasion of his legal rights within the repose period. Perez at 468.

If there exists a difficulty of defending such claims after seven years, there exists an equal burden on the plaintiff in prosecuting one. Respondents offer no evidence that "after seven years there is an increased likelihood that fraud allegations are ruses." Respondents, who had the knowledge and the duty to disclose the cause of Petitioners' injuries, also had the ability to prevent the uncertainty of which they now complain. Respondents are entitled to no reward for extending the length of their concealment beyond the repose period. Fraudulent concealment by a fiduciary requires equitable relief. See Soud v. Hike, 56 So.2d 462 (Fla. 1952). The constitution, case law and established principles of equity estop Respondents from raising the seven-year statute of repose to bar Petitioner's access to the courts of this State.

CONCLUSION

Based on the facts and argument provided in this Reply Brief as well as Petitioners' Initial Brief, Petitioners respectfully submit that the rulings of the lower tribunals must be reversed and the cause must be remanded for trial on the merits.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioners was mailed this 10th day of August, 1987, to the following counsel of record: STEVEN R. BERGER, ESQ., Suite B-5, 8525 S.W. 92nd Street, Miami, FL 33156; REX CONRAD, ESQ., Conrad, Scherer & James, P. O. Box 14723, Ft. Lauderdale, FL 33302; and JOHN W. THORNTON, ESQ., Thornton & Hinshaw Culbertson, 19 West Flagler Street, Suite 720, Miami, FL 33130.

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