IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,574

LAZARO DESVERGUNDT,

Petitioner,

vs.

KOPPERS COMPANY, INC. a/k/a
HOOPER MANUFACTURER, INC.,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

TABLE OF CITATIONS

CASES **PAGE**

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

OTHER AUTHORITIES

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

INTRODUCTION

Throughout this brief the parties will be referred to by name or as they stood before the trial court. Thus, Lazaro Desvergundt, petitioner herein and appellant below, will be referred to as "Plaintiff." Koppers Company, Inc. a/k/a Hooper Manufacturer, Inc., respondent herein and appellee below, will be referred to as "Defendant."

References to the Record transmitted by the Clerk of the Third District Court of Appeal will be by the letter "R" and a corresponding page number, and references to the Appendix will be by the letter "A." Unless otherwise indicated, all emphasis has been supplied by counsel.

STATEMENT OF THE CASE AND FACTS

This petition involves a products liability action in which summary judgment was granted in favor of the Defendant on the basis of the statute of repose. In the Initial Brief of Petitioner on the Merits, Plaintiff accurately sets forth the history of this case culminating in the trial court's denial of his motion for rehearing of the adverse summary final judgment. Defendant would only add the following chronology of dates and events germane to resolution of the two certified questions posed by the Third District Court of Appeal:

May 7, 1954	Defendant delivers printing machine to the original purchaser. (R.14,27).
May 7, 1966	Twelve years elapsed from date of delivery of completed product to original purchaser.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

January 1, 1975	Florida legislature enacts the twelve-year statute of repose, Fla.Stat. §95.031(2) (1975).
December 11, 1980	Florida Supreme Court decision in Battilla[1/] declares statute of repose unconstitutional.
April 12, 1982	Plaintiff injured while using the printing machine. (R.2).
January 23, 1985	Plaintiff files complaint instituting instant action. (R.1-4).
August 29, 1985	Florida Supreme Court issues the Pullum[2/] decision, overruling Battilla.
January 23, 1986	Trial court enters summary final judgment against the Plaintiff. (R.30-31).
Effective July 1, 1986	Florida legislature amends §95.031(2).

1/ Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980).

2/ Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), appeal dismissed, 106 S.Ct. 1626 (1986).

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

POINTS INVOLVED

The two questions certified by the Third District Court of Appeal are as follows:

I. WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2) FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCTS LIABILITY ACTIONS, SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

II. IF NOT, WHETHER THE DECISION OF PULLUM V. CINCINNATI, INC., 476 SO.2D 657 (FLA. 1985), APPEAL DISMISSED, _____ U.S. _____, 106 S.CT. 1626, 90 L.ED.2D 174 (1986), WHICH OVERRULED BATTILLA V. ALLIS CHALMERS MFG. CO., 392 SO.2D 874 (FLA. 1980), APPLIES SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED BEFORE THE PULLUM DECISION. (A.1-2).

SUMMARY OF ARGUMENT

Florida's products liability statute of repose was in effect at all times material herein and Plaintiff's action, commenced thirty-one years after the delivery of the product by the Defendant manufacturer to the original purchaser, was barred. The 1986 legislative amendment to the statute of repose has no bearing on Plaintiff's case. The legislative act amending Section 95.031(2) contains no clear expression of retroactivity and thus is effective prospectively only. Furthermore, as Plaintiff's claim was barred by Section 95.031(2) before Battilla was decided and before he instituted this action, the legislature could not revive it by subsequent legislation. The first certified question accordingly should be given a negative response.

Nor did Plaintiff acquire a property right when he was injured twenty-eight years after the Defendant sold and delivered the product in question. The 1980 Pullum decision, overruling Battilla, had the effect of rendering the statute valid from its effective date in 1975. The second certified question therefore also requires a negative response, and the decision below should be approved.

ARGUMENT

POINT I

The legislature did not expressly, clearly, and explicitly manifest its intent that Chapter 86-272 be applied retroactively. The legislation affects substantive rights and cannot be applied retroactively so as to deprive Defendant of the vested right not to be sued -- The answer to the first certified question should be "no."

Section 95.031(2) was amended in 1986, four years after the Plaintiff was injured and twenty years after the expiration of the period of repose. Laws of Florida, Ch. 86-272, §2. The law is clear that "the presumption is against retroactive application of a statute where the Legislature has not expressly in clear and explicit language expressed an intention that the statute be so applied." Foley v. Morris, 339 So.2d 215, 216 (Fla. 1976). The 1986 amendment does not contain a clear and unequivocal expression of retroactivity and thus, under well-established principles of statutory construction, it applies prospectively only.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

Justice Grimes aptly observed, "[i]n considering [the question of whether the 1986 amendment should be retroactively applied] the cases involving statutory changes to periods of limitation are instructive." Nissan Motor Co. v. Phlieger, 12 F.L.W. 256, 258 (Fla. May 28, 1987) (Grimes, J., specially concurring). A similar situation was presented in Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981), where the plaintiff asked the Court to resurrect an otherwise barred cause of action on the basis of a statutory amendment extending the earlier limitations period. This Court declined the plaintiff's invitation, however, holding that because of the "absence of any express, clear or manifest legislative intent to apply [the amended statute] retroactively, we conclude that it does not apply to causes of action occurring prior to its effective date." Id. at 967 (quoting Brooks v. Cerrato, 355 So.2d 119 (Fla. 4th DCA 1978)).

Nor does Section 3 of Chapter 86-272 supply the requisite legislative intent that the amendment apply retroactively. In Foley, 339 So.2d at 217, this Court held that where the legislature stated only that a statute was to "take effect on July 1, 1972," the statute was to be applied prospectively only.

The reasoning of Homemakers, Inc. and Foley apply with equal force to the instant case. It is submitted that Justice Grimes and every District Court of Appeal have correctly interpreted Chapter 86-272 and the applicable authorities. This Court should also conclude that the 1986 amendment to Section 95.031(2) does not serve to revive Plaintiff's suit. See Phlieger, supra,

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

12 F.L.W. at 258 (Grimes, J., specially concurring); Small v. Niagara Machine & Tool Works, 502 So.2d 943 (Fla. 2d DCA 1987); Shaw v. General Motors Corp., 503 So.2d 362 (Fla. 3d DCA 1987) (question certified); Willer v. Pierce, 505 So.2d 441 (Fla. 4th DCA 1987) (question certified); Pait v. Ford Motor Co., 500 So.2d 743 (Fla. 5th DCA 1987) (question certified); see also Cassidy v. Firestone Tire & Rubber Co., 495 So.2d 801, 802 n.1 (Fla. 1st DCA 1986), rev. denied, 506 So.2d 1040 (Fla. 1987) (court affirmed summary judgment in favor of defendant, noting amendment).

Plaintiff seeks refuge from the "general rule against retrospective application of statutes," L. Ross, Inc. v. R.W. Roberts Construction Co., 481 So.2d 484 (Fla. 1986), by characterizing Chapter 86-272 as a "remedial enactment" which merely divests a defendant of a statutorily created "right or remedy." Initial Brief of Petitioner on the Merits, at 10-12. Plaintiff's argument, however, reveals a fundamental misunderstanding of the nature of a statute of repose and the rights acquired thereunder when the period has expired.

From the Plaintiff's perspective, Chapter 86-272 is "understandably considered beneficial, curative, and remedial." L. Ross, Inc. v. R. W. Roberts Construction Co., 466 So.2d 1096, 1097 (Fla. 5th DCA 1985), approved, 481 So.2d 484 (Fla. 1986). That does not end the retroactivity inquiry, however. As the Fifth District has observed, enactments such as the 1986 amendment can easily be viewed as remedial and procedural, on the one hand, or substantive and penal, on the other, "depending on whose

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

ox is being gored." 466 So.2d 1097. Legislation thus is not automatically deemed retroactive simply because, from the Plaintiff's perspective the enactment is remedial.

Plaintiff's "remedial enactment" argument is premised on the erroneous assumption that former Section 95.031(2) and, a fortiori, Chapter 86-272, merely alter or modify a remedy. Statutes of repose, however, do not alter or modify remedies. Instead, such statutes "define[] substantive rights to bring an action." Colony Hill Condominium Ass'n v. Colony Co., 70 N.C.App. 390, 320 S.E.2d 273, 276 (1984), rev. denied, 312 N.C. 796, 325 S.E.2d 485 (1985); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972). To apply the 1986 amendment retroactively accordingly would impermissibly "revive a liability already extinguished, and not merely restore a lapsed remedy." Colony Hill, 320 S.E.2d at 276.

The Court's recent decision in L. Ross, Inc. v. R.W. Roberts Construction Co., 481 So.2d 484 (Fla. 1986), approving, 466 So.2d 1096 (Fla. 5th DCA 1985), is helpful. There an insured had an action pending against an insurance company for payment on a bond when the legislature repealed a limitation on the amount of recoverable statutory attorney's fees. Over plaintiff's objection, the trial court limited the plaintiff's recovery of attorney's fees to 12-1/2% of the judgment recovered pursuant to the version of the statute in force when the cause of action accrued.

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

On appeal the plaintiff complained that the repeal of the cap on recoverable attorney's fees should be applied retroactively because "it is procedural [and] merely confers a remedy which affects only the measure of damages for vindication of an existing substantive right." Id. at 1097. In resolving the retroactivity issue, the Fifth District refused to mechanically affix to the repealing legislation the "curative" and "remedial" labels. The court held that repeal of the statutory cap resulted in an increased substantive burden on the defendant and thus could not constitutionally be applied retroactively. This Court affirmed, holding that as the statutory right to attorney's fees and the correlative burden to pay them are substantive, "[a] statutory amendment affecting the substantive right and concomitant burden is likewise substantive." L. Ross, Inc., 481 So.2d at 485.

The 1986 amendment plainly goes beyond altering or modifying a remedy to vindicate an existing right. Chapter 86-272, by removing a condition precedent to the accrual of a products liability cause of action, affects the Defendant's substantive right not to be hailed into court years after the period of repose has expired. Plaintiff's "remedial enactment" argument is without merit. L. Ross, Inc., 481 So.2d at 485; Colony Hill, 320 S.E.2d at 273.

Plaintiff further contends that Section 86-272 should be retroactively applied because the statute of repose is a creature of the legislature and Section 86-272 was a repeal of that stat-

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

ute. Plaintiff agrees that the period of repose is not a product of the common law. The same can be said of statutes of limitations, yet the law has long been clear that once a period of limitations has expired a right vests in the defendant not to be sued. Thereafter the legislature is without power to resurrect the cause of action by either repeal or extension of the period. Six years before the product involved in the instant case was sold and delivered by the Defendant, this Court, echoing the majority of jurisdictions, held as follows:

> [T]he legislature has the power to increase the period of time necessary to constitute limitation, and to make it applicable to existing causes of action, provided such change is made before the cause of action is extinguished under the preexisting statute of limitations....

Corbett v. General Engineering & Machinery Co., 37 So.2d 161, 162 (Fla. 1948); Walter, Denson & Son v. Nelson, 88 So.2d 120 (Fla. 1956); accord, Mazda Motors v. S.C. Henderson & Sons, 364 So.2d 107, 108 (Fla. 1st DCA 1978), cert. denied, 378 So.2d 348 (Fla. 1979) (person has vested right in running of limitations period once it has completely run and barred the action). See generally 51 Am.Jur.2d, Limitations of Actions, §43 at 624 (footnote omitted) ("The great preponderance of authority supports the general view . . . that after a cause of action has become barred it cannot be revived by the legislature by . . . repealing the limitation statute.").

In the instant case the constitutionally valid period of repose expired years before Plaintiff was injured and the enact-

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

ment of Chapter 86-272. It follows that the Defendant acquired a vested right not to defend an action based on a product it delivered to the first purchaser in 1954. Section 86-272 cannot constitutionally be given retrospective effect as to this Defendant, even if the legislature had intended that it apply retroactively, and even if it is properly viewed as "remedial" legislation that repealed the statute of repose.

POINT II

The Plaintiff acquired no property or contract right when he was injured in 1982. Pullum therefore is retrospective in its application and the statute of repose was in effect at the time Plaintiff commenced this action -- The answer to the second certified question should be "no."

The Florida legislature enacted Section 95.031(2) in 1974, and it became effective on January 1, 1975.[3/] (Ch. 74-382, §36, Laws of Fla.). In 1980, in a brief opinion from which three members of the Court dissented, the statute of repose was held unconstitutional on grounds that it was in contravention of the

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3/ Section 95.031(2) provides:

> Actions for products liability and fraud under subsection (3) of Section 95.11 must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in subsection (3) of Section 95.11, but in any event within 12 years after the date of delivery of the completed product to its original purchaser or the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

right to "access to the courts" provided for in Article I, Section 21 of the Florida Constitution. Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980). Five years later, in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) the Court overruled Battilla and upheld the constitutionality of Section 95.031(2).

Pullum had the effect of revalidating the statute from its effective date in January of 1975. Florida Forest & Park Service v. Strickland, 18 So.2d 251 (Fla. 1944), mistakenly relied upon by Plaintiff, fully supports Defendant's contention that the statute of repose bars Plaintiff's suit:

> Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have prospective effect only. Generally speaking, therefore, a judicial construction of a statute will ordinarily be deemed to relate back to the enactment of the statute....

Id. at 253.

Plaintiff attempts to bring himself within the exception to the Strickland rule: i.e., where a property or contract right has been created during the interim period in which the statute was construed as unconstitutional, the rights that have been created cannot be destroyed by subsequent judicial interpretation. Id. Plaintiff has failed to establish, however, that he acquired any contract or property rights between 1980 and 1985. In the absence of the acquisition of a vested right in either property or contract, the Strickland exception is inapplicable.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

Plaintiff offers no support for his contention that even though he was injured 28 years after the product was delivered to the original purchaser he nonetheless acquired a cause of action as the injury occurred after Battilla. This is understandable given the fact that well before that decision was handed down Defendant's potential liability had been extinguished by operation of Section 95.031(2). Simply put, Battilla does not alter the fact that after the statutory period had run in 1975 Plaintiff was foreclosed from ever having a cause of action against this Defendant.

> No cause of action was created by the statute and Battilla vested in plaintiffs no cause of action. It removed the bar of the statute to plaintiffs' assertion of a cause of action. But plaintiffs had, at most, a mere expectation that they had a cause of action they could pursue, and a subsequent decision, holding the statute to be constitutional, could not and does not deprive them of any vested rights.

Eddings v. Volkswagenwerk, A.G., 635 F.Supp. 45, 47 (N.D. Fla. 1986); Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144, 1149 (S.D. Fla. 1986) ("Plaintiff . . . had no vested . . . property right prior to Pullum . . . . [T]he statute of repose and the lapse of the twelve-year . . . period obviated the very possibility of Plaintiff sustaining any legal injury . . . ."); see also In re Will of Martell, 457 So.2d 1064, 1067 (Fla. 2d DCA 1984) (substantive vested right is an immediate right of present enjoyment or present fixed right of future enjoyment); Division of Workers' Compensation v. Brevda, 420 So.2d 887, 891 (Fla. 1st DCA 1982) ("To be vested, a right must be more than a mere expec-

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

tation based on an anticipation of the continuance of an existing law; it must have become title . . . to the present or future enforcement of demand.").

Plaintiff cannot meet the requirements of the Strickland exception. Having failed to establish a property or contract right acquired under Battilla, the Pullum decision applies to bar the Plaintiff's cause of action.

Plaintiff's belated reliance on Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) also is misplaced. As an initial matter, Plaintiff did not bring Chevron Oil to the attention of the trial court or the Third District and, it is submitted, he should be deemed to have waived any reliance on that decision as a basis for reversal of the summary judgment. In any event, in Chevron Oil the Supreme Court formulated a three-part test for determining the retroactivity of federal decisions. In Lamb and Eddings, supra, the federal district courts emphasized that the Chevron Oil test would not be determinative as their task was to apply Florida law. Lamb, 631 F.Supp. at 1151; Eddings, 635 F.Supp. at 48; see also United States v. Estate of Donnelly, 397 U.S. 286, 297 (1970) and Taylor v. Hartford Casualty Insurance Co., 545 F.Supp. 282 (S.D. Ga. 1982) (retroactivity of state judicial decision is a question of state law). As noted above, the Florida law as to retroactivity of Florida decisions is set forth in Strickland. See also Parkway General Hospital v. Stern, 400 So.2d 166 (Fla. 3d DCA 1981). Mindful of the Chevron Oil approach, this Court nonetheless has continued to adhere to the

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

Strickland rule. Cf. Lurie v. Florida Board of Dentistry, 288 So.2d 223 (Fla. 1973).

State courts are not bound to follow decisions of federal courts dealing with state law even decisions of the United States Supreme Court; state Supreme Courts are supreme in matters of state law. See, e.g., State v. Barquet, 262 So.2d 431 (Fla. 1972). This Court has not adopted the Chevron Oil approach which is thus simply inapplicable to Plaintiff's case. Chevron Oil is inapplicable to Plaintiff's case for another reason as well. At the time the Chevron Oil plaintiff was injured, he had a valid cause of action. In contrast, Plaintiff herein had no valid claim against the Defendant when he was injured because his claim had already been barred by the statute of repose.

Even if this Court chooses to be guided in this case by the federal approach to retroactivity, the same result would be reached as that required under the Strickland analysis.[4/] The Plaintiff has failed to establish that the Pullum decision meets the first criterion of the Chevron Oil test, i.e., the decision established a new principle of law by overruling a clear past precedent on which he relied. Chevron Oil, 404 U.S. at 106. Pullum's effect of reinstating the statute of repose clearly did not establish a new principle since the statute had been in ef-

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4/ Not only does the Chevron Oil test enumerate three factors to determine the retroactive effect of decisions, but further the federal courts require that all three prongs of the test be established by the party seeking to limit a decision to prospective effect only. See, e.g., Lamb, 631 F.Supp. at 1150.

DANIELS AND HICKS, P. A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

fect since 1975. See also Goodman v. Lukens Steel Co., 55 U.S.L.W. 4881 (U.S. June 19, 1987).

As to the second Chevron Oil criterion, statutes of repose such as former Section 95.031(2) are not designed to provide a remedy to the injured party. Rather, as this Court noted in Pullum, Florida's products liability statute of repose was enacted because the legislature viewed perpetual liability as an undue burden on manufacturers. Pullum, 476 So.2d at 659. Accordingly, to apply Pullum prospectively only would retard the operation of a statute which was specifically designed to benefit manufacturers such as the Defendant herein. Plaintiff has thus failed to meet the second criterion of Chevron Oil. Chevron Oil, 404 U.S. at 107.

Nor has Plaintiff satisfied the third Chevron Oil criterion, i.e., retroactive operation of Pullum would produce substantial inequitable results. Id. at 107. Plaintiff never had a cause of action against the Defendant because the period of repose had run even before Battilla was decided. As noted above, once the period of repose expired the Defendant had a vested right not to be sued on the basis of a product it sold and delivered in 1954. To interpret Pullum in such a way as to revive Plaintiff's claim and allow his suit to proceed would thus constitute an unjustified windfall for the Plaintiff and result in substantial inequity and hardship to the Defendant.

In sum, the Plaintiff's claim was barred by the statute of repose in effect when he was injured and when he filed suit. Summary judgment was properly entered for the Defendant.

DANIELS AND HICKS, P.A.
SUITE 2400 NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132-2513 • TEL. (305) 374-8171

CONCLUSION

Based upon the foregoing reasoning and authorities, Defendant/Respondent submits that both of the certified questions should be given a negative response.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief on the Merits was mailed this 20th day of July, 1987, to:

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