4-24

IN THE SUPREME COURT OF FLORIDA

HUMANA OF FLORIDA, INC., et al.,

Petitioners,

vs.

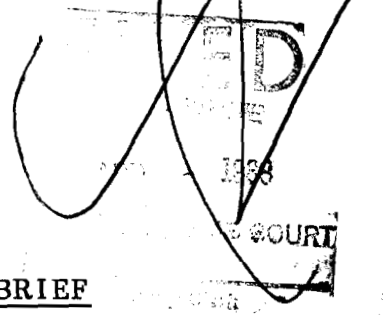
UNDERWRITERS' ADJUSTING CO., et al,

Respondents.

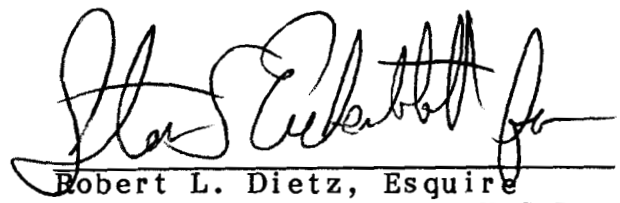
_____/

CASE NO.: 71 889

APPEAL NO: 86-2866



RESPONDENT'S ANSWER BRIEF



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INDEX

TABLE OF CITATIONS

STATUTES

PRELIMINARY STATEMENT

In this brief, the parties will be referred to as they appeared before the Second District Court of Appeal. The respondent, UNDERWRITERS ADJUSTING COMPANY, will be referred to as the employer/self-insured. The petitioners, HUMANA OF FLORIDA, INC., d/b/a SUN BAY COMMUNITY HOSPITAL; SUN BAY COMMUNITY HOSPITAL STAFF, INC.; AARON SCHNEIDER, M.D.; A. SCHNEIDER, M.D., PA. and FLORIDA PATIENTS COMPENSATION FUND will be referred to as defendants. LAURENCE J. REILLY, JR. and MARY ANN REILLY, Husband and Wife, will be referred to as plaintiffs.

All references to the record on appeal will be designated by the letter "R" followed by the appropriate page numbers.

STATEMENT OF THE CASE

This appeal involves two cases that were consolidated at the Second District Court of Appeal. Both cases involve medical malpractice actions that were brought against health care providers.

In Florida Power Corporation v. Humana of Florida, Inc., Laurence J. Reilly and Mary Ann Reilly filed a complaint alleging medical malpractice against several defendants. The defendants included Aaron Schneider, M.D. and A. Schneider, M.D., P.A. (R. at 1-7). Florida Power subsequently filed a Notice of Payment of Compensation and Medical Benefits (lien) in the above referenced action (R. at 8). The workers' compensation lien was amended by subsequent notices of payment of compensation and medical benefits (R. at 23, 29, 33). On July 3, 1986, defendants, Aaron Schneider, M.D., and A. Schneider, M.D., P.A., filed a motion to strike Florida Power Corporation's Second Amended Notice of Payment of Compensation and Medical Benefits (lien). (R. at 42). On October 7, 1986, the trial court entered an order striking Florida Power Corporation's Second Amended Notice of Compensation and Medical Benefits (lien) (R. at 46). The respondent timely appealed that order to the Second District Court of Appeal (R. at 48).

In Humana of Florida, Inc. v. Underwriters Adjusting Company, plaintiff brought a medical malpractice action

against multiple defendants, including Humana of Florida, Inc. and the petitioners in this appeal (R. at 1-7). The respondents, plaintiff's self-insured employer and the employer's adjusting agent, The Family Mart and Underwriters Adjusting Company, filed a Notice of Payment of Compensation and Medical Benefits (lien). (R. at 8-9). Each of the defendants, including petitioners Humana of Florida, Inc. and Sun Bay Community Hospital Medical Staff, Inc. subsequently filed motions to strike the notice of workers' compensation lien (R. at 10-13).

On September 18, 1986, the trial court judge heard the defendants' motions to strike. On October 7, 1986, the trial court granted the motions to strike and entered an order granting defendants' motions to strike Notice of Payment of Compensation and Medical Benefits (lien) of Underwriters' Adjusting Company (R. at 14-15). The respondents timely appealed this order (R. at 16).

The Second District Court of Appeal consolidated these cases and reversed the trial courts' orders striking the notices of payment of workers' compensation benefits. The court certified that its decision directly conflicted with the Third District Court of Appeal's decision in American Motors Ins. Co. v. Coll, 479 So.2d 156 (Fla. 3rd DCA 1985), rev. denied, 488 So.2d 829 (Fla. 1986). Petitioners then timely filed a notice to invoke discretionary jurisdiction. This Honorable Court chose to resolve the conflict. Respondent's brief on the merits timely follows.

STATEMENT OF THE FACTS

On June 1, 1979, the Plaintiff, Laurence J. Reilly, Jr. suffered an industrial injury while in the course and scope of his employment with Florida Power Corporation (R. at 8). On said date, the self-insured employer, Florida Power Corporation, provided Workers' Compensation insurance coverage for its employees in accordance with the provisions of the Florida Workers' Compensation Law, Fla. Stat. §440.01 et. seq. (R. at 8). Florida Power Corporation paid in excess of $100,000.00 of Workers' Compensation benefits to the plaintiff, Laurence J. Reilly, Jr. Medical expenses comprised the majority of the benefits paid (R. at 33).

In their complaint, plaintiffs alleged that Aaron Schneider, M.D. and A. Schneider, M.D., PA. negligently and carelessly performed the following acts: removed a normal disc at the L6-S1 level when the CT scan showed bulging at the L5-L6 level; performed an unnecessary laminectomy at the L6-S1 level; improperly performed a posterior lumbar interbody fusion at L6; performed an unnecessary discogram at the L5 and L6 levels; and performed unnecessary reexploration of the L5-L6 and L6-S1 regions (R. at 1-5). Plaintiffs further alleged that Humana of Florida, Inc., d/b/a Sun Bay Community Hospital and Sun Bay Community Hospital Staff, Inc. were careless and negligent because they failed to investigate and evaluate the professional

training and special skills which Dr. Schneider claimed to possess before initially awarding surgical privileges for those specialized surgical procedures. Also, plaintiffs claimed that the defendants failed to review patient charts and surgical results of Dr. Schneider. Finally, plaintiffs asserted that defendants renewed Dr. Schneider's surgical privileges without sufficient evaluation of his ability to perform highly specialized spinal surgeries (R. at 6).

SUMMARY OF ARGUMENT

The unambiguous language of Florida Statutes Sections 768.50 and 440.39 does not permit striking workers' compensation liens in medical malpractice cases. The Second District Court of Appeal is the only court that has extensively discussed and analyzed the issues pertinent to the subrogation issue, and this Honorable Court should follow the cogent reasoning of that court's decision.

The Florida legislature has for over forty years expressly provided an employer/carrier with a right of subrogation against third party tortfeasors, including health care providers. The inequities that would arise if a workers' compensation provider were not entitled to subrogation are unacceptable. First, a workers' compensation provider would fail to recover for payments made to a medical malpractice plaintiff. Second, the medical malpractice defendant would receive a windfall because plaintiff's judgment would not be reduced by his or her receipt of collateral benefits. Neither statutory law nor case law supports the premise that a health care provider has different financial responsibilities than any other third party tortfeasor.

Furthermore, the majority, if not all courts, agree that subrogation is proper in the factual scenario before this honorable court. Florida's legislative policy has been

to avoid double recoveries without extending tort immunity to strangers outside of the employer-employee relationship. Also, Florida law has encouraged the use of an employer/carrier's subrogation right as a means of reducing costs in the workers' compensation system.

The decisions of the Third District Court of Appeal offered as persuasive precedent are shallow opinions that do not comport with logic or reason. The cases fail to explore the case law and public policy relevant to the subrogation issue before this honorable court. Also, petitioners 'arguments concerning rules of statutory construction fail to address the significant public policy issues that weighed heavily in the decisions rendered by the Second District Court of Appeal. Therefore, in light of the strong case law and public policy supporting respondent's position, respondent respectfully requests that this Honorable Court affirm the decisions of the Second District Court of Appeal and assure that third party tortfeasors comply with their financial responsibilities.

ARGUMENT

THE UNAMBIGUOUS LANGUAGE OF FLORIDA STATUTES SECTION 768.50 PROHIBITS STRIKING A WORKERS' COMPENSATION LIEN IN MEDICAL MALPRACTICE CASES BECAUSE THE FLORIDA LEGISLATURE HAS EXPRESSLY PROVIDED THAT AN EMPLOYER/CARRIER IS ENTITLED TO A RIGHT OF SUBROGATION PURSUANT TO FLORIDA STATUTE SECTION 440.39(2) (1977).

The unequivocal language of Florida Statutes Sections 768.50(4) and 440.39(2) provides for an employer/carrier's right of subrogation in medical malpractice cases. Furthermore, Florida Statute Section 768.50(1) (1979) clearly states that "...there shall be no reduction for collateral sources for which a subrogation right exists."

For the last forty years, the Florida legislature has expressly provided an employer/carrier with a right of subrogation against third party tortfeasors once an injured employee or his dependents has accepted or begun proceedings for workers' compensation benefits. 1947 Fla. Laws Section 1, Ch. 23822; 1951, Section 1, Ch. 26546; 1959, Section 1, Ch. 59-431; 1970, Section 6, Ch. 70-148; 1974, Section 18, Ch. 74-197; 1977, Section 11, Ch. 77-290. In the present case, the employer/carrier's right of subrogation came into being when plaintiff received workers' compensation benefits. Florida Power's subrogation right extends to those additional workers' compensation benefits for which it was liable and which directly resulted from the alleged

negligence of the defendants.

It is well settled Florida law that an employer's workers' compensation liability extends to injuries and aggravations of injuries resulting from medical treatment rendered incidental to the original compensable injury. Sullivan v. Liberty Mutual Insurance Company, 367 So.2d 658, 660 (Fla. 4th DCA 1979); Warwick v. Hudson Pulp & Paper Co., Inc., 303 So.2d 701, 702 (Fla. 1st DCA 1974). Therefore, a claimant's injuries arising from medical treatment that was rendered incidental to his original compensable injury are likewise compensable by his employer and his employer's workers' compensation carrier. Sullivan, supra at 660. The present controversy resulted from conflicting decisions rendered recently by the Second and Third District Courts of Appeal concerning the propriety of workers' compensation liens in medical malpractice cases. See Sun Coast Homes, Inc. v. Humana of Florida, Inc., 13 FLW 445 (Fla. 2d DCA Feb. 10, 1988); American Mutual Ins. Co. v. Decker, 518 So.2d 315 (Fla. 2d DCA 1987); American Motorists Insurance Company v. Coll, 479 So.2d 156 (Fla. 3d DCA 1985); Rosabal v. Arza, 485 So.2d 846 (Fla. 3d DCA 1986).

The Second District Court of Appeal correctly resolved the issue before this Honorable Court. The court declared that the plain meaning of Florida Statutes Sections 768.50 and 440.39 entitle a collateral source provider to a right of subrogation in workers' compensation cases involving medical malpractice. American Mutual Ins. Co. v. Decker,

518 So.2d 315, 317 (Fla. 2d DCA 1987). In Decker, the Second District Court of Appeal consolidated two cases involving liens filed by workers' compensation carriers against health care providers in medical malpractice cases. Id. The trial courts both entered judgments striking the workers' compensation liens filed by the self-insured employer for workers' compensation benefits paid. Id. On appeal, the Second District Court of Appeal refused to embrace opinions rendered by the Third District Court of Appeal. Id. Instead, the court analyzed the interaction of a statute concerning collateral sources of benefits in medical malpractice cases with a statute authorizing workers' compensation payments to be recovered from third party tortfeasors. Id. The court held that a self-insured employer or workers' compensation carrier that possesses a statutory subrogation right under workers' compensation law may file a lien against a health care provider and directly recover workers' compensation benefits paid to an employee as a result of medical negligence. Id. at 318, 319.

In support of its decision, the court conducted a lengthy analysis of the controlling statutory law and relevant public policy. The court clarified that the plain language of Florida Statute §768.50(4) controlled the outcome of the controversy. Id. at 317. The relevant language of the statute reads as follows:

> Unless otherwise expressly provided by law, no insurer or any other party providing collateral source benefits as defined in subsection (2) shall be

> entitled to recover the amounts of any such benefits from the defendant or any other person or entity, and no right of subrogation or assignment of rights of recovery shall exist. (emphasis added) Fla. Stat. §768.50(4) (1979)

The court stated that the underscored words above were crucial to the resolution of the subrogation controversy because the prefatory language validates the statutory subrogation right provided in Section 440.39 of the workers' compensation laws of the Florida Statutes. Decker, supra at 317. The pertinent language of the relevant workers' compensation subrogation statute reads as follows:

> "If the employee or his dependents accept compensation or other benefits under this law, or begin proceedings therefore, the employer or in the event the employer is insured against liability hereunder, the insurer shall be subrogated to the rights of the employee or his dependents against such third-party tortfeasor, to the extent of the amount of compensation benefits paid or to be paid...." Florida Statute Section 440.39(2) (1987).

Thus, the court concluded that an employer or carrier can recover 100% of any benefits paid or payable to an employee as a result of medical negligence. Decker, supra at 317. The court further reasoned that the comprehensive nature of the statutory workers' compensation subrogation scheme ensured an equitable allocation of financial responsibility among the plaintiff, defendant, and collateral source in a medical malpractice action. Id. at 318.

The Second District Court of Appeal also refused to sanction the inequities that would arise if a self-insured or workers' compensation carrier were not entitled to a

right of subrogation in medical malpractice cases. Id. First, the collateral source provider would fail to recover for payments made to the medical malpractice plaintiff. Id. Second, the medical malpractice defendant would receive a windfall because plaintiff's judgment would be reduced by his or her receipt of collateral benefits. Id. The court recognized that the Florida legislature expressly created a right of subrogation in workers' compensation cases to prevent the unjust financial detriment that would accrue to the self-insured employer or workers' compensation carrier if subrogation were not allowed. Id. Essentially, the court concluded that Sections 768.50(4) and 440.39(2) are functionally integrated, and, by their plain language, mandate that a health care provider meet its financial responsibilities as a third party tortfeasor. Id. at 317, 318.

This Honorable Court should follow the precedent established by the Second District Court of Appeal in Decker. The plain language of the statutes evaluated by the Decker court demonstrates that they are integrated. Where statutory law is unambiguous on its face, the courts have a responsibility to follow express legislative intent and refrain from judicial interpretation. Citizens of the State of Florida v. Public Service Commission, 453 So.2d 784, 786 (Fla. 1983). Because workers' compensation payments clearly constitute collateral source payments pursuant to the statutory law discussed, the self-insured employer or

carrier is statutorily entitled to a right of subrogation against third party tortfeasors, including health care providers. Unacceptable inequities arise if the provider of collateral source benefits is not entitled to a right of subrogation. The medical malpractice defendant receives an unearned windfall and the workers' compensation system is burdened because the workers' compensation provider is denied the right of subrogation. Decker, supra at 318. Neither the statutory provisions nor the case law involved in this case provide justification for why health care providers should receive more favorable treatment than other third party tortfeasors. Furthermore, as the Second District Court of Appeal pointed out, the majority, if not all courts, that have handled this issue have concluded that subrogation by the workers' compensation provider in medical malpractice cases is proper. Id.

Furthermore, the Second District Court of Appeal's decision in Decker is the only Florida case that thoroughly analyzes the desirability of a self-insured employer or carrier's right of subrogation in a medical malpractice action. The Decker court extensively reviewed both the statutory law related to the subrogation issue and the public policy supporting the law. See generally Decker, supra. In contrast, the case law proffered by petitioners merely provides a cursory examination of the issue before this Honorable Court and should not be considered persuasive.

The Second District Court of Appeal recently reaffirmed the Decker decision in the case of Sun Coast Homes, Inc. v. Humana of Florida, Inc., 13 FLW 445 (Fla. 2d DCA Feb. 10, 1988). Sun Coast involved the identical issue decided by the Decker court. Sun Coast, supra at 445. The Sun Coast court based its decision on its opinion in Decker. The court held that it was error to strike a notice of lien filed by plaintiff's employer and the employers' workers' compensation carrier in plaintiff's medical malpractice suit against appellee health care provider. Id.

This Honorable Court should adhere to precedent that demands compliance with express legislative intent. Where the words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace expressed intent. Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784, 786 (Fla. 1983); Heredia v. Allstate Insurance Company, 358 So.2d 1353, 1355 (Fla. 1978); Florida Gulf Health Systems Agency, Inc. v. Commission on Ethics, 354 So.2d 932, 933 (Fla. 2d DCA 1978). As the Second District Court of Appeal has stated:

> In statutory construction legislative intent must be ascertained and must govern. However, where the language is plain, definite in meaning and without ambiguity, it needs no interpretation or construction and itself fixes the legislative intent. Determination of legislative intent must be primarily from the language of the statute itself and not from conjecture. When the language of an act is clear and unambiguous it is not within the province of the court to sit in judgment upon the wisdom of the

> legislative policy embodied in it nor to assume that the legislature meant something which does not appear upon the face of the statute. Platt v. Lanier, 127 So.2d 912, 913 (Fla. 2d DCA 1961).

The language of Florida Statutes Sections 768.50(1) & (4), (1979) is plain, definite in meaning and without ambiguity. Therefore, the statute needs neither interpretation nor construction; rather, the statutes' legislative intent is evident. The Florida legislature neither intended to reduce nor extinguish an employer/carrier's subrogation rights which have been expressly provided by law.

For many years the legislature has endeavored to balance the respective interests between the claimant, the employer/carrier and the third party tortfeasor. The underlying theory relied upon by the legislature is that a double recovery should be avoided and tort immunity should not be extended to strangers outside of the employer-employee relationship. See Aetna Casualty & Surety v. Bortz, 271 So.2d 108 (Fla. 1973); Brown v. State Farm Mutual Automobile Insurance Company, 281 So. 2d 364 (Fla. 2d DCA 1973). In Aetna Casualty, this Honorable Court recognized that the legislature has not yet allowed an injured employee to receive in excess of a single recovery for one injury from a third party tortfeasor. Aetna Casualty, supra at 113. In 1969, the Florida legislature attempted to prevent the possibility of double recovery by an injured employee through the enactment of Florida Statute §440. 39(3)(b).

Allowing striking of a workers' compensation lien in medical malpractice cases extends unearned tort immunity to third party tortfeasors and permits the claimant a double recovery.

In addition to the legislative policy of avoiding double recoveries by the claimant, the legislature has determined that the employer/carrier's subrogation right is an effective method of reducing costs in the workers' compensation system. For example, in 1979, the year of the industrial accident in this case, the legislature decided that, to the extent that subrogation was a method of reducing costs in the workers' compensation system, subrogation should be encouraged. Therefore, a new subsection (3) was added to sections 627.7372, providing that "benefits received under the Workers' Compensation Act shall not be considered a collateral source." William E. Sadowski, Jack Herzog, R. Terry Butler, and Ruth L. Gokel, "The 1979 Florida Workers' Compensation Reform: Back To Basics", 7 FSU Law Review 641, 680 (1979). Section 627.7372(1) Florida Statutes (1979) provides as follows:

> In any action for personal injury or wrongful death arising out of the ownership, operation, use, or maintenance of a motor vehicle, the court shall admit into evidence the total amount of all collateral sources paid to the claimant, and the court shall instruct the jury to deduct from its verdict the value of all benefits received by the claimant from any collateral source.

The definition of "collateral sources" contained in

§627.7372 of the Florida Motor Vehicle No Fault Law is identical to that contained in Florida Statute §768.50 (1979). In 1979, the Florida legislature added the following language to §627.7372:

> (3) Notwithstanding any other provision of this section, benefits received under the Workers' Compensation Law shall not be considered a collateral source.

No similar amendment was necessary to Section 768.50 Florida in 1979 because the express language in the statute clearly permits the workers' compensation carrier to pursue its subrogation right.

Under the provisions of the Florida Workers' Compensation Law, only the injured employee or his dependents may bring suit against a third party tortfeasor during the first year following the date on which the cause of action accrued. Florida Statute §440.39(4)(a) (1983) . During the second year, either the injured employee or the employer/carrier may file suit against the third party tortfeasor if the employer/carrier gives the injured employee the necessary 30 days notice. Florida Statute §440.39(4)(a) (1983). Finally, if the carrier or employer does not bring suit within two years following the date the cause of action accrued against the third party tortfeasor, the right of action shall revert to the employee. Florida Statute §440.39(3)(b) (1983). Therefore, the employer/carrier is prevented from filing an action against the third party tortfeasor during the first year; the

employer/carriers' sole remedy is to file a notice of lien pursuant to §440.39(3)(a). This is precisely what the the employer/self-insured has attempted to do in this case.

Although petitioner will assert that recent decisions of the Third District Court of Appeal should control this controversy, the suggested precedent is misguided because it fails to accord Florida Statute Section 768.50 its full significance. In American Motorists, Ins. Co. v. Coll, 978 So.2d 156 (Fla. 3d DCA 1986), the Third District Court of Appeal held that a workers' compensation carrier is a party providing "collateral source benefits" as that term is defined in Florida Statute §768.50(2) (1983). The court decided that an employer/carrier is legislatively disentitled to recover "the amounts of any such benefits from the defendant or any other person or entity, and no right of subrogation or assignment of rights of recovery shall exist." Id. at 157. In the subsequent case of Rosabal v. Arza, 495 So.2d 896 (Fla. 3d DCA 1986), the Third District Court of Appeal relied upon its previous holding in Coll and remanded the cause to the trial court with directions to modify the final judgement by granting the appellant a set-off from the jury's award of the amounts paid to the claimant as workers' compensation benefits. Id. at 847. The Arza court directed the trail court to strike the notice of workers' compensation lien filed by the claimant's employer and its workers' compensation carrier. Id. Respondent respectfully submits that the Coll and Arza

opinions represent a misguided application of Florida Statute §768.50.

The Third District Court of Appeals decisions in Coll and Arza are puzzling in light of that courts' recognition in Continental Insurance Company v. Industrial Fire & Casualty Insurance Co., 427 So.2d 792 (Fla. 3d DCA 1983), that subrogation on the part of the employer's carrier in a workers' compensation case is solely a creature of statute. In light of the existence of Florida Statute Section 440.39(2) and the Third District Court of Appeal's previous pronouncement in Continental Insurance Company, the Coll and Arza opinions should be disregarded.

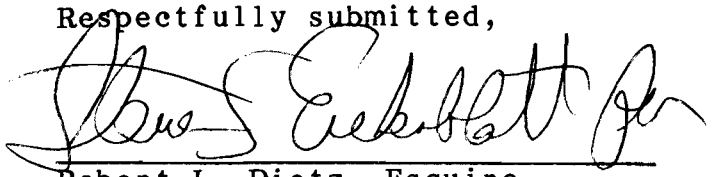
In contrast to the Decker and Sun Coast cases, precedent established by the Third District Court of Appeal does not further public policy related to subrogation in workers' compensation cases. The Decker court concluded that precedent established by the Third District Court of Appeal could not be squared with the proposition that a medical malpractice defendant unjustly benefits from a reduction in the judgment amount absent a self-insured employers' or workers' compensation carrier's right of subrogation. Decker, supra at 318. Finally, the Decker court recited case law that indicated that "the majority, if not all, of the courts in the United States,... [agree]....that there is the right of subrogation under statutes and fact situations similar to the applicable statute and facts in this case." Id.

The unambiguous language of Florida Statutues Section 768.50(4) (1979) does not permit the striking of a workers' compensation lien in medical malpractice cases. For over forty years, the Florida legislature has expressly provided an employer/carrier with a right of subrogation against third party tortfeasors, and this subrogation right is solely a creature of statute. Continental Insurance Company, supra. Furthermore, legislative policy seeks to prevent an injured employee from receiving in excess of a single recovery for one injury from a third party tortfeasor. In addition, legislative policy attempts to encourage the use of the employer/carrier's subrogation right as a method of reducing costs in the workers' compensation system. Therefore, the respondent respectfully requests that this Honorable Court affirm the cogent decision of the Second District Court of Appeal.

CONCLUSION

Based on the reasons and authorities set forth above, it is respectfully requested that this Honorable Court affirm the decision of the Second District Court of Appeal dated December 4, 1987, and enforce the employer/self-insured's notice of Payment of Compensation and Medical Benefits (lien) as previously filed and amended.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Donald V. Bulleitt, Esq., Post Office Box 210, St. Petersburg, FL 33701; Rodney Morgan, Esq., Post Office Box 2378, Tampa, FL 33601; A. Broaddus Livingston, Esq., Post Office Box 3239, Tampa, FL 33601; and John W. Mitzell, Esq., 701 E. Washington Street, Tampa, FL 33602, Attorneys for the claimant, by regular U.S. mail this 30th day of March, 1988.

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