D/a 12-7-88

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8 Separate

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: 72,357



W. W. GAY MECHANICAL CONTRACTOR, INC., a Florida corporation,

Plaintiff/Petitioner,

vs.

WHARFSIDE TWO, LTD., and CHANEN CONSTRUCTION COMPANY, INC.,

Defendants/Respondents.

On Appeal from the First District Court of Appeal, State of Florida.
DCA-1 NOS.: BQ-394 & BQ-397

# ANSWER BRIEF AND APPENDIX OF RESPONDENT WHARFSIDE TWO, LTD. ON THE MERITS

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## STATEMENT OF THE CASE

This is an appeal in the Supreme Court seeking reversal of the opinion of the District Court of Appeal, First District, and a reinstatement of the Final Judgment rendered by the Trial Court. Respondent has included in this brief Statements of the Case and Facts as the Statement of Petitioner contains few of the facts material to this appeal.

In this brief, references to the Record on Appeal will be by the symbol "R". References to the Trial Transcript will be by the symbol "T". References to the Exhibits of Wharfside will be by the symbol "WX". References to the Appendix will be by the symbol "A".

This suit arose out of a dispute between the parties emanating from the construction and installation of the plumbing system for the domestic water supply at the Sheraton at St. Johns Place Hotel in Jacksonville, Florida.

Petitioner W. W. Gay was the subcontractor who installed the plumbing system. It was the Plaintiff in the Trial Court. (R1-19). In this brief, W. W. Gay will be referred to as "Gay".

Wharfside Two, Ltd. was the owner of the hotel. It was a Defendant in the Trial Court. (R1-19). It will be referred to as "Wharfside".

Chanen Construction was the general contractor who constructed the hotel. It was a Defendant in the Trial Court (R1-19). It will be referred to as "Chanen".

Gay initially filed a mechanic's lien foreclosure against Wharfside and an action for breach of contract against Chanen because Chanen withheld $230,000 from the final payment on the contract it had with Gay for the plumbing. (R1-19).

Wharfside counterclaimed alleging breach of contract, negligence, breach of implied warranty, and Restatement Strict Liability. The heart of each theory was that Gay had installed a defective domestic water system. Wharfside claimed damages for money to repair or replace the defective system and claimed that it had suffered lost profits. (R116-127).

Chanen likewise filed a counterclaim against Gay on similar theories. (R128-139).

Thereafter, Wharfside filed a crossclaim against Chanen for breach of contract and breach of implied warranty and sought the same damages it claimed against Gay. It was based on Chanen being responsible for the acts of Gay. (R177-206).

Then, Chanen amended its counterclaim to seek additional damages in the way of indemnity from Gay for any sums for which it was found liable to Wharfside. (R207-251).

The case went to trial and a jury verdict was rendered.

The jury found in favor of Gay and against Wharfside and Chanen and assessed the damages of Gay at $200,000, plus

interest, costs and attorneys' fees. On the counterclaims of Wharfside and Chanen against Gay, the jury found in favor of Gay.

On the crossclaim of Wharfside against Chanen, the jury found in favor of Wharfside and assessed the damages at $30,000, plus interest and costs. (R451-470). Judgment was entered in accordance with the verdict.

Thereafter, Wharfside and Chanen appealed to the First District Court of Appeal and it reversed the Trial Court with opinion. The First District held that the Trial Court should have admitted evidence of lost profits sustained by the hotel and also held that the jury verdict was so inconsistent that the underlying basis for the verdict was fundamentally undermined. (A1-7).

## STATEMENT OF THE FACTS

There were two basic problems with the domestic water system of the Sheraton Hotel. There was odor in the water and corrosion of the pipes causing them to deteriorate and to leak.

The hotel opened for business on October 6, 1980. (T119-120). Approximately eighteen (18) months later pipe leaks began occurring in the hot water piping. (T226, 507, 976).

An investigation by Wharfside to determine the cause of the leaks showed that they were caused by two factors, (1) galvanic corrosion which occurred where pipes of dissimilar metal, i.e., copper and galvanized steel, were joined together without the use of dialectic connectors (T587-588, 640, 646, 1023-1024), and, (2) because a silicate-based water treatment system on the hot water side was not used. (T646, 649, 652, 664). Gay disputed these findings.

The odor in the water was first noticed about a month before the hotel opened. (T164; WX4). Gay's field notes (T170; WX5, WX6, WX7, WX8), and the punch list of items to be corrected showed the water problem had been observed and that attempts had been made to correct it. (T196-199, 913-914).

Gay tried to resolve the odor problem for approximately one (1) year after the hotel opened and then refused to do anything else about it. (T127-128, 129, 199-200, 484-485; WX12). There was substantial evidence, again disputed, that the cause of the odor was Gay's use of a lubricant called "pipe

dope" which had a petroleum like odor. The manufacturer of the lubricant made one which was odorless, but it was not used. (T581, 582). Wharfside also offered evidence that more of the pipe dope was used than should have been (T959), and that it had been improperly applied. (T582, 1354, 1355).

Some witnesses testified that the odor problem was still present in the hotel water at the time of the trial. (T206, 1066-1067).

One of the primary elements of damage claimed by Wharfside was for lost profits from the operation of the hotel. The hotel was a new business and, therefore, it was not possible for Wharfside to offer a past pattern of profits.

Wharfside attempted to present several witnesses with supporting documents to show that the hotel's occupancy rates had been severely reduced by the plumbing problems and in particular the odor problem, and that its profits had been reduced substantially. The amount of the lost profits were determined by comparing the hotels actual performance with projections for the hotel's performance made prior to its opening. The Trial Court received some of the evidence offered to support the claim and denied the admissibility of other of the evidence.

Prior to the development of the hotel property, Wharfside had economic feasibility studies performed to determine if the project was a good investment, to obtain construction and long term financing and to use in the negotiating of an operating

management agreement with a major hotel company. (T147). These studies were done by a nationally recognized organization, Pannell, Kerr and Foster. (T147). The studies were performed in February 1977, November 1977 and June 1980. (T148, 149, 151). Three studies were done in order to insure that they were up-to-date and accurate. (T151-152). The studies estimated that the occupancy level of the hotel for the years 1981-1985 would range from sixty-five percent (65%) (T339), in 1981 to seventy-nine percent (79%) in 1985. (T341). The rooms department profit was projected from 70.2% to 73.5% during that same period. (T342). They projected that the room rates would average between $60.00 and $70.00. (T343). It was the consulting firm's opinion that the chances for financial success of the hotel were good as occupancy rates in the mid to upper seventies are indicative of success. (T345). The studies and the testimony of the person who supervised the preparing of them was admitted into evidence.

From June 1981 until January 1984 the hotel was managed by Jay Litt, whose testimony was heard by the jury. (T398). Mr. Litt later became the head of a hotel management and consulting firm. (T395). When he arrived at the hotel he found the management to be professional and well trained. (T398). However, he found that the hotel was not doing well financially because it had an occupancy problem. (T399-400). His investigation showed that economic conditions were such that there

should not be an occupancy problem. (T400). He discovered in the spring of 1981 that the water in the hotel smelled like petroleum. (T400). This problem still existed when he was transferred to another hotel. (T406). When Gay attempted to correct the problem, parts of the hotel were shut down so that samples could be taken and the pipes flushed. (T400). This would take rooms out of service from one day up to a week. (T485). There were so many complaints about water odor, that a water complaint log was started. (T489). Mr. Litt considered the water odor problem to be the only one which the hotel had which was impossible to correct. He felt that this was a major cause of the occupancy problem (T409), and also felt that the leaking and plumbing problems adversely effected the financial conditions of the hotel. (T418). Occupancy rates of the hotel during the years Mr. Litt was there were below the economic forecast. (T410).

The general manager at the time of the trial, Fred Corso, was called as a witness. Mr. Corso had worked in all phases of the hotel business for 28 years. (T1058-1060). The Court would not allow him to give an opinion as an expert witness in the hotel industry as to whether or not the occupancy rates of the hotel from the time that it opened until 1984 were as high as they should have been. The Court refused to give a reason for the ruling. (T1067-1070). Mr. Corso's opinion was that the occupancy rate should have been higher. (T1070). It was his

further opinion that the reason for these low occupancy figures was the odor in the water coming so soon after the problem that a hotel in the north had had with Legionnaires Disease. (T1071). The Court would not allow Mr. Corso to compare the difference in the amounts of money earned from the actual occupancy rate of the hotel with the projected rates. (T1073-1093).

The Court's stated ruling for refusing to allow this testimony was that it went to the question of lost anticipated profits as a measure of damage. The Court held that the jury could not consider that because such damages were not recoverable by a new business with no proof of profits for a reasonable time anterior to the wrongful act. (T1091, 1093).

The testimony of Dr. Joseph M. Perry, an economist with wide experience in the consulting field, in the preparation of market share surveys, and in projection of sales and revenues, including work for developers of hotels or firms intending to operate hotels, was offered. The Court ruled the testimony inadmissible because it went to the Wharfside claim for lost profits. (T1138, 1139). Dr. Perry gave estimates as to the lost profits of the Sheraton Hotel based upon a comparison of actual figures with projected financial figures. (T1156).

Dr. Perry then reviewed the actual figures of the hotel's accountants and found that the hotel lost money in 1981, 1982 and 1983. (T1157, 1158). In Dr. Perry's opinion, if the

occupancy rates had been higher, it would have shown a profit. (T1189).

The Court denied requests to instruct the jury that an element of damage which they could consider on Wharfside's claim was lost anticipated profits. The Court did instruct the jury that Wharfside could recover damages for the cost to correct the construction defects and the cost to repair the pipe leaks.

A water chemist with vast teaching and work experience, Dr. J. E. Singley, testified that the entire domestic water system would have to be replaced within a period of seven (7) to eight (8) years. He said if proper materials had been used, the system would have lasted twenty (20) to thirty (30) years. (T648, 664).

The only witness who testified as to the cost of replacing the piping at the hotel was an architect, Dennis Taggart. (T780). His study showed that it would cost $1,474,455 to repipe the hotel. (T859).

Leaking pipes were repaired both in-house and by outside plumbers. The amounts paid for leaking pipes to outside sources was $21,345.12. (T511-514; WX17).

The jury verdict awarded damages to Gay in the sum of $200,000 when the parties had stipulated that the sum due Gay on its contract was $230,000. (R310-314). The jury found Chanen liable to Wharfside, but held that Gay was not liable to

Wharfside and neither was it liable to Chanen for indemnity. This, despite the fact that the only claims made by Wharfside against Chanen were for the acts of Gay for which Chanen was only derivatively responsible. (R177-206).

## SUMMARY OF ARGUMENT

The Trial Court in this case refused to allow Wharfside to claim lost anticipated profits from its hotel operation because it was the Court's position that a new business could not recover lost profits under Florida law.

There is no legal or moral justification for such a rule of law, if one, in fact, has ever existed in this state.

The early decisions of this Court indicate that competent evidence can be used, even by a new business, to show lost anticipated profits. Decisions of the Courts of Appeal have allowed recovery of lost anticipated profits in appropriate circumstances. Any decisions of the District Courts of Appeal holding otherwise are either based upon an erroneous reading of this Court's prior holdings, or more likely, because no competent evidence could be offered to show the amount of the loss.

Wharfside offered substantial competent evidence, both as to the fact of damage, the cause of damage, and the amount of lost future profits which had been sustained. This evidence was based upon established market data and competent and uncontradicted financial projections done for the purpose of obtaining financing for the hotel, management contracts, and to determine the feasibility of the owners entering into the project. That is, Wharfside offered a sufficient yardstick to measure its lost profits by comparing the financial projections

with the actual performance of the hotel. Such evidence was just as reliable as evidence of profits before and after the wrongful act would have been.

The verdict of the jury was fatally inconsistent. The jury awarded a lesser sum of damages to Gay than the parties had stipulated to. The jury awarded a sum of damages to Wharfside on its crossclaim against Chanen, which had no support in the evidence. There was no way Chanen could have been liable, under the Court's instructions and the issues in the case, to Wharfside unless Gay was also liable to Wharfside, yet the jury found against Wharfside on its claim against Gay.

These inconsistencies were so fundamental that the Appellate Court had no alternative but to hold that that action of the jury required reversal also.

## ARGUMENT

### POINT ONE

**DID THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA, ERR IN ITS HOLDING THAT THE PROFFERED EVIDENCE OF WHARFSIDE ON ITS CLAIM OF LOST PROFITS WAS NOT SO SPECULATIVE AS TO REQUIRE ITS EXCLUSION?**

The Court's stated reason for excluding the claim of lost profits and the testimony of Fred Corso and Joseph Perry was that a new business could not recover damages for lost profits under Florida law.

Petitioner here argues that there were other reasons why the claim for lost profits was too speculative. He contends that there was a question as to whether or not there was an objectionable odor. All parties agreed that there was such an odor.

He contends that it was speculative as to whether or not Gay had caused the odor. There was ample evidence to show that Gay had caused the objectionable odor.

Recognized experts in the field of hotel management testified that guests would refuse to come to a hotel with an

objectionable odor and that other factors bearing on the occupancy issue had been considered and rejected as a cause.

Insofar as the amount of profit which had been lost is concerned, that was adequately covered by the testimony of Mr. Corso and Dr. Perry by comparison with established economic surveys.

Therefore, the only reason which the Trial Court could have had for the exclusion of the claim for lost profits was its belief that a new business could not, under any circumstances, claim damages for lost profits due to a wrongful act.

The Sheraton Hotel was a new business during the time for which damages were sought. A number of Florida Appellate Court decisions have held that a new business venture can not recover for lost future profits because proof of profits for a reasonable time prior to the breach or wrongful act is required to establish a basis for the recovery. See, E.F.K. Collins Corp. v. S.M.M.G., Inc., 464 So.2d 214 (3rd Fla. D.C.A. 1985); Murciano v. Urroz, 455 So.2d 463 (3rd Fla. D.C.A. 1984); Wash-Bowl, Inc. v. Wroton, 432 So.2d 766 (2nd Fla. D.C.A. 1983). These cases are cited, there are others containing similar statements, because they are illustrative of the problems which new businesses, which are damaged or destroyed, so often face in attempting to show lost profits.

There is most often simply no competent evidence available or other factors which make the claim one of pure speculation.

For instance in E.F.K. Collins Corp., there was no evidence offered to show lost profits were in fact sustained by the alleged wrongful act. In Murciano, the opinion does not reflect that any evidence which might represent a yardstick of the Plaintiff's lost profits was offered or even available. And in Wash-Bowl, Inc., the Court found, not only that the Plaintiff was a new business with no record of profits, but also that its operators had no prior experience in the laundromat business, so that the claim was based on speculation.

However, as the First District Court of Appeal pointed out in its decision in this case, the rule of no lost profits for a new business is not ironclad.

The First District in the case of Massey Ferguson, Inc. v. Santa Rosa Tractor Co., 415 So.2d 865 (Fla. 1st D.C.A. 1982), held that anticipated profits of a commercial business could be recovered if the amount of the lost profits could be satisfactorily ascertained by some standard, such as regular market value or other established data.

The Third District Court of Appeal in the case of Resorts International, Inc. v. Charter Air Center, Inc., 503 So.2d 1293 (Fla. 3rd D.C.A. 1987), allowed the recovery of lost profits for a new business. In that case, there was a contractual agreement which provided for specific numbers of flights to and from the Defendant's casinos in the Bahamas at agreed rates. These flights never materialized. The Third District Court held that that contractual agreement provided a measure for a

sufficiently accurate approximation of Plaintiff's lost profits for business which it never received.

Both of those cases are based upon this Court's early decision Twyman v. Roell, 123 Fla.2, 166 So. 215 (1936).

In that case, this Court adopted what has been called the "yardstick test" for measuring lost profits as an alternative theory to the "profits before and after breach test". The opinion held that damages for the loss of prospective profits could be recovered if a Plaintiff could establish the amount of the damages with such certainty as would satisfy an impartial person. The Court said that this could be done by the use of some yardstick or measure such as regular market values or other established data. The language of the Court reads:

> "The rule is well settled that if there is a yardstick or measure of damages by which prospective profits may be determined and they arise out of a contract in which profit is the inducement to its making, they may be allowed if proven, whether they arise from farming, mechanical, or other contracts.
>
> This rule was approved in Hodges v. Fries, supra, where the court said that if prospective profits form an elemental constituent of the contract, their loss, the natural result of its breach, and the amount can be established with reasonable certainty, such certainty as satisfied the mind of a prudent and impartial person, they are allowed. The requisite to their allowance is some standard, such as regular market values, or other established data, by reference to which the amount may be satisfactorily ascertained."

Twyman was decided approximately three (3) months after the Supreme Court case most often cited for the proposition that a new business may not recover lost profits. That is the decision found in New Amsterdam Casualty Co. v. Utility Battery Mfg. Co., 122 Fla. 718, 166 So. 856 (1935). In that case, this Court held that generally, anticipated profits of a commercial business were too speculative and dependent upon changing circumstances to warrant their recovery. However, the Court then noted that there was an exception to that rule when proof of income and expenses of the business for a reasonable time prior to the interruption could be shown. Many of the Courts of Appeal seem to have given undue influence to that language and concluded that if you can not show a period of profits prior to the breach, then you will always be precluded from recovery.

However, in those cases where the sole basis for denying lost profits have been that the Plaintiff is a new business, the decisions have ignored the plain language of New Amsterdam and Twyman. The exact language of the Court relative to what proof is required in order to recover lost profits is as follows:

> "The general rule is that the anticipated profits of a commercial business are too speculative and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to this rule, however, to the effect that the loss of profit from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof

> what the amount of his actual loss was. Proof of the income and of the expenses of the business for a reasonable time anterior to the interruption charged, or facts of equivalent import, is usually required." (Emphasis supplied)

The Twyman decision when read in pari materia with New Amsterdam, shows that this Court never intended that there be an absolute rule that a new business could never recover lost anticipated profits.

In New Amsterdam, this Court said that a Plaintiff either had to show profits before and after a breach, or "facts of equivalent import". In Twyman the Court held that facts of equivalent import would be "some standard, such as regular market values, or other established data" which could be used by reference to establish what the amount of lost profits were.

In this case, as the First District Court recognized, established market surveys were used as a reference to compare with actual occupancy rates and room and related services earnings to determine the amount of the loss. These surveys, accompanied by two expert witnesses with years of experience in hotel management and hotel consulting, coupled with an economist with wide experience in the hotel consulting field, were used by Wharfside to meet the New Amsterdam and Twyman test. The evidence was sufficient to warrant the consideration by the jury of Wharfside's claim for lost profits and the Trial Court should have admitted it. As the First District pointed out,

the surveys which formed the basis for the damages had been used to obtain multimillion dollar financing and long term management contracts with the Sheraton Corporation. The surveys had been done years before any litigation was even anticipated. They were not suspect and their accurateness was not challenged by Gay.

A fairly recent Federal Court decision from the Eleventh Circuit Court of Appeals, involving Florida law, is strikingly similar to this case. G. M. Brod & Company, Inc. v. U. S. Home Corp., 759 F.2d 1526 (11th Cir. 1985), involved a dispute for wrongful termination of a hotel management contract. In that case, U. S. Home developed a condominium hotel. It hired Brod to manage it. Brod managed the hotel for only three and one-half (3-1/2) months when the contract was terminated by Home. Brod sued Home for breach of the contract, tortious interference with Brod's business and for violation of Florida's theft statute. The jury awarded damages for anticipated lost profits to Brod and that portion of the judgment was affirmed.

The evidence offered by Plaintiff in that case was comparable to that offered by Wharfside. A certified public accountant was called who specialized in the hotel and resort industry. His firm had developed a publication which gathered data for the purpose of projections and feasibility studies. He compared the projection data he had put together with his publication and based his testimony concerning profit

projections on assumptions of comparable occupancy percentages, rates and expenses. Those assumptions were based on the testimony of another expert witness who was engaged with and familiar with operations in the area where the hotel was located. The Court held that the evidence presented by these two experts was both admissible and relevent.

Judge Dyer, specifically addressing the question of whether or not a new business may claim future lost profits, held that the mere fact that the Plaintiff was a new business, did not automatically exclude its claim for future lost profits. Judge Dyer noted that there are two generally recognized methods of proving lost profits. First, the "before and after theory", and secondly, the so called "yardstick test". The Court said that the before and after theory is not easily adaptable to a Plaintiff who has been driven out of business before he is able to compile an earnings record. Therefore, he may rely upon the yardstick test when he has adequate data to support assumptions showing lost profits and their amount.

In light of New Amsterdam, Twyman, Massey Ferguson, Resorts International, Inc. and G. M. Brod & Company, Inc., there is simply no legal justification for a ruling that a new business may never recover damages for lost profits. That is only true where a Plaintiff does not have available to him any yardstick to use to measure his damages.

There certainly is no moral justification for such a rule of law. That was more eloquently stated in G. M. Brod & Company, Inc. v. U. S. Home Corp., supra, where the Court said:

> "In Mechanical Wholesale the court stated that 'the mere fact that Mechanical was a new business does not automatically exclude its claim for future lost profits . . . . The fact that such damages are difficult to measure and by their nature are uncertain in amount does not render such damages unrecoverable.' Id. at 231. The court noted that this is particularly true where a party breaches his contract and seeks to escape liability merely because it is impossible for the other party to state or prove a perfect measure of damages."

It is submitted that the evidence offered by Wharfside as to the amount of its damages and as to the fact and cause of damage, was sufficient to go to the jury. Wharfside was entitled to have the jury consider that as an element of damage. The Trial Court erred in refusing to admit the testimony of Fred Corso and Dr. Joseph Perry, in not allowing Plaintiff to argue its claim for lost profits and in declining to instruct the jury that they could award damages to Wharfside for lost profits.

The First District Court of Appeal was correct in reversing the Trial Court for those rulings.

## POINT TWO

**DID THE JURY'S VERDICT CONTAIN INCONSISTENCIES WHICH FUNDAMENTALLY UNDERMINED ITS UNDERLYING BASIS?**

The jury's verdict was fundamentally inconsistent without question. The only claim which Wharfside had against Chanen arose because Chanen was the general contractor for the construction of this hotel, and as such, had overall responsibility for all of the subcontractors' work. Wharfside made a claim against Chanen on that basis and a claim against Gay as the actual tort feasor. Chanen properly sought indemnity from Gay for any sums for which it was held liable.

The jury found in favor of Wharfside and against Chanen. However, it found against Wharfside and in favor of Gay and against Chanen and in favor of Gay. That simply could not have been done under the pleadings, issues and instructions of the Court.

Further, there was no evidence which would have supported a verdict against either Chanen or Gay in favor of Wharfside in the amount of $30,000. The only testimony of damage to Wharfside, outside of lost profits, was that it would have required over $1,000,000 to replace the piping system and that the sums which had been paid to outside sources to repair the

pipes was approximately $21,000. The jury could not have arrived at the sum of $30,000 as Wharfside's damages.

Further, the damages of Gay, if any were to be recovered, were stipulated at $230,000. There was no way the jury could have awarded $200,000 under that agreement of the parties.

Therefore, as the First District Court of Appeals stated, this verdict was so inconsistent that the inconsistencies fundamentally undermined the verdict's underlying basis. In such a situation, a Court of Appeals has no alternative but to reverse a judgment founded upon the verdict. See, North Am. Catamaran Racing v. McCollister, 480 So.2d 669 (5th Fla. D.C.A. 1985).

## CONCLUSION

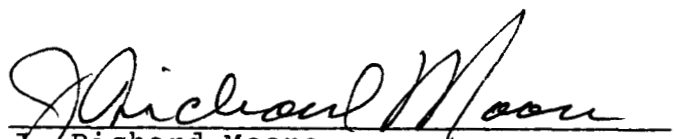
The Trial Court erred in refusing to admit evidence on Wharfside's claim for lost profits and in striking that claim. Wharfside should have been allowed to argue its claim for lost profits to the jury and the jury should have been instructed that that was an element of damage which they could consider on the claim of Wharfside against Chanen and Gay. The Trial Court was properly reversed for these rulings.

The jury verdict was so inconsistent that it was fundamentally flawed and its underlying basis was undermined. That alone requires reversal by the Appellate Court.

Therefore, the decision of the Florida District Court of Appeal, First District, should be affirmed and this cause should be returned to the Trial Court for further proceedings not inconsistent with that decision.

Respectfully submitted,

J. RICHARD MOORE, P.A.



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY, a copy of the foregoing instrument has been furnished to S. Gordon Blalock, Esquire, 2301 Independent Square, Jacksonville, Florida 32202 and Robert C. Gobelman, Esquire, 126 West Adams Street, Suite 700, Jacksonville, Florida 32202, by U. S. Mail, this 19th day of October, 1988.

J. Richard Moore
Attorney