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O/A 12-6-88
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,412

CLAY SHEARER,

Petitioner,

vs.

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Respondent.

On review from the Fifth District Court of Appeal, Florida

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The Petitioners were the Plaintiffs (T ——— P [redacted] and M [redacted], and the Defendant (Shearer), in a civil action brought in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida. The Respondent, The Insurance Company of the State of Pennsylvania, intervened in that action and will hereinafter be referred to as the Respondent. T [redacted] P [redacted] M [redacted] and Shearer will be referred to individually or collectively as Petitioners.

The following symbols will be used "R", Record on Appeal, "App", Appendix attached to the brief.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts Petitioner's, Clay Shearer, Statement of the Case and Facts with the following additions and/or corrections.

The Petitioner, Clay Shearer, was charged with crimes as a result of the incidents alleged in the Complaint, to which he entered a plea of no contest and was convicted (R 158).

The allegations of the Third Amended Complaint filed in this cause are important to note due to the procedural and factual distinctions between this case and Zordan v. Page, 500 So.2d 608 (2nd DCA 1986). In these cases, the Petitioners have not alleged negligent acts by Mr. Shearer; rather, they have pursued a theory of intentional tort alleging his acts to be "willful, wanton, and reckless." (R252-258).

The policy of insurance provides coverage for an occurrence which is defined as:

> " 'Occurrence' means an accident, including continuous, repeated exposure to conditions which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

SUMMARY OF THE ARGUMENT

The Trial Court ruled that the acts of molestation of the children while they were under the supervision of Clay Shearer during an "overnight" at the YMCA, or alleged in the Complaing would be excluded from coverage under the Respondent's policy of insurance issued to the Central Florida YMCA. That holding was affirmed by the Fifth District Court of Appeals in the case of McCullough vs. YMCA, 523 So.2d 1208. Both Courts were correct. This Court should affirm the granting of the Motion for Summary Judgment in favor of the Respondent, and affirm the opinion of the Fifth District Court of Appeal.

It is the Respondent's position that its policy of insurance specifically excluded coverage for injuries intentionally caused by an insured; and, that under the facts and circumstances of this case, there is no question but the acts alleged in the Third Amended Complaint were intentional acts against specific individuals that were excluded from coverage. The subjective intent of Clay Shearer to harm the children is totally irrelevant. The intent to injure should be inferred as a matter of law, from the intentional, malicious, wanton, and deliberate acts of child molestation alleged.

The arguments made by the Petitioner and the cases relied upon are not on point and do not support their position that the exclusion only applies if there is evidence that the

insured subjectively intended to cause the injury. They rely on case authority which deals solely with incidental contact or transferred touching. The law is clear that when a specific act is done to a specific victim, the insured's subjective intent is irrelevant.

Alternatively, the Respondent would argue that if this Court adopts the majority opinion of Zordan v. Page, the ruling of the Trial Court and the Fifth DCA in the instant case should still be affirmed. In that regard, Clay Shearer has an extraordinary educational background, which is particularly relevant to the circumstances of this case. He has an undergraduate degree and teaching certificate, and has held positions as an elementary school teacher. In his testimony, he clearly and unequivocally agreed that the conduct alleged in the Complaint would lead to serious injurious consequences for the children involvedand that he and any person with his education, training or experience would realize that fact. This evidence of subjective intent was uncontradicted by the Petitioners.

ARGUMENT

I. THE TRIAL COURT AND THE FIFTH DISTRICT COURT OF APPEALS WERE CORRECT IN GRANTING SUMMARY JUDGMENT FOR INSURER IN A CASE CLAIMING SEXUAL BATTERY AND SEXUAL MOLESTATION BECAUSE:

A. SUBJECTIVE INTENT OF AN INSURED, NOT A PROPER LEGAL TEST FOR THE APPLICATION OF AN "INTENTIONAL ACT" EXCLUSION IN POLICY OF INSURANCE; AND

B. ALTERNATIVELY, THE SUBJECTIVE INTENT OF INSURED CLEARLY SHOWN BY THE RECORD IN THIS CAUSE SUPPORTS THE SUMMARY JUDGMENT ENTERED BY THE TRIAL COURT.

A. SUBJECTIVE INTENT OF AN INSURED, NOT A PROPER LEGAL TEST FOR THE APPLICATION OF AN "INTENTIONAL ACT" EXCLUSION IN POLICY OF INSURANCE.

The Petitioners have taken the position that in the case of sexual molestation of a child, by an adult, in a position of control and authority over the child, an intent to injure should not be inferred from the molestation, despite the allegations of intentional act (Shearer, Initial Brief, Page 6). Such a position is absurd and has been nearly universally rejected by American courts faced with this issue. The Petitioner relies extensively on the split opinion from the Second District Court of Appeals in Zordan v. Page, 500 So.2d 608 (1988). In a well reasoned dissent by Judge Frank in that case, the fallacy of such a position is pointed out.

> I am absolutely unwilling to deny the foreseeability of injury to a child who is subjected to sexual abuse. It defies human response and sensitivity to conclude that the inevitable product of the sexual molestation of a child is not intended. That conduct inescapably inspires some response in the minor victim. Whether the response is precocious excitation of libido, an utter revulsion or simply confusion, the child suffers grave psychological injury. Indeed, the fact that the ultimate goal of this litigation is to acquire funding to reconstruct Nichole's emotional status is a testament to the soundness of my urging that we not accord slavish adherence to a principle that simply does not fit the context. The damage Nicole suffered flowed just as surely from Page's criminal acts as if he had taken his fist or a club and struck her in the face. The nature of Page's conduct 'was such that an intention to inflict injury can be inferred as a matter of law.' Fireman's Fund Ins. Co. v. Hill, **314** N.W. 2d **834** (Minn. **1982).**

When confronted with a similar situation, the Fifth District Court, in the instant case, and the Third District Court of Appeal in Landis v. Allstate Insurance Company, **516** So.2d **305**, unequivocally align themselves with the vast majority of courts in rejecting such a notion, as put forth by the Petitioner here. This Court has acknowledged the near inevitable injurious consequences of a sexual battery by the use of even slight force in Lerma v. State, **497** So.2d **736** (Fla.

1986). In discussing whether emotional hardship on the victim may support a departure from the sentencing guidelines, this Court noted that such hardship was an inherent component of the crime:

> "In contrast, emotional hardship can never constitute a clear and convincing reason to depart in a sexual battery case because nearly all sexual battery cases inflict emotional hardship on the victim." (at 739)

The Petitioner acknowledges that the acts alleged against him would have serious injurious consequences to the children. (R 201)

In Zordan, the Second DCA acknowledged that in cases of violence or penetration, Florida law would infer an intent to harm and deny coverage. Id. at 611. It is respectfully submitted that the reasoning of the Second DCA in creating an exception is flawed in at least two regards. First, the Court in Zordan relies heavily on the First District's opinion, Kokx v. State, 198 So.2d 534, (Fla. 1st DCA 1986), and distinguished it from Lerma v. State, 497 So.2d 736, (Fla. 1986), to support the distinction it was making. This Court, when confronted with a conflict between Barrentine v. State, 504 So.2d 533 (Fla. 1st

DCA 1987), and Connell v. State, 502 So.2d 1272 (Fla. 2nd DCA 1987), focused on emotional injury and treated sexual offenses of all degrees equally in applying sentencing guidelines and specifically rejected the analysis used in Kokx v. State, thereby weakening the Zordan decision's persuasiveness in the case at bar. Barrentine v. State, 521 So.2d 1093 (Fla. 1988), affirms the "Lerma" rule which the Zordan court seeks to evade.

Secondly, the Court in Zordan relied heavily on MacKinnon v. Hanover Insurance Company, 471 A.2d 1166 (N.H. 1984) in support of the proposition that "intent to injure cannot be Inferred ...from intentional sexual molestation." However, two years later, the same New Hampshire court reached a contrary conclusion in Vermont Mutual Insurance Company v. Malcolm, 517 A.2d 800 (N.H. 1986). In Vermont Mutual, the policy of insurance seem to have the identical language that is contained in the Respondent's policy. The policy only covered bodily injury "caused by an occurrence" and defined occurrence as "an accident." The New Hampshire Supreme Court found that acts of sexual assault could not reasonably be viewed as an accident or occurrence within the basic coverage provisions of the policy. A similar result was reached in Western National Ass. Co. v. Hecker, 719 P.2d 954 (Wash. App. 1986). In Vermont Mutual, the New Hampshire Supreme Court ruled that acts of

sexual assault were *so* inherently injurious that they could not be performed without causing resultant injury. Such assaults are inherently injurious in the most obvious sense in that they cannot be performed upon a boy without appalling effects upon his mind as well as forbidden contact with his body. Id. at 802. Clearly, the Second DCA has relied upon very weak and inadequate authority for their position by citing the MacKinnon and Kokx cases.

Three approaches for dealing with this coverage question have emerged throughout the country. First, a minority of courts have applied a subjective test that the intentional act exclusion does not apply unless the insured subjectively intends to cause some injury, such as was adopted by Zordan. 1

The second test is more objective. Here the Courts will apply the exclusion *so* long as an ordinary reasonable person would expect or intend injury to result from the particular act committed, or alternatively stated, if the natural and ordinary consequences of the act are bodily harm. 2

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1. Also see Farmers Ins. Group v. Sessions, 607 P.2d 422, 426 (Idaho 1980) (exclusion applies only if the insured actually intended some injury, however slight); Brown v. State Automobile & Casualty Underwriters, 293 N.W.2d 822, 823 (Minn. 1980) (the exclusion is inapplicable where the insured denies an intent to injure); Continental Western Ins. Co. v. Toal, 244 N.W. 2d 121 (Minn. 1976) (same).

2. See CNA Ins. Co. v. McGinnis, 666 S.W.2d 689, 691 (Ark. 1984) (the test is what a plain ordinary person would expect and intend to result from an act of sexual assault); Wright v. White Birch Park, Inc. 325 N.W.2d 524, 528 (Mich. App. 1982) (injury intentional when a reasonable person could expect injury from the act); Group Ins. Co. v. Morrelli, 314 N.W. 2d 672, 675 (Mich. App. 1982) (both the act and the injury intentional when the injury was the natural, foreseeable, expected and anticipated result of act); Mutual Service Co. v. McGehee, 711 P.2d 826, 827 (Mont. 1986) (exclusion applied where insured punched another in the face because such an act would reasonably be expected to lead to injury).

The third rule, and it is respectfully submitted, the best rule, was created in Minnesota and is widely followed throughout the United States and has been adopted by the Third DCA, (Landis), and the Fifth DCA in the instant case. These courts have ruled that in sexual assault and molestation cases, the intent to cause injury will be inferred from the act as a matter of law.3

No matter which test is applied to the case at bar, the result should be the same. Clearly, this case would be affirmed using the second or third test outlined above. It should also be affirmed using the first or subjective test, because the Trial Court had clear, unequivocal, unrebutted evidence of the insured's subjective intent, as will be shown in Part B of this brief.

In Allstate v. Thomas, No.Civ. 87-522-B (W.D. OK April 27, 1988), the Federal Trial Court Judge interpreting Oklahoma law, noted that "Florida is the only state which, when presented

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3. See Linebaugh v. Berdisch, 376 N.W. 2d 400, 405 (Mich. App. 1985) (intent to injure inferred from young male's sexual assault of a fourteen-year-old girl); Horace Mann Ins. Co. v. Independent School District, 355 N.W.2d 413 , 416 (Minn. 1984) (intent to cause bodily injury inferred as a matter of law from high school teacher's unconsented to sexual contacts with student; Estate of Lehmann v. Metzger, 355 N.W.2d 425, 426 (Minn. 1984) (intent inferred from uncle's sexual assault of young niece); State Farm Fire & Casualty Co. v. Williams, 355 N.W.2d 421, 424 (Minn. 1984) (intent to cause bodily injury inferred as a matter of law from professor's unconsented to sexual contact with a disabled student); Fireman's Fund Ins. Co. v. Hill, 314 N.W. 2d 834, 835 (Minn. 1982) (intent to injure inferred from sexual molestation of foster child) Illinois Farmers Ins. v. Judith G., 379 N.W.2d 638, 641 (Minn. App. 1986) (intent to injure inferred a5 a matter of law from minor's sexual abuse of two minor children); Grange Ins. Assoc. v. Authier, 725 P.2d 642, 644 (Wash. App. 1986) (dicta) (intent to harm a minor child inferred as a matter of law from act of sexual assault).

with the opportunity to do so, failed to adopt the rule urged by Allstate." [Note: The rule urged was that sexual abuse should be considered inherently harmful and deny coverage under intentional act exclusion, i.e., the third rule stated above.] The Court noted:

> "Common sense and legislative history lead this Court to conclude that Oklahoma would not accept Florida's distinction that harm may be inferred only where penetration or threats of violence accompany a sexual assault on a child. Obviously rape or torture greatly intensifies the trauma of a sexual attack; however, molestation and fondling are far from being non-violent acts. Hugging, kissing, or simply touching a child becomes an act of emotional, if not physical, violence when such touching is used for the sexual gratification of an adult. 'The night and day distinction between acts of compassion and those motivated by wanton salacity is one which the reasonable person could not confuse.' " Whaley v. State, 556 P.2d 1063, 1064 (Okl. Cr. 1976)

The Trial Court also relied on Oklahoma public policy, recognizing the serious nature of such acts as reflected in the criminal statutes of that State. Florida has also enacted stringent laws expressing its own public policy. See generally Florida Statutes Chapters 794, 800, and 827. Other Federal Courts have reached the same conclusions, Allstate v. Sena, Case No. 87-6148, (U.S. Court of Appeals, 9th Circuit, 1988), and Allstate v. Roelfs, Case No. 87-061, U.S. district Court (Alaska) 1988.

In addition to the cases cited above, other courts have adopted the third test, which infers an intent to injure as a matter of law. Arkansas' Supreme Court inferred an intent to injure in a stepfather's sexual abuse of his stepdaughter. CNA Ins. Co. v. McGinnis, 282 Ark. 90, 666 S.W. 2d 689 (1984). The court's reasoning was succinct: "to claim that he did not expect or intend to cause injury, flies in the face of all reason, common sense and experience. Id., at 691. California has also inferred harm in a child molestation case. In Allstate Ins. Co. v. Kin W., 160 Cal App.3d 326, 206 Cal. Rptr. 609, 613 (1984), the court found that an intent to injure is inherent in the nature of the act.

Minnesota first inferred an intent to inflict injury in Fireman's Fund Ins. Co. v. Hill, 314 N.W. 2d 834, 835 (Minn. 1982). This case involves a man who molested a foster child. The rule was upheld two years later when the court considered a sexual attack on a physically disabled adult. State Farm Fire and Casualty Co. v. Williams, 355 N.W. 2d 421 (Minn. 1984). In Illinois Farmers Ins. Co. v. Judith G., 379 N.W.2d 638 (Minn. App. 1986), the court considered coverage for a babysitter who repeatedly molested two girls left in his care. The male babysitter argued that his young age rendered him unable to comprehend that his actions would injure the girls. Recalling that the insured's lack of subjective intent was stipulated in Williams, the court determined that "subjective statements do

not preclude this court from inferring an intent to injure or to damage from the nature of acts involved - unconsented [sic] sexual contact with a minor." Judith G., 379 N.W.2d at 642.

Finally, the Petitioners have cited a variety of cases to support the proposition that the Court must always determine subjective intent of the actor to apply the intentional act exclusion. These cases are all distinguishable. The distinction demonstrates just how far the Petitioner and the Court in Zordan have drifted from well established Florida case law. It must be pointed out that no Florida case has been found where a court held that an intentional injury exclusion clause did not apply where the insured specifically intended to do a certain act to a specific victim, just as we have in this case. In Florida, when a person specifically and intentionally injures a specific victim, his subjective intent is irrelevant. E.g., Peters v. Trousclair, supra,; Hartford Fire Insurance Company v. Spreen, supra, ; Bosson v. Uderitz, supra. The cases in Florida holding that the exclusion does not apply because there was no specific intent to injure, all deal with situtations where the insured either incidentally injured the person making the claim, when the intent was directed at another or involved a personal catastrophe liability policy which expressly provides coverage for libel and slander.

Cases relied upon by the Petitioner, such as Phoenix Insurance Company v. Helton, 298 So.2d 177 (Fla. 1st DCA 1974)

and Cloud v. Shelby Mutual Insurance Company of Shelby, Ohio, 248 So.2d 217 (Fla. 3rd DCA 1971) deal with an intentional act causing an injury to one not intended to be a victim. Such cases involve mere incidental or transferred touching. It can only be concluded here that the Third Amended Complaint alleges specific acts against specific victims; and therefore, the cases cited by Petition just are not on point.

It is urged that this Court adopt the better rule of law and public policy which provides is in sexual molestation cases, the intent to harm is inferred and effect be given to the intentional act exclusion. This conclusion is consistent with Florida law, Florida public policy and the purpose of the intentional act exclusion which is to "prevent extending to the insured a license to commit wanton and malicious acts." Farmer Insurance Exchange v. Sipple, 255 N.W.2d 373, 375 (Minn. 1977).

B. ALTERNATIVELY, THE SUBJECTIVE INTENT OF INSURED CLEARLY SHOWN BY THE RECORD IN THIS CAUSE AND SUPPORTS THE SUMMARY JUDGMENT ENTERED BY THE TRIAL COURT.

In Zordan, the Trial Court makes specific note that there was the unresolved fact that the insured did not subjectively intend or expect injuries. In that regard, at Page 609, the Court notes:

> "The Plaintiff argues that there is an unresolved fact issue as to whether the insured subjectively intended or expected the alleged injury. It is argued that the Complaint alleges that he did not, there is not evidence otherwise, and that in this insurance coverage context it is not presumed from the intent to act that there was an intent to injury."
>
> "We agree that there are unresolved fact issues."

The Petitioners, in their Brief to this Court, wholly and completely ignore the record that was before the Court that clearly shows the inappropriate liability of Zonder to the case at Bar. Firth, the Plaintiffs in Zordan alleged ngligence on the part of the Defendant, while i thie instant case the only allegation against Mr. Shearer are of intentional tort. Secondly, the Petitioner completely ignores the testimony of Mr. Shearer as to what he might intend or expect If, in fact, he was guilty of the acts alleged in the Thrid Amended Complaint. The deposition testimony of Clay Shearer was before the Court and considered by the Court when it entered its Final Judgment indicating that "the allegations of the Complaint and the record before the Court show that there was no'occurrence' as defined by the policy."

The deposition testimony of Clay Shearer, which is completely ignored by the Appellants in their briefs, is quite instructive on the issue of subjective intent. Mr. Shearer, who is a college graduate and professional school teacher, with emphasis in the elementary levels, acknowledged that an individual with his background and experience would know and expect that injury would occur as a result of a sexual molestation of a child.

Mr. Shearer indicates that he is thirty-six years old with a B.A. from the University of Kentucky in education (R 170). He indicates that he took many education classes and specifically specialized in elementary education (R 171). In 1978, he did a student-teaching assignment in elementary school, which he completed successfully (R 172). He obtained a teaching certificate in the States of Kentucky and Florida (R 172). While in school, he took courses entitled Introduction to Biology and Human Health (R 173), Math and Art designed for elementary school teachers, Basic Psychology One (R 174), and Introduction to Sociology (R 175) which was a two semester course. Additionally, through the Anthropology Department, he took a course called Human Ancestory (R 1761, he took a course entitled Introduction to Philosophy (R 176) while at the same time taking a course called General Psychology (R 1771,

which was a Sophomore level course and part of the core curriculum for his eduction degree. In the Fall of 1975, he took a course entitled Psychology of a Child, which was also a Sophomore level course (R 178). He additionally took a course called Modern Social Problems (R179). In 1976, he took a Junior level course entitled Applied Statistics in Psychology (180), and Human Development Curriculum (R 180). He indicates that in his Teaching Method courses, an element of what they were teaching, although a small element, was how children react and think through things (R 182). Additionally, the Petitioner took a course in Children's Literature (R 182). He also took a course on teaching Physical Education in Elementary Schools (R 185).

The Petitioner, once he graduated from the University of Kentucky, taught school at Beachwood Independent Schools, Fort Mitchell, Kentucky (R 186) where he taught Science, Social Studies, and Math in the fifth and sixth grades (R 187). It should be pointed out that children in those grades would be the approximate age groups of the Plaintiffs in this case. He has also taught school in Manatee County, Florida (R 187), in the 6th, 7th, and 8th grades, including, Math, Science, and Physical Education for boys and grils. In addition to all of this other experience with children, he has also worked at the YMCA while in college in Lexington, Kentucky, and in Orlando, Florida (R 190). At the YMCA, he worked as a coach in the elementary school's sports program.

The following significant testimony was given by the Petitioner, Clay Shearer, under oath, in his deposition:

> "Q. Sir, I want to ask you, based on your training and experience as a teacher and just for your experience as a member of society in general, do you have any opinion as to the effect of sexual child molestation on a child?"
>
> "A. I have no specific opinion, no. I never dealt with the situation, *so* I never formed an opinion."
>
> "Q. Well, you dealt with it fairly substantially since the time these accusations were made, haven't you?"
>
> "A. Yes."
>
> "Q. It is a very direct and personal effect on you?"
>
> "A. Yes."
>
> "Q. And I'm not asking you a question now about whether or not the accusations that those boys have made are true. What I'm asking you is do you agree with me that child molestation is a serious crime?"
>
> "A. Yes."
>
> "Q. Do you agree with me that an adult who sexually molests a child exposes that child to injury, whether it be physical or psychological?"
>
> "A. Yes."
>
> "Q. Do you agree with me that any reasonably intelligent, responsible adult would not be involved in sexually molesting a child because of the adverse consequences that would likely occur to the child, again whether physically or psychologically?"
>
> "A. Yes."

"Q. Would you agree with me that a person of your education, training and background could not be involved in the molestation of a child without the realization that such acts on the part of the adult would have serious injurious consequences to the child?"

"A. Yes."

(R 200-201)

Clearly, the Trial Court had befor it overwhelming substantial, undisputed, unrefuted evidence that Clay Shearer, has the personal and educational background to be fully cognizant of the realization that the molestation of a child would have serious injurious consequences to the child, as he testified in his deposition. His testimony, in the context of the particular policy provisions involved in this case, and the particular allegations of the Complaint, and theories of law under which the Plaintiffs are proceeding, mandate the result that the Trial Court reached, that is, granting the Summary Judgment for the Respondents.

Rulings of the Second District Court of Appeal, in other cases dealing with intentional act exclusions, are consistent with the Trial Court's holding in the instant case. In Bosson v. Uderitz, 426 So.2d 1301 (Fla. App. 2nd DCA, 1983), the Court found that conduct, which amounted to a robbery, was

intentional within the purview of an automobile insurance policy's intentional act exclusion and was not negligent. Therefore, such conduct was not within the scope of the policy's coverage. By analogy, the battery alleged in the instant case was intentional and therefore not within the scope of coverage provided by Respondent's policy. This case is also similar to Hartford Insurance Company v. Spreen, 343 So.2d 649 (Fla. 3rd DCA, 1977), where the Court found the acts of an insured, who intended striking an individual but who did not intent to cause the extensive injury which resulted would not have coverage under a policy that provided for an accident which excluded damages which were either expected or intended from the standpoint of the insured. Clearly, from the insured's own testimony cited above, the dilatorious effects alleged in the Complaint would have to be expected or intended by him. Therefore, based upon the only theories alleged against him under the Complaint, there should be no coverage under this policy. While the Petitioner has cited both Bossen and Spreen, it is submitted that their reliance on these cases is ill-founded. Neither case deals with incidental or transferred touching. Both deal with a situation such as we have in the instant case, where the insured specifically intended to do a certain act to a specific victim. Coverage was not allowed in either case, nor should coverage be allowed in this case.

CONCLUSION

The conclusion will be based on the foregoing arguments and authorities cited herein. The Respondent respectfully requests this Honorable Court affirm the decision of the Fifth District Court of Appeal in the instant case and quash the decision of the Second District in Zordan v. Page.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail this 19th day of October, **1988** to Michael M. Bell, Esq., Post Office Box **536487**, Orlando, Florida **32853-6487;** Scott L. Sterling, Esq., **1214** East Robinson Street, Suite One, Orlando, Florida **32801;** and John R. McDonough, Esq **, 19** East Central Blvd., Orlando, Florida **32801**

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