IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 73,395

EASTERN AIRLINES, INC.

Petitioner,

vs.

CHARLES KING,

Respondent.

ON PETITION FOR REVIEW
FROM THE DISTRICT COURT
OF APPEAL, OF FLORIDA, THIRD DISTRICT

REPLY BRIEF OF PETITIONER, EASTERN AIRLINES, INC.

Florida Bar No. 656658

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RESTATEMENT AND OTHER AUTHORITIES

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INTRODUCTION

Petitioner, Eastern Air Lines, Inc., the Defendant below, files this Reply to the Answer Brief of Respondent, the Plaintiff below, Charles King.[1] Since the filing of Eastern's Initial Brief, two events which effect this case have occurred. First, on April 13, 1989, Eastern filed a petition under Chapter 11 of the United States Bankruptcy Code. Second, the Eleventh Circuit issued its opinion in the related action, Floyd v. Eastern Airlines, Inc., No. 86-5381 (11th Cir. May 5, 1989).[2] The Floyd court has deferred to this Court the determination of whether King has stated a claim for infliction of emotional distress under Florida law.[3] The Eleventh Circuit, however, contrary to the Third District Court of Appeal, determined that the plaintiffs can bring a cause of action for emotional injury under the Warsaw Convention. See, Argument II of this Reply Brief. Additionally, the court found that the Warsaw Convention "preempts those aspects of the state law cause of action which conflict with the

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[1] In this Reply Brief, Eastern will address only those arguments made by Respondent which relate to Eastern's Initial Brief, and not to those made in response to the Amicus Curiae Brief.

[2] In its Opinion of May 5, 1989, the Eleventh Circuit stayed its own mandate and additionally, the parties may move for rehearing in Floyd up to 14 days after the bankruptcy stay is lifted. Therefore, that decision is not yet final.

[3] The Eleventh Circuit recognized that "on remand the district court will be bound by the decision of the Supreme Court of Florida on the issue of the state law cause of action for intentional infliction of emotional distress," as that will provide the "final resolution of the issue." Floyd, slip op. at 5, 55.

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Convention, including plaintiffs' claim for punitive damages." Floyd, slip op. at 55.[4]

ISSUES INVOLVED[5]

I.

WHETHER THE THIRD DISTRICT ERRED IN REVERSING A JUDGMENT IN FAVOR OF EASTERN ON KING'S CLAIM UNDER FLORIDA LAW FOR RECKLESS INFLICTION OF EMOTIONAL DISTRESS?

II.

WHETHER THE THIRD DISTRICT ERRED IN RULING THAT KING'S STATE LAW CLAIM WAS NOT PREEMPTED BY THE WARSAW CONVENTION?

ARGUMENT

I.

THE THIRD DISTRICT ERRED IN REVERSING A JUDGMENT IN FAVOR OF EASTERN ON KING'S CLAIM UNDER FLORIDA LAW FOR RECKLESS INFLICTION OF EMOTIONAL DISTRESS.[6]

A. King urges the Court to adopt a subjective rather than an objective test.

The legal standard concerning causes of action for infliction of emotional distress has been articulated in several Florida cases.

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[4] Even if this Court chooses to adopt that portion of the Floyd opinion which holds that inconsistent state law is preempted by the Warsaw Convention, Eastern respectfully urges this Court to determine the state law issue for the benefit of litigants in future cases. Of course, if this Court finds that Warsaw does not preclude a state law cause of action, a final resolution of the state law question remains crucial to the parties here.

[5] King added a third issue in the Answer Brief which attempted to address every possible outcome relating to the Warsaw Convention. However, the Answer Brief was filed before the Eleventh Circuit's opinion in Floyd was issued. Accordingly, Eastern responds to the second issue in light of the recent decision in Floyd v. Eastern.

[6] It is clear from the Answer Brief that King is now maintaining that the amended complaint stated a cause of action only for reckless, not intentional, infliction of emotional distress. See, King's Answer Brief at p. 5, Issue A and p. 18 ("[s]ince we have not alleged an intentional tort in this case...") (emphasis in original).

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That standard sets forth objective criteria.

> The threshold test to be followed in assessing behavior claimed to constitute the "intentional infliction of emotional distress" is whether such behavior is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." In applying that standard, it is manifest that the subjective response of the person who is the target of the actor's conduct is not to control the question of whether the tort occurred. Rather, an evaluation of the claimed misconduct must be undertaken to determine, as objectively as is possible, whether it is "atrocious, and utterly intolerable in a civilized community." That burden falls to the judiciary--it is a matter of law, not a question of fact. [Emphasis added.]

Kent v. Harrison, 467 So.2d 1114, 1115 (Fla. 2d DCA 1985) (citing Ponton v. Scarfone, 468 So.2d 1009 (Fla. 2d DCA 1985)); accord, Dependable Life Insurance Company v. Harris, 510 So.2d 985, 988 (Fla. 5th DCA 1987). Here, this Court must ascertain whether the facts as pled in the complaint state a cause of action for reckless infliction of emotional distress under the objective standard enunciated in Metropolitan Life Insurance Company v. McCarson, 467 So.2d 277, 278-79 (Fla. 1985) (liability for infliction of emotional distress found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community....[so as to lead one] to exclaim, 'Outrageous!'"). Eastern submits that the trial court was correct in finding that the pleadings did not state such a claim.

The cases relied upon by King to support a contrary conclusion are inapposite. In those cases, the pleadings were sufficient to withstand dispositive pre-trial motions because the conduct as pled constituted willful conduct. See, Johns-Manville Sales Corp. v.

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Janssens, 463 So.2d 242 (Fla. 1st DCA 1984) (asbestos manufacturer was liable for asbestosis which plaintiff developed and award of punitive damages was proper based upon showing that manufacturer intentionally covered up the known danger so that continued marketing of the product could continue); Toyota Motor Company, Limited v. Moll, 438 So.2d 192 (Fla. 4th DCA 1983) (evidence was sufficient to withstand motion for directed verdict where manufacturer was shown to know of defects in the automobiles and continued to market the cars without taking any corrective action of its "life-threatening design flaws"); American Motors Corporation v. Ellis, 403 So.2d 459 (Fla. 5th DCA 1981) (evidence showed that defendant was "aware of catastrophic results of fuel tank fires in its vehicles from its own crash tests,...[but] chose not to implement the recommendation of its engineers to relocate the fuel tank in order to maximize profits") (emphasis added). In all of the aforementioned cases, the conduct alleged was found to be deliberate with the intent to injure. Here, King concedes that Eastern's conduct was not intentional. See, footnote 6, supra.

In essence, the entire basis of King's argument is an appeal to the emotions of the individual members of the Court. Indeed, King admits as much when he states, the "recognition of an action for...reckless infliction of mental distress depends largely on this Court's sensibilities... ." King's Answer Brief at p. 12. Eastern respectfully disagrees with this analysis. This Court's function is to set forth rules of law, not only for this case, but for others as well. To suggest that the outcome of this or any case turns on the

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personality of the individual members of the Court is contrary to the fundamental principles upon which our judicial system is based.

B. Case law establishes that the facts as pled cannot support a claim for reckless infliction of emotional distress.

In White Construction Co.. Inc. v. Dupont, 455 So.2d 1026 (Fla. 1984), this Court held that the plaintiff could not recover punitive damages where the defendant's employee hit a trailer while operating a forty ton loader with faulty brakes at top speed. This Court found that although the defendant knew that the loader's brakes had not been working for some time, such conduct was solely negligent and not sufficient for an award of punitive damages. King's attempt to distinguish White by classifying that accident as a "fluke," is as unpersuasive as his description of the triple engine failure here as "perfectly predictable." See, King's Answer Brief at p. 16. There is nothing more "predictable" and threatening to human life than an accident caused by a forty ton loader traveling at top speed with faulty brakes. Just as this Court found that the level of culpability in White v. Dupont did not amount to recklessness, Eastern submits that the Court should find the same here. See also, American Cyanamid Co. v. RoY, 498 So.2d 859 (Fla. 1986) (defendant's failure to place appropriate warning on label of toxic product did not warrant an award of punitive damages, as conduct was merely negligent); Como Oil Company, Inc. v. O'Loughlin, 466 So.2d 1061 (Fla. 1985) (punitive damages not warranted where truck driver overfilled an underground gasoline storage tank causing injury to an individual injured by the resulting gasoline explosion); McPhail v. Jenkins, 382 So.2d 1329

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(Fla. 1st DCA 1980) (suit for wrongful death of eighteen year old daughter caused by defendant dentist's oversedation of decedent insufficient to maintain cause of action for mental suffering and distress).

King's reliance on Wansen v. Ford Motor Company, 97 Wis.2d 260, 294 N.W.2d 437, 13 ALR4th 1 (Wis. 1980) for the proposition that Eastern's behavior was "reckless" is misplaced. In Wansen, a manufacturer was found negligent for designing a fuel tank that would explode upon a relatively minor impact combined with the defendant's knowledse of that danger without taking any curative action. The court in Wansen described recklessness as "something in the nature of special ill will towards the person injured, or a wanton, deliberate disregard of the particular duty then being breached, or that which resembles gross, as distinguished from ordinary, negligence." Wansen, 13 ALR4th at 9.

Chief Judge Schwartz, in a strong dissent, reasoned that

> the principles of §46 [of the Restatement (Second) of Torts] require that the defendant's purportedly tortious activities be either intended to cause that mental distress or be undertaken with a reckless disregard of the known likelihood that it will occur. In other words, §46 liability is designed to cover the narrow class of conduct in which, without impact, not only are the plaintiff's interests in psychic tranquility severely and adversely affected, but that those interests are designedly or recklessly disregarded by the defendant as well. Since it is inconceivable that Eastern's alleged negligence, even if recklessly accomplished, was undertaken in knowing, intentional or wanton disregard of the likelihood that the plaintiff would be mentally harmed, I conclude that no §46 claim can possibly be asserted. [Emphasis in original.]

King v. Eastern Airlines, Inc., 536 So.2d 1023, 1034 (Fla. 3d DCA 1988) (Schwartz, C.J., dissenting). (A. 9-10). In other words,

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permitting a cause of action on these allegations dangerously expands the limited circumstances in which the courts have heretofore permitted claims for reckless infliction of emotional distress. As Judge Schwartz pointed out, the exception created by the Third District might very well swallow the "impact rule" enunciated in Brown v. Cadillac Motor Car Div., 468 So.2d 903 (Fla. 1985).

> It would apply when, for example, a highly intoxicated driver recklessly operates his vehicle and narrowly misses but severely frightens a plaintiff, or when a plaintiff uses and becomes mentally concerned over some potential harm, but is not actually "impacted" or physically injured by a product-like a [Pinto] or a Dalkon Shield-which may have been recklessly manufactured.

King, 536 So.2d at 1036-7 (Schwartz, C.J., dissenting).

c. Eastern's status as a common carrier is irrelevant.

King's argument that Eastern, as a common carrier, had a "special relationship" with its passengers is of no assistance. The standard of care Eastern owes its passengers sheds no light on the issue of the character of Eastern's purported actions, but rather, only establishes the plaintiff's burden of proof under the doctrine of negligence. That is, it is axiomatic that whether or not a defendant's conduct is "outrageous" depends solely on the defendant's actions, not the standard of care that may be owed a particular plaintiff.[7]

King further asserts that under comment f to section 46 of the Restatement (Second) of Torts, the "helplessness" of a passenger in an

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[7] Similarly, King's attempt to bootstrap section 48 of the Restatement (Second) of Torts on the basis of Eastern's position as a common carrier is of no avail. As Eastern stated in its Initial Brief, section 48 deals solely with the vicarious liability of employers for insults by employees which result in injury to third parties.

airplane, in some manner, modifies the character of Eastern's actions. This analysis is incorrect for three reasons. First, as with the common carrier argument, this portion of the Restatement applies to the plaintiff's burden of proof. Second, comment f to section 46 refers to a person particularly susceptible to emotional distress. Third, the actor must be aware of the peculiarity and intentionally proceed in the face of it. Thus, in each of the cases relied upon by King, the defendant intentionally placed the plaintiff in a position of "helplessness" akin to being victimized. See, Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950) (defendant mortician held the body of plaintiff's deceased daughter for several days despite plaintiff's demands that the body be sent to a different funeral home and refused to surrender the body until plaintiff paid for the embalming fee); Smith v. Telophase National Cremation Society, Inc., 471 So.2d 163 (Fla. 2d DCA 1985) (defendant was liable for intentional infliction of emotional distress where evidence showed that crematory's known practice of mixing ashes of deceased persons resulted in plaintiff's receipt of the remains of someone other than her deceased husband).

Indeed, in applying comment f of section 46, Florida courts have required the element of intent. For example, in Dominsuez v. Equitable Life Assurance Society of the United States, 438 So.2d 58 (Fla. 3d DCA 1983) the defendant insurance company was liable for intentional infliction of emotional distress where it falsely represented the insurance coverage due to plaintiff and attempted to coerce plaintiff into surrendering his policy. The Court, in finding that plaintiff did state a claim stated, "The complaint alleges the

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defendants to be not only in a position to affect the plaintiff's interests, but actually having asserted their power by cutting off the plaintiff's disability payments without justification. It alleges further that the defendants were...aware of the plaintiff's disabilities and thus his susceptibility to emotional distress when they acted." Dominsuez, 438 So.2d at 62.

Unlike the complaints in Kirksey, Smith and Dominsuez, King fails to allege that Eastern intentionally placed its passengers in jeopardy. Indeed, King has abandoned its claim for intentional infliction of emotional distress and is proceeding only on a theory of recklessness. See, footnote 6, supra. As a matter of common sense, "it is rather farfetched to suggest that defendant['s] conduct...was calculated to cause emotional distress." King v. Eastern Airlines, Inc., 536 So.2d at 1036 (Schwartz, C.J. dissenting) (emphasis in original).

D. The complaint presumes Eastern took some action to address the purported o-ring problem.

The central allegation in the claim for emotional distress was found in the amended complaint at paragraph 18.

> EASTERN'S acts in failing to properly inspect, maintain and operate its aircraft on flight no. 855 on May 5, 1983, constituted an entire want of care or attention to its duty and showed great indifference to the persons, property and rights of the plaintiff. More particularly, EASTERN'S records reveal at least one dozen prior instances of engine failures due to missing O-rings, and yet EASTERN failed to institute appropriate procedures to cure this maintenance problem despite such knowledge. [Emphasis added].

(A. 43). This Court must hold the plaintiff to the allegations in the complaint. Bradham v. Hayes Enterprises, Inc., 306 So.2d 568, 570

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(Fla. 1st DCA 1975). King asserts on appeal that the amended complaint alleges that Eastern took no actions whatsoever to avert the incident. However, the undeniable fact is that the complaint does not allege that Eastern failed to institute any procedures but only failed to institute appropriate procedures. King did not allege that Eastern wholly failed to "inspect, maintain and operate" its equipment, but instead, that Eastern failed to properly "inspect, maintain and operate." The complaint, by its very terms, alleges some action was taken, however, those acts were purportedly insufficient.

In Ten Associates v. Brunson, 492 So.2d 1149 (Fla. 3d DCA 1986), defendants, owners of an apartment complex, were aware of more than sixty criminal incidents on the premises, yet failed to properly train their guards. The court, however, found that the apartment owners were not reckless because they had taken some action to secure the property, although those attempts were unsuccessful. King's argument that there was no strong probability of serious harm in Ten Associates is illogical. The unavailability of good security in an area with prior criminal activity certainly presents an active threat to human safety.

As Eastern's conduct was not "so extreme and outrageous as to permit recovery" under section 46 of the Restatement (Second) of Torts, comment h, the decision of the Third District should be quashed and the decision of the trial court in favor of Eastern should be reinstated.

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II.

ASSUMING THAT A CAUSE OF ACTION EXISTS UNDER THE WARSAW CONVENTION FOR EMOTIONAL INJURY, THE THIRD DISTRICT ERRED IN RULING THAT KING'S STATE LAW CLAIM WAS NOT PREEMPTED.

As explained in the introduction to this Reply Brief, since the time of filing Eastern's Initial Brief, the Eleventh Circuit Court of Appeals has issued its decision in the related cases arising out of the same incident. Flovd v. Eastern Airlines, Inc., No. 86-5381 (11th Cir. May 5, 1989).[8] The Flovd court determined that Warsaw does afford a cause of action for emotional distress unaccompanied by physical injury.[9] Accord, Palogonia v. Trans World Airlines, Inc., 110 Misc.2d 478, 442 N.Y.S.2d 670, 675 (N.Y. Sup. Ct. 1978); Husserl v. Swiss Air Transport Co., 388 F.Supp. 1238 (S.D. N.Y. 1975). The court found support for its conclusion in that "the only document

[8] Eastern does not retreat from its original position that the Third District Court of Appeal was correct in finding that no cause of action under the Warsaw Convention for reckless infliction of emotional distress could be stated. Similarly, Eastern maintains that the Third District erred in determining that the failure of the Warsaw Convention to provide for such a cause of action did not preclude the purported state law claim. However, in this respect, Eastern reiterates the arguments it set forth in its Initial Brief at p. 29-48. Here, Eastern will solely address the ramifications of the Flovd decision.

[9] Eastern recognizes that this Court is not bound by the Flovd decision. See, State v. Dwyer, 332 So.2d 333, 335 (Fla. 1976) (opinions by lower federal courts are persuasive, but only decisions of the United States Supreme Court are binding on the courts of the state). However, if this Court agrees with the analysis of the Warsaw Convention in Flovd, then, it follows that preemption exists where Florida law is contrary to the Convention. Flovd, slip op. at 44. Thus, if this Court finds King states a cause of action for reckless infliction of emotional distress under Florida law, that cause of action would be preempted under Flovd inasmuch as the damages recoverable for such an action under the Warsaw Convention are limited in amount and type.

which is actually delivered to passengers informs them that the airline's liability is limited in cases of death or 'personal injury,' not merely bodily injury." Floyd, slip op. at 23. The court reasoned that

> [t]he conference at Warsaw had two goals. First, to establish uniformity as to documentation such as tickets and waybills, and procedures for dealing with claims arising out of international transportation....The second, and more important at the time, goal of the conference was to limit the potential liability of air carriers in the event of accidents and lost or damaged cargo.

Floyd, slip op. at 6. Thus, the policies underlying the Convention were to

> ensure uniformity, both in matters of documentation and matters of liability. [Citation omitted]....It hardly seems consistent with the intent of the Convention to place a strict cap of *$75,000* on damages for death or harm resulting from physical impact while allowing unlimited recovery for purely emotional or psychological injuries.

Floyd, slip op. at 33-34. The $75,000 per passenger liability limitation under Article 22 (A. 31) of the Convention is in effect unless the plaintiff can meet its burden of proof that there was willful misconduct on the part of the defendant. Floyd, slip op. at 53. As discussed in Argument I of this brief, King has failed to allege any willful misconduct on the part of Eastern. In fact, King has abandoned any intentional tort claim. See, footnote 6, supra.

Additionally, just as Eastern argued in its Initial Brief, the Floyd court has held that the Warsaw Convention preempts any aspects of state law causes of action which conflict with the Convention.

Floyd, slip op. at 35.[10] "Any state law in conflict with a treaty of the United States is invalid." Floyd, slip op. at 35 (citing Ray v. Atlantic Richfield Co., 435 U.S. 151, 157-58 (1978)); accord, Kaper v. Kuwait Airways Corp., 845 F.2d 1100, 1104 (D.C. Cir. 1988); Butler v. Aeromexico, 774 F.2d 429 (11th Cir. 1985); Highlands Insurance Co. v. Trinidad and Tobago (BWIA International) Airways Corp., 739 F.2d 536, 537 n.2 (11th Cir. 1984); In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1307-08 (9th Cir. 1982).[11]

There is a definite conflict between the provisions of the Warsaw Convention and Florida's cause of action for emotional distress. Under Article 25 of the Convention, punitive damages are not available. Floyd, slip op. at 43, 48, 52. "Article 25 of the Warsaw Convention does not create an independent cause of action for willful misconduct which would entitle plaintiffs to punitive damages." Floyd, slip op. at 43. (A. 32). Further, although Florida law permits an award of punitive damages for intentional infliction of emotional distress, the Convention preempts that inconsistency. Floyd, slip op. at 44. "Plaintiffs have pointed to no authority suggesting that the French legal meaning of Article 17 permits

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[10] As the Floyd opinion noted, if this Court determines that the plaintiffs have not stated a claim for reckless infliction of emotional distress, there is no question of preemption. Floyd, slip op. at 61 n. 28.

[11] The Eleventh Circuit, following the lead of the United States Supreme Court, has declined at this time to determine whether Warsaw creates an exclusive cause of action. Floyd, slip op. at 38-39, 63-64 n. 33 (citing Air France v. Saks, 470 U.S. 392 (1985)). It is still Eastern's contention that the Convention does create an exclusive theory of liability and requests that this Court resolve this question.

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recovery of punitive damages, and we have found no such authority." Floyd, slip op. at 45.

King's argument that because the Convention makes no mention of damages, punitive damages are allowed under state law, was rejected by the Floyd court. "[W]e do not think plaintiffs can take much comfort in this 'silence'." Floyd, slip op. at 45. The court reasoned that the policy behind punitive damages would not be served in this situation. "Punitive damages are intended to penalize the wrongdoer in order to benefit society, and as such are not 'sustained' by the victim." Floyd, slip op. at 46. "Nowhere in the Minutes of the Convention is there any mention of deterring misconduct by imposing punitive damages on derelict air carriers." Floyd, slip op. at 47.

> This conclusion is supported by the purposes and goals of the Convention to limit strictly the liability of the airlines and to provide a uniform and comprehensive scheme of liability. The Convention was intended to place strict limits on air carrier liability for accidents, as well as to ensure at least a measure of compensation for accident victims. [Citation omitted.] Holding that the punitive damages are unavailable in an action governed by the Warsaw Convention furthers the goal of certainty of liability. [Citation omitted.]...Allowing punitive damages in Warsaw Convention cases would undermine this strict limitation of liability, which was the central feature of the Warsaw System. See, Trans World Airways, Inc. v. Franklin Mint Corp., 466 U.S. 243, 256, 104 S.Ct. 1776, 1784 (1984).
>
> The recovery of punitive damages would also be inconsistent with the goal of the Convention to provide a comprehensive and uniform scheme governing the liability of the airlines in the areas covered by the Convention.

Floyd, slip op. at 49. Based upon the Floyd opinion, it is clear that King's claim for emotional distress is preempted by the Warsaw Convention.

CONCLUSION

Eastern respectfully requests that the Third District Court of Appeals decision that King has stated a claim for emotional distress under Florida law, be quashed with directions to enter judgment in favor of Eastern.

Should this Court find that King has stated a claim under state law, Eastern respectfully requests that the Third District decision finding that Warsaw does not preempt that claim be quashed with directions to enter judgment in favor of Eastern.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of May, 1989 to: JOEL D. EATON, ESQ., Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Suite 800, City National Bank Building, 25 West Flagler Street, Miami, FL 33130; and EDWARD T. O'DONNELL, ESQ., Mershon, Sawyer, Johnston, Dunwody & Cole, Southeast Financial Center, Suite 4500, 200 South Biscayne Blvd., Miami, FL 33131-2387.

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