IN THE SUPREME COURT OF FLORIDA

THE GLADES, INC.,
a Florida corporation,

Petitioner,

vs.

THE GLADES COUNTRY CLUB
APTS. ASSOCIATION, INC.,
a non-profit Florida
corporation,

Respondent.

_____/

Case No. 73,467

(District Court of Appeal)
No. 87-1757
87-3553

RESPONDENTS ANSWER BRIEF TO PETITIONERS INITIAL BRIEF ON MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES CITED — PAGE NO.

RESPONDENT'S RESTATEMENT OF THE CASE AND THE FACTS

Respondent, **THE GLADES COUNTRY CLUB APTS. ASSOCIATION, INC.** (COUNTRY CLUB) restates the case and the facts in that Petitioner, THE GLADES, INC.'S (GLADES) Statement of the Case and the Facts is partially inaccurate, and incomplete as it does not include "the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;" (emphasis supplied)(Rule 4-1.5(B)(4), Rules Regulating the Florida Bar.

This action was tried by the Trial Judge. The Court entered an Order of Dismissal with Prejudice at the conclusion of Glades Case on January 21, 1986. (R, 1045)

The action brought by the GLADES against COUNTRY CLUB alleged the breach by COUNTRY CLUB of a Comprehensive Settlement Agreement between the parties (R, Plaintiff's Exhibit 2) which settled a prior action (R, 382-462), and involved a complex Three Count Complaint (R, 938-1006): (a) seeking to accelerate a Promissory Note having an outstanding principal balance of approximately $4,600,000.00 and the foreclosure of the Mortgage securing same, (b) seeking $1,500,000.00 in damages, (c) seeking the restoration and reinstatement of onerous long term recreational leases which had been purchased by COUNTRY CLUB from GLADES, (d) seeking forfeiture of the benefits received by COUNTRY CLUB in dismissing a Complaint by COUNTRY CLUB against

GLADES, with prejudice, involving Fourteen Counts and seeking several million dollars in damages and the cancellation of onerous long term leases, and (e) which action by GLADES if successful, would have resulted in the forfeiture of the cash down payment paid by COUNTRY CLUB to GLADES in connection with the purchase of the recreation facilities (the security under the Mortgage) and the potential loss of approximately $3,000,000.00 paid by COUNTRY CLUB to GLADES in reduction of the Mortgage. (See Paragraph 4 Trial Court's Order of November 17, 1987, (Appendix 6, Page 9)

The Comprehensive Settlement Agreement provided for the payment of reasonable attorneys fees, including fees on Appeal to the prevailing party in any action commenced seeking to enforce any of the provisions thereof.

A hearing was held on May 6, 1986 for the determination of a reasonable attorneys fee to be awarded COUNTRY CLUB as the prevailing party.

At the hearing COUNTRY CLUB submitted testimony from three witnesses. Attorney Donald Van Koughnet, Attorney James Elkins and George Derbyshire, past president of COUNTRY CLUB.

Attorney Van Koughnet testified that he had practiced law for 40 years, 8 of which were in Collier County, Florida; that he had reviewed the Court files including the pleadings, discovery, the Comprehensive Settlement Agreement, the Mortgage and Note, the files of counsel for The Glades Country Club Apartments Association, Inc., inclusive of the pleadings, Defendant's

Memorandum in Support of Motion for Assessment of Costs and Attorney's Fees, and Defendant's Response to Interrogatories. Based upon his review, he estimated that between 400 and 450 hours had been expended on the case and that a reasonable fee for the services was $250,000.00 based upon the potential loss of $4,500,000.00 if the GLADES had been successful in the action.

Mr. Elkins testified as to his experience as a lawyer; and that he had practiced law in Collier County for 23 years; that he had examined the file of counsel for COUNTRY CLUB, the pleadings, Defendant's Memorandum in Support of Motion for Costs and Attorney's Fees, and Defendant's Response to Plaintiff's Interrogatories and he estimated the time necessary to complete the work. He admitted that he did not have the benefit of the number of hours expended by COUNTRY CLUB'S Counsel but testified that the reasonable value of the services was at least $150,000.00.

The testimony of COUNTRY CLUB'S expert witnesses was uncontroverted.

Mr. Derbyshire testified that after the Order of Dismissal had been entered for COUNTRY CLUB, COUNTRY CLUB negotiated with its Counsel and agreed that a reasonable fee for the services provided would be $150,000.00. Mr. Derbyshire further testified that the payment of the $150,000.00 fee was not contingent upon the outcome of the attorney's fee hearings or any other contingency but that the agreement between COUNTRY CLUB and its

Counsel was at all times to pay Counsel a reasonable attorney's fee.

Counsel for COUNTRY CLUB asked that COUNTRY CLUB'S Answers to GLADES Interrogatories (Appendix 9), COUNTRY CLUB'S Response to GLADES' Request to Produce (Appendix 10), and COUNTRY CLUB'S Memorandum in Support of Motion for Assessment of Costs and Attorneys Fees (Appendix 11) and Memorandum in Support of Motion For Assessment of Costs and Attorneys' Fees (Appendix 12) be included in the record.

In opposition to COUNTRY CLUB'S request for attorney's fees, GLADES submitted the testimony of attorney Donald A. Pickworth who testified that he reviewed the Court file and the file of counsel for GLADES. He further testified to having reviewed the invoices prepared from the records of the attorney for GLADES which itemized a total of 151 hours as being expended in the prosecution of the action. The Court accepted these invoices into evidence. Mr. Pickworth further testified that the customary rate in the community for attorneys of the experience of COUNTRY CLUB'S Counsel ranged between $100.00 and $165.00 per hour and that applying the highest rate of $165.00 per hour to the 151 hours accumulated by GLADES Counsel (since COUNTRY CLUB'S counsel kept no time records) he arrived at a reasonable fee of approximately $25,000.00. Mr. Pickworth made no attempt to determine the number of hours worked by COUNTRY CLUB'S counsel, nor did he compute a fee based upon the testimony given as to the estimated hours expended by COUNTRY CLUB'S counsel, to-wit:

between 400 to 450 hours, nor did he testify as to any factor (criteria) in establishing a reasonable fee, other than the number of hours GLADES (NOTE: Not COUNTRY CLUB'S Counsel) counsel had expended times the customary rate in the community.

The GLADES also called attorney S. Lee Crouch, COUNTRY CLUB'S Counsel who testified that he did not keep any time records in this case and does not do so as a matter of course. Mr. Crouch also clarified COUNTRY CLUB'S answer to interrogatory number 4 which stated that the firm of Crouch & Miner, P. A. had expended approximately 300 hours in defense of this action by stating that in his estimate he had spent more than 400 to 450 hours on the case. He indicated that the 300 hour estimate had been merely a conservative estimate.

In closing argument, counsel for GLADES cited the case of FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 472 So.2d 1145 (Fla. 1985) and argued that COUNTRY CLUB had not met the burden stated therein. Also cited was the case of PEZZIMENTI v. CIROU, 466 So.2D 274 (Fla. 2d DCA 1985).

In closing argument, COUNTRY CLUB'S counsel argued as to the reasonableness of the fee based on the criteria for the establishment of a reasonable fee as set forth in the Code of Professional Responsibility DR 2-106 (Now Rule 4-1.5(B) and the evidence presented thereon, inclusive of the Pleadings, COUNTRY CLUB'S Memorandum in Support of Motion for Assessment of Costs and Attorney's Fees, and COUNTRY CLUB'S Response to GLADES' Interrogatories.

(See Stipulated Statement of the Evidence or Proceedings)(Appendix 13).

After considering the argument of counsel, the Court awarded a fee of $150,000.00 as reimbursement to COUNTRY CLUB, stating that it had knowledge of the lodestar criteria (factor) stated in FLORIDA PATIENT'S COMPENSATION FUND v. ROWE (Supra), AND THAT IT WOULD HAVE AWARDED A HIGHER FEE, (emphasis supplied) but that it felt constrained by the case of PEZZIMENTI v. CIROU (Supra) to limit the fee to the amount agreed upon by COUNTRY CLUB and its counsel.

The hearing on attorney's fees was not transcribed.

The Trial Court, after hearing by Order dated May 6, 1986 awarded COUNTRY CLUB the sum of $150,000.00 as and for attorney's fees incurred in it's successful defense of the action, together with costs in the sum of $2,102.47. (Appendix 1, Page 1) The Order did not contain findings.

Both the Order of Dismissal and the Judgment for costs and attorneys' fees were appealed. (Case Nos. 86-459; 86-1180 consolidated) The Second District affirmed the Trial Court's Order of Dismissal on the merits and Judgment for costs by opinion filed February 27, 1987. (Appendix 2, Pages 2 and 3)(502 So.2d 1368 (Fla. 2d DCA 1987). The Court in said opinion however, stated:

> "The only issue with merit concerns the trial court's findings regarding the amount of attorney's fees awarded to appellee.", And that, "Neither in the order awarding judgment for attorney's fees, nor in the transcript of the hearing to establish the reasonable amount of those fees, does the trial judge comply with the requirements of FLORIDA

PATIENT'S COMPENSATION FUND v. ROWE, 472 So.2d 1145 (Fla. 1985) and LAKE TIPPECANOE OWNERS ASSOCIATION, INC. v. HANAUER, 494 So.2d 226 (Fla. 2d DCA 1986)."

The Court then remanded

"for the purpose of determining the amount of attorneys' fees to be awarded Appellee, THE GLADES COUNTRY CLUB APTS. ASSOCIATION, INC., after compliance with the dictates of ROWE."

Upon remand the Trial Court, after hearing held June 8, 1987, entered its Order on said date (Appendix 3, Pages 4 and 5) awarding COUNTRY CLUB an Attorneys' Fee of $150,000.00 (lodestar $66,000 i.e. 400 x $165)(enhancement $84,000.00) and costs of $2,102.47, the same as it had in its Order of May 6, 1986. The Trial Court however enlarged its June 8, 1987 Order (Appendix 3) to include a recitation of the evidence, documentation, and argument of counsel relied upon by the Court in the making of its Order, and made specific findings as dictated by ROWE, to-wit: the minimum number of hours reasonably expended by COUNTRY CLUB'S attorneys on the litigation, a reasonable hourly rate for the services of COUNTRY CLUB'S attorneys, the basis of the enhancement of the lodestar figure, and whether the fee was fixed or contingent.

By Notice dated June 17, 1987, GLADES appealed the Order of June 8, 1987 awarding COUNTRY CLUB $150,000.00. (Appendix 4, Page 6)(Case No. 87-1757)

On July 7, 1987, the Trial Court on its own initiative issued a letter to counsel for the parties (Appendix 5, Page 7) indicating its intention to amend its Order dated June 8, 1987

awarding attorneys' fees for the defense of the action. The Court in its letter stated:

> "it is my conclusion that the Second District Court of Appeals has made an attempt to clarify the somewhat ambiguous language contained in the Rowe case, and it appears that the 'lodestar' approach is the only thing available in this particular case." and that, "Therefore, by copy of this letter to you I am requesting that Mr. Siesky prepare an amended order regarding attorneys fees to reflect that only the first two elements, to-wit: hours times hourly rate would appear to be compensable in this particular case, and give the final amount due and owing for attorneys' fees." (Appendix 5, Page 7)

Based upon the letter, GLADES moved The Second District to relinquish jurisdiction to the Trial Court so that an Amended Order could be entered. Jurisdiction was relinquished and the Trial Court on November 17, 1987 entered an Amended Order awarding COUNTRY CLUB an attorneys' fee in the sum of $66,000.00 i.e. lodestar, thereby deleting enhancement ($84,000.00). (Appendix 6, Pages 8 through 10)

The Trial Court in its Order of November 17, 1987 (Appendix 6) made the same findings as contained in its order of June 8, 1987, and additionally made specific findings in Paragraph 4 thereof as to the basis for enhancement, but only awarded $66,000 (lodestar) based upon its erroneous interpretation (as it turned out) of the Second District's opinion filed February 27, 1987 that ROWE and LAKE TIPPECANOE precluded enhancement in the instant case.

On December 16, 1987, COUNTRY CLUB filed a Notice of Appeal of the Trial Court's Amended Order dated November 17, 1987 awarding COUNTRY CLUB an attorneys' fee of $66,000.00 (Case No.

87-3553) and moved the Court for an order consolidating Appellant's and Appellee's respective Appeals, i.e. Case Nos. 87-1757 and 87-3553, which was granted January 25, 1988.

The Second District's Second Opinion, entered December 9th, 1988, 534 So.2d 723 (Fla. App. 2 Dist. 1988) (Appendix 8) after denial of Appellant's Motion for Rehearing or Clarification, affirmed the award of the lodestar figure ($66,000.00) reversed the failure of the Trial Court to again award the enhanced figure ($84,000.00) which the Trial Court had awarded in its Order of May 6th, 1986 and June 8th, 1987 and to which the Trial Court found COUNTRY CLUB would have been entitled, unless precluded by ROWE and LAKE TIPPECANOE. The Second District then remanded for the entry of an Order awarding the total of the lodestar figure and the enhanced figure, to-wit: $150,000.00.

GLADES, in addition to its Motion for Rehearing or Clarification, filed a Motion For Rehearing En Banc, which was denied, and suggestions to the Court that it certify its decision to this Court, on the grounds same was in conflict with ROWE and certain District Court opinions, and was of great public importance. The Second District did not act on said suggestions.

GLADES petitioned this Court for a review of the Second District's Opinion of December 9, 1988. This Court accepted jurisdiction on March 14th, 1990.

SUMMARY OF THE ARGUMENT

I. The finding and determination of the Trial Court as to the number of hours of attorneys time reasonably expended on the litigation and affirmed by the Second District was based on objective and detailed documentation, records and evidence and does not conflict with the statement in ROWE that: ".... the attorney fee applicant should present records detailing the amount of work performed". (emphasis supplied) The Trial Court twice found the evidence sufficient for its findings and specifically set forth in its Orders of June 8th, 1987 and November 17th, 1987, the voluminous documents, testimony, exhibits and other evidence on which it relied. The Second district affirmed on appeal. Neither Court found it necessary to reduce the number of hours expended in the litigation, which each could have done if they had deemed it appropriate. ROWE GLADES under the guise of conflict would like to re-argue the sufficiency of the evidence.

II. ROWE does not preclude the use of the factors (criteria) set forth in Rule 4-1.5(B)(4) formerly Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility, in determining a reasonable fee in an appropriate case, but to the contrary, ROWE provides "in determining reasonable attorney fees, Courts of this State should utilize the criteria . . ." (Appendix 7, Page 16) ROWE did not speak to the question of enhancement of the product of hours and rate in a non-contingent fee case, except indirectly by stating that in

determining a reasonable fee, all of the factors of the Rule should be considered. The Rule itself contains all of the factors necessary to determine the product of hours and rate, and the possible increase or decrease thereof by the application of the other factors. The Rule provides that "In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors." Under the facts of the instant case, the Trial Court properly found in considering the factor of amounts involved and results obtained and others, that the product of hours and rate should be increased more than $84,000 in order to afford a reasonable fee, but limited it to $84,000.00, because it, together with the product of time and rate would have exceeded the fee agreement between COUNTRY CLUB and its Counsel. The instant case was one of indemnity, did not involve a contingent fee contract, did not apply a risk multiplier, did not involve a Federal authorizing Statute and the Trial Court gave no enhancement for risk.

The procedure followed is not in conflict with ROWE, QUANSTROM or TIPPECANOE.

ARGUMENT

POINT I

COUNTRY CLUB responds to GLADES POINT I, to-wit:

DEFENDANT HAS FAILED TO SUBMIT DETAILED CONTEMPORANEOUS TIME RECORDS OR RECONSTRUCTED TIME RECORDS SUFFICIENT TO SUPPORT THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES.

COUNTRY CLUB suggests that the issue should be:

WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS AND DETERMINATION SET FORTH IN ITS ORDER OF NOVEMBER 17, 1987, THAT THE MINIMUM NUMBER OF HOURS REASONABLY EXPENDED BY COUNTRY CLUB'S COUNSEL WAS 400 HOURS.

COUNTRY CLUB agrees with GLADES that the absence of contemporaneous time records is not fatal to a claim for attorney's fees and that "mere estimates of time are not acceptable." (emphasis supplied)

ROWE does require "the Court to determine the number of hours reasonably expended on the litigation.", and provides that "Inadequate documentation may result in a reduction in the number of hours claimed." (emphasis supplied)

GLADES Point I in its jurisdictional Brief was that there was a conflict between the Second District's Opinion and ROWE.

The Second District's Opinion is not in conflict with ROWE.

The Second District Court in this case properly stated:

> "in a particular case like this, evidence sufficient to support a finding of the number of hours reasonably expended by an attorney need not necessarily include specific, written time records, although such records are highly preferable and the lack thereof may in certain cases justify a reduction in the number of hours claimed."

The Trial Court twice found and determined (paragraph 1, Court Orders of June 8, 1987 and November 17, 1987(Appendix 3, Page 4 and Appendix 6, Page 8) that the minimum number of hours reasonably expended on the litigation was 400 hours and that the Court had considered the adequacy of COUNTRY CLUB'S attorneys documentation in determining the number of hours. The trial Court specifically set forth on Page 1 of its Order (Appendix 6, Page 8) the voluminous documentation and evidence considered by

it in determining the number of hours reasonably expended. The Second District in its Opinion stated:

"The order awarding the fee recites that the trial judge who had tried the case, in determining the hours reasonably expended, considered defense counsel's testimony, the testimony and exhibits at the trial, defendant's memorandum in support of the motion for attorney's fee, and 'the adequacy of (defense counsel's) documentation' of his work, including the pleadings, discovery, other contents of the court file, the settlement agreement, the mortgage and note which were incident to the settlement agreement, and a stipulated statement of untranscribed testimony at the fee hearing. That testimony included that of two expert witnesses on behalf of defendant as to a reasonable attorney's fee based upon their review of the work done by defense counsel." and that,

"We do not conclude that the evidence for the lodestar figure equation as to the number of hours reasonably expended has been shown to have been insufficient in this case or that there was an abuse of discretion in that regard"

If either the Trial Judge or Second District deemed the evidence insufficient to support a finding of the number of hours reasonably expended, or that there was inadequate documentation, either could have reduced the number of hours claimed or requested additional evidence or documentation whether in the form of reconstructed time records or other. Neither the Trial Judge nor the Second District chose to do so, and twice each found it to be adequate.

The Trial Judge in the Transcript of Proceedings of June 8th, 1987 (Record, Page 1195), in response to argument by Appellant's counsel stated:

> "The Court previously found that the 400, 450 hours was a reasonable figure of amount of time spent on this case. In fact, the Court said, still says, that it would have possibly awarded more, but it felt that it was constrained because of prior case law to do so."

and that

"I understand your (Appellant's counsel)(parenthetical supplied) argument and accept it and reject it, you know with no offense meant."

The Court additionally stated:

"I think 400, 450 hours is a reasonable amount of time. In fact, I think I could have awarded more, as I said in the last hearing. But I accept the figures which would be 400 hours as a reasonable fee at $165 an hour, . . ."

GLADES in its Brief, Page 7, raises the straw man "travel time" by inferring that the 400 hours awarded by the Trial Judge included travel time, whereas in fact, it did not as evidenced on Page 23 of the transcript, lines 14 through 19:

"THE COURT: Let me ask you a question.

MR. SIESKY: Yes, Your Honor,

THE COURT: Is there any recollection on your part or counsel's part that the Court did award fees for travel time?

MR. CROUCH: No. Your Honor did not.

THE COURT: I don't believe I did. I --"

The Court further stated on Page 24, Line 12:

"I surely don't recollect awarding travel time. I'm clearly aware that you're not allowed to have that."

GLADES, Page 8 of its Brief makes much of the fact that COUNTRY CLUB'S counsel stated "300 hours approximately" in response to an interrogatory and "estimated hours three hundred (300)" in the memorandum (Appendix 12) whereas upon direct examination by GLADES counsel, COUNTRY CLUB'S Counsel estimated he expended 400 to 450 hours on the case, and that his 300 hour estimate had merely been "conservative". GLADES concludes the trial Court's acceptance of 400 hours was therefore arbitrary.

GLADES conclusion does not take into consideration the fact that the trial Court not only considered Defense counsel's testimony (which it apparently believed), but all of the additional evidence set forth in the preface to its Order dated 17th November, 1987. (Appendix 6, Page 8)

The number of hours and rate in the instant case, being only two factors (criteria) to be considered as guides in determining a reasonable fee pale to insignificance in the instant case where the total fee was only $150,000.00 and the fee could have been justified considering the amounts involved and results obtained factor alone, and where the Trial Court stated in its Order that it would have awarded more for enhancement except for the fee agreement between COUNTRY CLUB and its Counsel. A successful defense of the potentially devastating action justified such award regardless of the number of hours involved.

One can only speculate as to the fee that would have been sought by GLADES if it had been the prevailing party in the action, but it is reasonable to believe that GLADES would have determined a reasonable fee to be several hundred thousand dollars, based on the foreclosure of its $4,600,000.00 Mortgage, either the recovery from or forfeiture by COUNTRY CLUB to GLADES of several million dollars, and the reinstatement of GLADES recreational leases worth additional millions of dollars. GLADES certainly would not have determined its fee based on 151 hours at $165.00 per hour.

GLADES reliance on the following cited cases is misplaced for the reasons stated following each cite.

LINDY BROS. BUILDERS, INC. v AMERICAN RADIATOR, ET AL., 540 F.2d 102 (1976). GLADES cites LINDY to the effect that "mere estimates of time are not acceptable". The Court however, in that case held that the firm had probably spent more time than they were claiming in connection with the litigation. The Trial Judge in the instant case found the same (R, Page 1195). In ROBERT H. CALHOUN v. ACME CLEVELAND CORPORATION, 801 F.2d 558 (1st Cir. 1986) the Court of Appeals held "Remand" to the United States District Court "for hearing on reasonableness of time spent and hourly rates claimed by attorneys requesting award under Civil Rights Attorney's Fees Awards Act of 1976 was necessary, in absence of submission of detailed contemporaneous time records." (Headnote 3.) The fee sought was for a sum based solely on the time and rate factor. No other factors of a rule or statute were involved such as in the instant case where enhancement of the time and rate factor was awarded based on other factors of the Rule, especially amounts involved and results obtained, and time and rate was not the significant factor.

The Court stated that "If, on remand, the Plaintiff fails to produce complete and specific contemporaneous time records, the District Court must scrutinize carefully the hours claimed." I submit that in the instant case the Trial Judge and the Second

District have twice scrutinized the hours claimed and found them reasonable.

It is interesting to note that the Court did not refer to the Product of time and rate as "Lodestar".

In AMICO v. NEW CASTLE COUNTY, 654 F.Supp 982 (D.Del. 1987) the fee submission did not include contemporaneous time records, but was composed of a letter, "the equivalent of a memo" that merely outlined the request for fees. In contrast to the above, the trial Judge in the instant case set forth the voluminous documentation, testimony, exhibits and other evidence considered by him in making his findings, including his finding of the number of hours reasonably expended by COUNTRY CLUB'S attorneys on the litigation. (Appendix 6, Page 8).

In KEYES v. SCHOOL DISTRICT NO. 1, 439 F. Supp 393 (D.Colo 1977) The fee applicant only submitted an affidavit merely presenting a total figure and included no attempt to tabulate the component hours in a manner meaningful to the Court. The Court disallowed 80 of the 182 hours requested. In the instant case the Trial Judge twice considered the adequacy of COUNTRY CLUB'S attorneys documentation and evidence and found it adequate and presumably meaningful for its finding as to the number of hours reasonably expended on the litigation. The Court did not deem it necessary to reduce the number of hours, and was twice sustained on Appeal.

GLADES stated in it Brief, Page 9,

> "there are several reasons for the judicial requirement of contemporaneous or reconstructed time records."

COUNTRY CLUB suggests the judicial requirement is one of submitting sufficient and adequate evidence. COUNTRY CLUB responds to the GLADES six stated reasons for the judicial requirement as follows:

1. COUNTRY CLUB concurs that Courts need an objective and uniform basis for awards.

2. GLADES reason 2 is:

> "sensitivity to the fact that the party paying the fee has not participated in the fee arrangement".

GLADES cites ROWE; HENSLEY v. ECKERHART, 461 US 424, 76 L.Ed. 2d 40, 103 S.Ct. 1933 (1983); and STANDARD GUARANTY v. QUANSTROM, 555 So.2d 828 (Fla. 1990). The sensitivity of the non-participating party paying the fee is protected by the fact that such party has a legal right to contest that fee and is not subject to paying the fee, unless the fee has been approved by a Court of competent jurisdiction as being reasonable. In the instant case the Court found the fee arrangement and amount to be reasonable.

3. COUNTRY CLUB agrees that opposing counsel should have a full and fair opportunity to challenge the amount and reasonableness of the time expended. Opposing counsel had a full and fair opportunity to challenge the amount and reasonableness of the time expended.

4. Contrary to the GLADES fourth reason, the attorneys fee in the instant case was not in the form of "damages" and was not based on speculation or conjecture.

5. COUNTRY CLUB agrees there should be the possibility of

meaningful Appellate review and there was meaningful Appellate review by the Second District, which apparently had no difficulty in affirming the Trial Judge's findings and determination. (Emphasis supplied)

6. COUNTRY CLUB concurs in GLADES statement:

> "that fact conclusions as to quantum meruit must be based upon competent, substantial evidence of something expended, done or accomplished".

In the instant case, the trial Court and the Second District in their respective opinions have detailed the competent, substantial evidence of something done or accomplished.

GLADES (presumably with tongue in cheek) concludes that this Court now faces the task of correcting an error and it should either:

1. Reverse the award and remand to the Trial Court with specific directions for the determination of the fee;

2. Reverse the award and establish the fee itself; or

3. Reverse the award and withhold any attorney's fees for COUNTRY CLUB.

GLADES suggests that choice No. 1 is the least acceptable, that No. 2 has merit and No. 3, being the elimination of any award of attorneys fees to COUNTRY CLUB, which it states is a strong sanction, and suggests four reasons for such sanction.

1. GLADES again would like this Court to reverse the Trial Court and the Second District by using GLADES counsel's 151 hours as opposed to COUNTRY CLUB'S counsel's 400 to 450 hours in computing lodestar, and suggests that even the paltry sum of

$66,000.00 be reduced to a sum based upon the number of hours its attorney expended on the litigation. There is no logical or legal rationale for such suggestion. Considering the results it obtained (total defeat of its claims) it perhaps should have expended more hours on its litigation. The hours expended by COUNTRY CLUB'S Counsel in litigation was the number of hours necessary to completely defeat GLADES claims, which if successful, could have bankrupted COUNTRY CLUB.

2. GLADES reason No. 2 is that: the "$150,000.00 is approximately six times a reasonable fee based on 151 hours." and "this demand sought a windfall for COUNTRY CLUB'S counsel at GLADES' expense." Again this reasoning is flawed, in that GLADES uses its counsel's hours as opposed to that of COUNTRY CLUB'S counsel, and to suggest that $150,000.00 is a windfall for COUNTRY CLUB'S Counsel at GLADES expense is ludicrous in light of the facts and arguments heretofore contained in this Brief. The only thing that "shocks the conscience" is that GLADES hasn't reimbursed COUNTRY CLUB for its reasonable attorneys fees as it contracted to do in the Comprehensive Settlement Agreement signed by GLADES.

3. GLADES reason No. 3 suggests that GLADES somehow has been damaged by its continued litigation seeking to avoid the payment by it of a reasonable fee. It has not been damaged, and to the contrary should be grateful to COUNTRY CLUB and its Counsel for limiting the fee to $150,000.00 when the Trial Court indicated it would have awarded more.

4. GLADES reason No. 4 is: "COUNTRY CLUB and not its attorney will bear the weight of the refusal to award attorney's fees since the fee payable to counsel for COUNTRY CLUB is not contingent upon the outcome of these proceedings." This is a true statement, but affords no reason to deny COUNTRY CLUB reimbursement of the reasonable attorneys fee incurred by it in the successful defense of GLADES claims. GLADES continues "this unusual situation exists, because after the trial, COUNTRY CLUB and its attorney agreed to the fee which they would attempt to recover from GLADES."(emphasis supplied) This is not true; it is true that COUNTRY CLUB and its attorney agreed that it would await the results of trial before establishing a reasonable fee, and upon the conclusion of the trial, based upon the factors (criteria) set forth in Rule 4-1.5(B) agreed that $150,000.00 would be a reasonable fee for COUNTRY CLUB to pay its Counsel. This was not a sum "which they would attempt to recover from GLADES", as the payment of the fee to COUNTRY CLUB'S Counsel was not contingent nor dependent upon the amount the Court determined COUNTRY CLUB should be reimbursed. As the Court has stated in ROWE "the prevailing party and that party's attorney, ... must not control the fee award" and "in no case should the Court awarded fee exceed the fee agreement reached by the attorney and his client". The Trial Court and the District Court's Opinions are in conformity with these principals.

There is no conflict in the instant case as the cases cited by Appellant have been distinguished and as all of said cases

stand for the proposition that adequate documentation should be presented, or the number of hours may be reduced. In the instant case, the trial Judge twice determined and found there was adequate documentation and this was affirmed by the Second District in its Opinion. (Appendix 8)

GLADES BY ITS PETITION FOR REVIEW SIMPLY SEEKS TO RE-ARGUE THE SUFFICIENCY OF THE EVIDENCE AND DOCUMENTATION AS TO THE NUMBER OF HOURS REASONABLY EXPENDED WHICH SHOULD BE LEFT TO THE REASONABLE DISCRETION OF THE TRIAL JUDGE.

POINT II

COUNTRY CLUB responds to GLADES'S POINT II, to-wit:

> NOTHING IN THE FACTS OF THIS CASE JUSTIFY THE ENHANCEMENT OF THE AWARD OF ATTORNEY'S FEES BASED UPON THE AMOUNTS INVOLVED AND THE RESULTS OBTAINED.

GLADES Point II in its Brief on jurisdiction was that the Second District's Opinion was in conflict with ROWE and MULTITECH CORP v. ST. JOHNS BLUFF INVESTMENT CORP., 518 So.2d 427 (Fla. 1st DCA 1988) and, in its initial Brief on the merits that "nothing in the facts of this case justify enhancement - - based upon the amounts involved and the results obtained". COUNTRY CLUB submits that there is no conflict with ROWE or MULTITECH and that the Trial Court in its Order (Appendix 6, Page 9) and the Second District in its Opinion (Appendix 8 Page 21(3)) set forth in detail the facts as to the amounts involved and the results obtained justifying enhancement.

ROWE involved a totally contingent fee agreement in a medical malpractice action, where a reasonable fee was to be awarded to the prevailing party by statute. This Court concluded that in contingent fee cases, the lodestar figure calculated by the Court is entitled to enhancement by an appropriate risk multiplier in a range from 1.5 to 3, and further, in that instance, the "results obtained" may provide an independent basis for reducing the fee. The "results obtained" factor involved in the lodestar process used in contingent fee cases where enhancement by the contingency risk multiplier is included as a part of the process may limit further enhancement in such a case because the enhancement has already been figured in through the use of the risk multiplier and therefore, if the results obtained were less than total, it makes sense that considering results obtained, in that instance, may provide an independent basis for reducing the total fee as enhanced. The use of a "results obtained" factor in the lodestar process is to be distinguished from the use of the "amounts involved and results obtained" factor of Rule 4-1.5(B).

ROWE did not speak to a basis for enhancement in a non contingent or partially contingent fee case involving exceptional success in the defense of a complex, multi-count action where the prevailing party was to be indemnified for its reasonable fee by contract and the fee agreement between attorney and client was for a reasonable fee to be determined after the trial taking into

consideration the criteria set forth in Rule 4-1.5(B), such as was true in the instant case.

The Second District's opinion is not in conflict with ROWE, but is in harmony with the holdings of ROWE that:

1. "the amount of an attorney's fee awarded must be determined on the facts of each case."

2. "In determining reasonable attorney fees, courts of this state should utilize the criteria set forth in Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility: ..." including "(4) the amount involved and the results obtained." (Emphasis supplied)

Having discussed ROWE it becomes necessary to consider LAKE TIPPECANOE v. HANAUER, 494 So.2d 226 (Fla. 2d DCA 1986). LAKE TIPPECANOE involved "calculation of attorney fees, for condominium owner who prevailed in litigation brought by condominium association for injunctive relief against her for alleged violation of condominium documents." The Second District held that the Trial Court "could not include multiplication of "lodestar factor" due to fact case did not qualify for enhanced fee as there was no contingency risk factor to be considered."

Based on the Court's Ruling, it must be assumed that the fee arrangement was not contingent, however, there obviously was a fee agreement between the prevailing party and her attorney as the case recites that the Trial Judge reduced the fee found by him to the amount which the prevailing party was obligated to pay her Counsel.

COUNTRY CLUB submits that the Second District was correct in holding that the risk multiplier should not have been applied as

there was no risk factor involved. COUNTRY CLUB, however, submits that the Second District's dicta that "Enhancement under ROWE is only applied where a contingency risk multiplier is appropriate," is incorrect, or in any event confusing, as ROWE did not speak to, nor preclude enhancement in a non-contingent fee arrangement case by applying the factors of the Rule or a fee authorizing statute. (Emphasis supplied)

The Second District in its opinion, the subject of this review, (Appendix 8, page 21 and 22) clarified its opinion in LAKE TIPPECANOE by stating that it meant that "a contingency risk multiplier is appropriate only in a case involving a totally contingent fee arrangement with the client...., which LAKE TIPPECANOE evidently did not involve" and that "the Court in LAKE TIPPECANOE did not address, and apparently was not confronted with, the aspect of exceptional success by defense counsel which was in effect found to be present in this case. When that aspect is present, as here, there may properly be enhancement of the lodestar." And that "Nothing in ROWE says otherwise."

The Trial Court in its Order of November 17th, 1987 found that the product of hours times rate, should be enhanced in excess of $84,000.00 except for ROWE and LAKE TIPPECANOE. Neither case precludes enhancement. The Opinion of the Second District should be affirmed so the case can be remanded to the Trial Court in order that it may amend its Order of November 17th, 1987 to include the enhancement it found to be appropriate in its Orders of June 8th, 1987 and November 17th, 1987.

To attempt to equate the facts in LAKE TIPPECANOE to the instant case demonstrates why the product of time and rate constitutes a reasonable fee in some cases, but requires enhancement in order to be reasonable in others. LAKE TIPPECANOE involved no amounts, the loss of the case might have constituted an inconvenience and a little lost pride, but would not have had any monetary affect, except the payment of an agreed fee. In the instant case as heretofore set forth, in both the facts of the case and argument, millions of dollars were involved, complete success obtained, the loss of the case would have been catastrophic to the client, and the responsibility of Counsel great.

In the instant case, the risk multiplier was not included in the process of determining a reasonable fee because it was not a totally contingent fee case. The Trial Court gave no enhancement for risk. The Trial Court, affirmed by the Second District, based enhancement on the criteria set forth in Rule 4-1.5(B) and more specifically (B)(4) involving not just the "results obtained", but

> "the significance of, or amount involved in, the subject matter of the representation, the responsibility in the representation, and the results obtained."

The Trial Court additionally had evidence before it:

1. As to COUNTRY CLUB Counsel's skill in excess of the ordinary skills of a lawyer necessary to perform the legal defense of COUNTRY CLUB in the action.

(See Answer to Interrogatory 6. (Appendix 9, Page 27)

(See Rule 4-5(B)(7)

(See LINDY Headnote 30)

2. As to the acceptance of the employment precluding other employment.

(See Answer to Interogatory 7, Appendix 9 Page 27)

(See Rule 4-1.5(B)(7)

3. As to the nature and length of the professional relationship between COUNTRY CLUB and its Counsel.

(See Answer to the Interrogatory 10 (Appendix 9 page 28)

(See Rule 4-1.5(B)(6)

4. As to the experience, reputation, and ability of COUNTRY CLUB'S Counsel and his firm.

(See Answer to Interrogatory 11, Appendix 9 Page 28)

The Trial Court specifically stated in the preface of its Order of November 17th, 1987 (Appendix 6 Page 8) that it had considered COUNTRY CLUB'S responses to Interrogatories above cited.

The Second District's Opinion is further in conformity with STANDARD GUARANTY v. QUANSTROM, 555 So.2d 828 (Fla. 1990) in which this Court states in regard to contract cases:

> "Here we reaffirm the principals set forth in Rowe, including the code provisions (emphasis supplied) and find that the Trial Court should consider the following factors in determining whether a multiplier is necessary: (1)...: (2) ...; and (3) whether any of the factors set forth in Rowe are applicable, especially, the amount involved, the results obtained (emphasis supplied),...." (Page 834) This Court further stated:

"We emphasize that the criteria and factors utilized in these cases must be consistent with the purpose of the fee authorizing statute or rule." (emphasis supplied) (Page 834)

and that:

"In this regard, the lodestar method is consequently unnecessary. It is not our intent to change the law in these instances." (Emphasis supplied) (Page 834 and 835)

As the Court said, the lodestar method is unnecessary where there is a specific fee authorizing statute or rule. In the instant case there is no fee authorizing statute, and as the fee arrangement was not totally contingent, there was no basis to use the lodestar method which involves the use of a risk multiplier in appropriate cases. Rule 4-1.5(B) was properly applied to determine a reasonable fee. This was especially necessary in the instant case as the Trial Court specifically states in its order that the reasonable hourly rate determined by the Court to wit: $165.00 did not include any consideration for the amounts involved (millions), the results obtained (complete success in defending the action), the length and nature of the relationship between COUNTRY CLUB and its attorneys, the nature of the fee arrangement to be determined at the conclusion of the case, and was to be partially contingent on the amounts involved and the results obtained. As this Court further stated in QUANSTROM:

"It is important to note that the existence of a contingency fee arrangement is but one of the factors to be considered."

The Second District's opinion (Appendix 8 page 19) is further in conformity with the provision of Rule 4-1.5(C):

> "In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factor."(emphasis supplied)
>
> and Rule 4-1.5(D)
>
> "Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreement, unless found to be illegal, prohibited by this rule, or clearly excessive as defined by this rule."

Neither the Trial Court, nor the Second District found the fee agreed to by COUNTRY CLUB and its Counsel to be illegal, prohibited by the Rule, or clearly excessive. To the contrary, the Trial Court, in its Order of November 17th, 1987 stated that the appropriate amount of enhancement would exceed $84,000.00, but it would limit the amount to $84,000.00, because that figure when added to the lodestar figure would equal the $150,000.00 fee agreed upon by attorney and client. (Appendix 6, Page 9)

GLADES cites ZOROVICH v. STOLLER, 293 So.2d 788 (Fla. 3d DCA 1974) as relying on Mc GILL v. COCKRELL, 101 So. 199 (Fla. 1924) in holding that an arrangement between Attorney and Client to the effect that the exact fee due for a zoning matter would be mutually agreeable to them, did not constitute a contingent fee contract. GLADES additionally cites HEAD v. LANE, 541 So.2d 672 (Fla. 4th DCA 1989) in which the Court held that an arrangement between Attorney and Client to the effect that the Attorney would

be paid $100.00 an hour for legal services rendered, regardless of the outcome of the case, but a 25% contingency fee, if the outcome was in his favor, was not a pure contingency fee agreement and therefore, found no basis for application of a contingency risk multiplier. These cases simply state, that if there is no contingency fee agreement, there can be no application of the contingency risk multiplier. In the instant case, neither the Trial Court, nor the Second District applied a contingency risk multiplier presumably for the reason that the fee arrangement was not totally contingent.

In the instant case, the Trial Court enhanced lodestar based on the factors of the Rule. If the Trial Court had applied a risk or other multiplier of 2.3 rather than enhancing using the factors of the Rule, primarily amounts involved and results obtained, the fee would still have been $150,000.00. If the Court had decided to include enhancement for amounts involved and results obtained in the hourly rate, which it did not (see paragraph 3 of Order Appendix 6 Page 9) the hourly rate necessary to produce the fee of $150,000.00 would be $375.00, a most reasonable rate when one considers the nature of the responsibility undertaken in defending a Condominium Association in a case involving a potential loss of millions of dollars, loss of ownership of recreation facilities and reimposition of onerous mandatory long term leases for the use of facilities (Golf Courses, Club House, Pools, Tennis Courts, Office Building and other) (See Comprehensive Settlement Agreement (R, Plaintiff's

Exhibit Number 2) The pressure of this responsibility lasted, not only just for the time of Trial, but from the date of the undertaking, approximately July, 1984, and continued through Trial and thereafter until the Second District affirmed the Order of the Trial Judge on the merits by its opinion filed February 27th, 1987. (Appendix 2 Pages 2 and 3)

As an aside, although the fee arrangement, being for a reasonable fee to be determined based on the factors of the Rule at the conclusion of the case, was not intended to be a contingent fee, if COUNTRY CLUB'S Counsel had lost the case, it could have become totally contingent as its hardly likely that any fee would have been deemed reasonable by COUNTRY CLUB, and in any event COUNTRY CLUB wouldn't have had the money to pay it. In addition to the possible loss of fee in this case, if the case had been lost, (with its devastating results) in this day and time of proliferating malpractice actions, its not unreasonable to believe that COUNTRY CLUB'S Counsel might now be defending a malpractice action as opposed to seeking reimbursement of its client for the reasonable fee paid Counsel.

The instant case also involved an uncompensated time factor as the fee could only be determined at the conclusion of the case as the "results" portion of the amounts involved and results obtained factor could not have been considered until the results came in. (emphasis supplied)

Glades on Page 14 of its Brief cites BLUM, PENNSYLVANIA v. DELAWARE VALLEY, HENSLEY and ROWE for the proposition that

"quality of performance", "novelty and difficulty", and "special skill and experience of Counsel" are fully reflected in lodestar and therefore, cannot be used to enhance the lodestar amount. This may be true under the facts of those cases, but has no applicability to the instant case as the Trial Court in paragraph 1 and 3 of its Order (Appendix 6 Page 8) specifically considered "novelty and difficulty" in its finding as to the number of hours reasonably expended in the litigation and also stated the factors not considered in the hours and rate factors, such as amounts involved and results obtained.

The factors not included in hours and rate were the factors justifying enhancement, or as COUNTRY CLUB would prefer to say, justifying the determination that a reasonable fee would be $150,000.00 considering all of the factors and criteria set forth in Rule 4-1.5(B) (C) and (D).

GLADES on page 15 of its Brief cites several Federal Court cases including PENNSYLVANIA v. DELAWARE VALLEY, 478 U.S. 546, 92 L.Ed. 2d 439, 106 S. CT. 3008 (1986); BLUM v.STENSON, 465 U.S. 886, 79 L.Ed 2d 891, 104 S. Ct. 1541 (1984); HENSLEY v. ECKERHART, 461 U.S. 424,, 76 L.Ed 2d 40, 103 S. Ct. 1933 (1983), and FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. KREBS ENGINEERS, 859 F.2d 501 (7th Cir. 1988). GLADES did not cite PENNSYLVANIA v. DELAWARE VALLEY CITIZENS' COUNSEL FOR CLEAN AIR, 107 S. Ct. 3078 (1987). The above cases were discussed and distinguished by this Court in QUANSTROM. This Court in QUANSTROM further considered BLANCHARD v. BERGERON, 109 S. Ct. 939 (1989) and stated "We agree

with the Court in BLANCHARD and find that the following twelve factors, as set forth in JOHNSON v. GEORGIA HIGHWAY EXPRESS, 488 F.2d 714 (5th Cir. 1974), should be considered to determine a reasonable Attorney's fee in these cases:" The Court then set out the twelve factors, which included substantially the same factors as Rule 4-1.5(B) plus others.

GLADES on page 14 of its brief, cites PENNSYLVANIA v. DELAWARE VALLEY, 92 L.Ed 2d. (at P. 456) to the effect that "Upward adjustment to the lodestar may be made only upon specific evidence and detailed findings by the lower Court." COUNTRY CLUB agrees and as heretofore pointed out in this brief the Trial Court in making the upward adjustment to lodestar set forth the evidence and detailed findings in its Orders of June 8th, 1987 and November 17th, 1987.

GLADES on Page 15 of its Brief states that the issue then becomes "was the fee arrangement between COUNTRY CLUB and its Counsel one for a contingent fee".

COUNTRY CLUB submits this is not the issue. The fee arrangement was set forth with specificity in paragraph 2 of the Trial Court's Order of November 17th, 1987 (Appendix 6, page 8) to wit:

> "2. The Court finds and determines that the fee arrangement between Appellee (COUNTRY CLUB) and Appellee's Attorneys was neither fixed, nor totally contingent, and was to be determined upon the conclusion of the case, based upon the criteria set forth in Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility, and that Appellee and Appellee's attorneys agreed on the sum of $150,000.00 as being a reasonable fee."

The Trial Court did not find the above fee arrangement to be totally contingent, did not apply a risk factor multiplier, and did not compensate for risk, although as previously pointed out, there was risk involved.

GLADES finally suggests on Page 17 and 18 of its Brief that the rationale for enhancement in a non-contingent fee case be determined based on the U.S. Supreme Court's analysis of such cases. COUNTRY CLUB suggests that this Court in ROWE and QUANSTROM has set forth the rationale to be used in such cases, i.e., that all factors of the Rule or fee authorizing Statute if applicable, should be considered in determining a reasonable fee, or in determining the reasonableness of a fee.

COUNTRY CLUB respectfully submits that where, as in the instant case, the fee agreement is not contingent and the lodestar method, including the possible application of the risk factor multiplier, is not appropriate, Rule 4-1.5(B)(C) and (D) should be the basis for determining a reasonable fee. There is no apparent reason in such case to call the number of the hours reasonably expended multiplied by a reasonable hourly rate "lodestar" or the "lodestar figure" as the time and rate factors are factors (1) and (3) of the Rule and of necessity are to be considered when determining a reasonable fee, or considering the reasonableness of a fee. The use of the terms imply that the lodestar method or process is involved, which has apparently created some confusion among the Bench and Bar.

Florida Courts have held that a contractual provision that the losing party will pay the prevailing party's attorneys' fees is an agreement for indemnification, i.e. to indemnify the prevailing party for fees reasonably contracted, or incurred. DUNN v. SENTRY INSURANCE, 462 So.2d 107 (Fla. App. 5th DCA 1985).

The Court in DUNN observed that:

> "The first question a trial court must answer when faced with a demand for attorneys fees is not what a reasonable fee might be in the absence of any fee contract between the claiming party and his attorney, but whether the actual fee agreement against which the claimant seeks indemnity is unreasonable. Specifically, whether the agreement is excessive under the terms of Fla. Bar Code Prof. Resp., D.R. 2-106(B). If the fee is not excessive, and it is enforceable by both parties thereto, that fee should be awarded. If the fee is excessive, then the Court should proceed to the determination of a "reasonable" fee, i.e. a quantum meruit fee based on the same factors it considered when it evaluated the fee contract." (Emphasis supplied).

COUNTRY CLUB submits that DUNN could be determinative of the instant case. The Stipulated Statement of the Evidence or Proceedings and the transcript of June 8th, 1987 (R, pages 1106-1215) evidenced that COUNTRY CLUB and its Counsel agreed on a fee of $150,000.00 as being reasonable, taking into consideration the factors set forth in Canon 2 of the Code of Professional Responsibility, DR 2-106, now Rule 4 - 1.5 of the Rules of Professional Conduct of the Rules regulating the Florida Bar, and the Trial Court after a review of the factors and making findings thereon determined that the fee was reasonable, not excessive.

CONCLUSION

The Second District Court of Appeal's Opinion dated December 9th, 1988 (Appendix 8 page 19) affirming the lodestar figure found by the Trial Court ($66,000.00) and reversing the Trial Court's failure to award the enhanced figure ($84,000.00) to which the Trial Court found COUNTRY CLUB would have been entitled unless precluded by ROWE and TIPPECANOE, and remanding for the entry of an Order awarding the total of the lodestar figure and the enhanced figure, ($150,000.00) SHOULD BE AFFIRMED in order that COUNTRY CLUB may be reimbursed for its reasonable attorney's fee incurred by it in it's successful defense of the claims of GLADES.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief to Petitioner's Initial Brief on the Merits has been furnished to: JAMES H. SIESKY, ESQUIRE, Siesky and Lehman, P.A., 700 Eleventh Street South, Suite 203, Naples, Florida 33940-6725, by regular U.S. Mail, this 3rd day of May, 1990.

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