IN THE SUPREME COURT OF THE
STATE OF FLORIDA

PAYNE H. MIDYETTE,

Petitioner,

vs. CASE NO. **74,091**

LARRY DONNELL MADISON and
LINDA MADISON, his wife; DWIGHT
YELTON and PATRICIA YELTON, his
wife; and JOHN JAMES PENN,

Respondents.
_____/

ON REVIEW FROM THE DISTRICT
COURT OF APPEAL, FIRST DISTRICT
OF THE STATE OF FLORIDA

CASE NO. **87-1947**

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

Payne H. Midyette entered into a contract with Dorsey Reaves who agreed to clear Midyette's twenty-eight (28) acre parcel of land located in a rural area located approximately one-quarter to one-half mile west of Interstate Highway 10. (R. 78; A. 2). The contract provided that this work would include "pushing, raking, piling and burning,'' and specified a per acre fee and completion date. Midyette provided no tools, equipment or labor, After securing a burn permit, Reaves began burning debris on Midyette's land on December 10, 1985. (A. 2).

Early the following day, on December 11, 1985, a multi-vehicle accident occurred on 1-10. As a result of the accident, respondents Madison, Yelton and Penn sued several defendants, including Midyette. The plaintiffs alleged that the smoke from the burning on Midyette's land, mixed with fog, caused dangerous visual conditions on Interstate 10. (R. 162-68).

Midyette denied liability and asserted as an affirmative defense that the alleged acts of negligence were committed by an independent contractor, thereby relieving Midyette of any liability. (R. 169-71). All plaintiffs denied Midyette's independent contractor defense and countered by raising the inherently dangerous work exception to the independent contractor defense. (R. 9).

Following a period of pretrial discovery, Midyette filed a motion for summary judgment which was granted by the trial court on November 4, 1987. (R. 319-20). The order was amended on

November 12, 1987 to correct a clerical error. (R. 321-22).

The plaintiffs filed a Joint Notice of Appeal on December 3, 1987. (R. 323-24). Following oral argument to the First District Court of Appeal, an opinion was issued on April 14, 1989, which held that Dorsey Reaves was an independent contractor but that the clearing of land by fire was inherently dangerous thereby subjecting Midyette to liability. The district court reversed the summary judgment in favor of Midyette, but certified to the Florida Supreme Court the following question of great public importance:

> IS THE CLEARING OF LAND BY FIRE, AND ITS RESULTING NATURAL CONSEQUENCE, SMOKE, AN INHERENTLY DANGEROUS ACTIVITY WHICH MAY CAUSE LIABILITY TO BE FASTENED UPON THE EMPLOYER OF AN INDEPENDENT CONTRACTOR FOR PERSONAL INJURIES SUFFERED BY THIRD PERSONS OUTSIDE THE PREMISES OF THE PROPERTY CLEARED?

Midyette then filed a Notice to Invoke the Discretionary Review of the Florida Supreme Court on April 28, 1989.

## SUMMARY OF ARGUMENT

Whether an activity should be considered inherently dangerous or not depends on the circumstances surrounding the activity. This court should not adopt a rule which would impose liability in every case on employers of independent contractors who utilize fire to clear land. Instead of the blanket rule announced by the First District, the determination of whether a burning is inherently dangerous should be made on a case by case basis with due regard given to the surrounding circumstances. The circumstances under which this fire was set indicate that the independent contractor exercised a high degree of care by securing a burn permit before burning, conducting the burn in a rural area, and burning the debris in discrete piles.

If this court should find that the clearing of land by fire is inherently dangerous, the harm which occurred in this case was beyond the scope of risk associated with fire. If fire is inherently dangerous, it is *so* only because of its propensity to burn. The injuries in this case occurred as the result of smoke and not from the burning characteristic of fire. Smoke is not and has never been regarded as an inherent danger.

ISSUE:

IS THE CLEARING OF LAND BY FIRE, AND ITS RESULTING NATURAL CONSEQUENCE, SMOKE, AN INHERENTLY DANGEROUS ACTIVITY WHICH MAY CAUSE LIABILITY TO BE FASTENED UPON THE EMPLOYER OF AN INDEPENDENT CONTRACTOR FOR PERSONAL INJURIES SUFFERED BY THIRD PERSONS OUTSIDE THE PREMISES OF THE PROPERTY CLEARED?

Petitioner submits that the above certified question, as phrased by the First District, actually poses two different queries to which a single answer may not apply. Petitioner respectfully suggests that the question should instead be broken down into two separate inquiries. The first is whether clearing land by fire is inherently dangerous? The second is whether smoke, in and of itself, is inherently dangerous? Petitioner suggests that the answer to either or both of these questions is "no". If the answer to either question is in the negative, then the decision of the district court is incorrect.

It has long been held that one who employs an independent contractor cannot be held liable for the negligence of that contractor. Baxley v. Dixie Land & Timber Co., 521 So.2d 170 (Fla. 1st DCA 1988); Van Ness v. Independent Constr. Co., 392 So.2d 1017 (Fla. 5th DCA), review denied, 402 So.2d 614 (1981); 57 C.J.S. Master & Servant § 584 (1948); 2 Fla.Jur.2d Agency & Employment § 109 (1977).

One recognized exception to this general rule, however, is that when the independent contractor engages in work which is inherently dangerous, the employer cannot escape liability for the contractor's negligence. Florida Power & Light Co. v. Price,

170 So.2d 293 (Fla. 1964); Bialkowicz v. Pan American Condominium No. 3, Inc., 215 So.2d 767 (Fla. 3d DCA 1968), cert. denied, 222 So.2d 751 (Fla. 1969). The major problem courts have faced has been the determination of what types of activities should be classified as inherently dangerous so that an employer may not be relieved of liability for the acts of the independent contractor.

A. The actions of an independent contractor in clearing land by fire is not an inherently dangerous activity and is, therefore, a delegable responsibility.

The Florida Supreme Court announced, in Cobb v. Twitchell, 91 Fla. 539, 108 So. 186 (1926), that fire was a "dangerous agency." Petitioner does not dispute that assessment, but respectfully submits that there is a difference between that which is merely "dangerous" and that which is "inherently dangerous." While the two phrases have often been used interchangeably, they do not mean the same thing. Seitz v. Zac Smith and Co., Inc., 500 So.2d 706 (Fla. 1st DCA 1987) ("dangerous instrumentality'' and "inherently dangerous instrumentality" do not have the same meaning and have different legal consequences (emphasis supplied)). The First District stated that "something which is inherently dangerous must be so imminently dangerous in kind as to imperil the life or limb of any person who uses it . . . ." Seitz, 500 So.2d at 710. For example, an automobile has long been held to be a dangerous instrumentality, but it is not inherently dangerous in and of itself. Rather, it is dangerous only in its use and operation. Id.

Consequently, while the Florida Supreme Court declared fire to be dangerous in Cobb, there has never been any judicial determination in Florida that fire is inherently dangerous. Instead, another Florida court addressing the issue stated that "[n]egligence is not constituted, per se, in the mere setting out of a fire for a lawful purpose and under prudent circumstances. So mere proof that damage resulted from the setting of a fire will not entitle the injured party to recover . . . ." Bush v. City of Dania, 121 So.2d 169, 171 (Fla. 2d DCA 1960). See also Cobb v. Twitchell, 91 Fla. at 543, 108 So. at 187.

The Bush case involved a fire which started at a municipal dump and subsequently spread to a nearby aviation repair facility. The district court ultimately held that there was insufficient evidence to prove that the dump fire was the cause of the plaintiff's damages. However, the above quoted language from Bush indicates that, because there is no negligence per se in setting a fire, there can be no automatic liability on the part of the responsible party. This underscores the contention that Florida appellate courts, until the First District in the instant case, have never considered fire to be inherently dangerous.

The fire in the instant case, as in Bush, was set for a lawful purpose and under prudent circumstances. Dorsey Reaves, the independent contractor, secured a burn permit which allowed burning on the date prior to the accident from 9:00 a.m. until 4:30 p.m. (R. 40; 206). A Division of Forestry agent testified that burn permits are issued by the Division only when there is a

low nighttime stagnation index and no fire hazard. (R. 198). Thus, the fire was set when there was relatively little risk of uncontrollable burning or smoke accumulation. Additionally, the burn occurred on a twenty-eight (28) acre parcel of land located on Thornton Road in rural Leon County. (R. 78). Under the rationale of Bush, there would be no negligence per se and liability should not attach to Reaves' employer merely because the fire was purposely set.

In addition, there is at least one federal court that has addressed the purported liability of a landowner for a fire started by an independent contractor. In Rayonier, Inc. v. Bryan, 249 F.2d 405 (5th Cir. 1957), Cone was hired to cut timber for Rayonier and, during the cutting work, one of Cone's employees purposely threw a match into a nest of yellowjackets and started a small fire on the land. The fire was extinguished and Cone even held some of his crew at the scene dousing it with water to make certain that the fire was out.

When Cone was satisfied that the fire was completely out, he and his crew left the area. However, on the following day a forest fire was spotted over a large area and ultimately burned 6500 acres. The Fifth Circuit held that Rayonier could not be held liable for the negligent acts of the independent contractors, although Rayonier was held liable for the fire on different grounds not applicable to these proceedings.

Rayonier illustrates the general rule that employers are not per se liable for fires started by independent contractors. See also 24 Fla.Jur.2d Explosions & Fires § 31 at 501 (1981) ("As a

general rule, a party cannot be held responsible for a fire caused by an independent contractor."); 35 Am.Jur.2d Fires § 18 at 599 (1967) ("an employer will not ordinarily be held liable for damages due to a fire negligently set by one who is clearly an independent contractor and not under the control of the employer").

The First District attempted to distinguish Rayonier on the basis that the independent contractor remained liable because, and in contrast to the present case, he was not hired to clear the land by burning. Such a distinction is inapposite given the facts in Rayonier. While the independent contractor was not retained to clear the land by burning, the crew nevertheless intentionally set a fire to destroy a nest of yellowjackets. If intentionally setting a fire was ipso facto an inherently dangerous activity, then the landowner would have been responsible without regard to the reasons underlying the setting of the fire for so long as the setting of the fire was at least reasonably foreseeable.

It can hardly be said that the crew's actions in Rayonier were not reasonably foreseeable and yet the Fifth Circuit held the landowner not responsible for a fire intentionally set by his independent contractor. Clearly, the Fifth Circuit did not believe an intentionally set fire to be an inherent danger and the distinction drawn by the First District below is not significant given the facts in Rayonier.

Other courts have held that the clearing of land by fire is not inherently dangerous. In the most recent case, Givens v.

Terrell, 461 S.W.2d 201 (Tex. Civ. App. 1970), a collision occurred when a second pickup truck ran into the rear end of another pickup stopped on a highway. The first truck was stopped because the highway was obscured by a cloud of smoke that had drifted from a field of burning wheat stubble which had been intentionally set afire by the landowner. In affirming the judgment for the defendant landowner, the court stated that the activity of burning wheat stubble was not inherently dangerous. Givens, 461 S.W.2d at 203.

Likewise, Becker v. Northland Transp. Co., 200 Minn. 272, 274 N.W. 180, ~~aff'd~~ ~~on~~ rehearing, 200 Minn. 278, 275 N.W. 510 (1937), arose out of a car accident that occurred on a highway obscured by smoke emitting from brush fires that had been purposely set by an independent contractor. The Becker court found that the burning of brush by an independent contractor "was not such an ultrahazardous activity that the risk could not have been eliminated by the exercise of a high degree of care." Becker, 274 N.W. at 183. The Supreme Court of Minnesota thereupon affirmed a judgment relieving from liability the person who hired the independent contractor.

On rehearing, the court again reiterated its earlier holding that burning was not so hazardous that the employer should have been held liable for the independent contractor's negligence. The court stated that the independent contractor need only have exercised ordinary care when burning the brush. Becker v. Northland Transp. Co., 200 Minn. 278, 275 N.W. 510 (1937).

The determination of whether or not a specific activity

should be classified as inherently dangerous is no easy task. It has been remarked that:

> courts have found no rule of universal application by which they may abstractly draw a line of classification in every case. Generally speaking, the proper test is whether danger 'inheres' in performance of the work, and important factors to be understood and considered are the contemplated conditions under which the work is to be done and the known circumstances attending it. It is not enough that it may possibly produce injury.

Reilly V. Highman, 185 Kan. 537, 541, 345 P.2d 652, 656 (1959) (emphasis added).

The vagueness of the application of this test is fairly apparent. In the Annotation, Non-delegable Duty of Employer with Respect to Work Which is Inherently or Intrinsically Dangerous, 23 A.L.R. 1084 (1923), Section 10 recites cases and situations where the liability of the employer for acts of his independent contractor has been upheld. On the other hand, section 11 recites cases where the liability of the employer has been denied. The interesting aspect of this is that there have been cases decided in direct opposition to each other on basically the same set of facts. As the annotation's author points out in section 11, "[t]he impossibility of reconciling some of the decisions with a portion of those reviewed in the preceding section [10] is manifest." Id. at 1106.

Nevertheless, according to the Restatement (Second) of Torts section 520 (1977), the determination of whether an activity is abnormally dangerous should include an analysis of the following factors:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great:

(c) inability to eliminate the risk by the exercise of reasonable care:

(d) extent to which the activity is not a matter of common usage:

(e) inappropriateness of the activity to the place where it is carried on: and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Petitioner concedes that in relation to factors (a) and (b), the harm that results from fire usually will be great and that, when carried on in an inappropriate place or under inappropriate conditions, fire may pose a high degree of risk to the person, land or chattels of another. However, as to factor (c), the risk of harm from fire can be eliminated by the exercise of reasonable care as evidenced by the many controlled burns and other land clearing activities which result in no harm whatsoever to persons or property. As to factor (d), fire is commonly used as a method of burning debris or clearing land. As to factor (e), fire may or may not be appropriate to the place where it is carried on. For instance, utilizing fire to clear a lot situated in a heavily populated residential area would be inappropriate. However, clearing a lot by fire in a rural setting may not be inappropriate. In point of fact the present fire was not even a controlled burn over a particular geographic area. Instead, the land in question was first mechanically cleared and then the

debris was placed in discrete piles before it was burned. (R. 37-38). This situation is significantly different from a controlled burn which actually clears the entire parcel of land. As to factor (f), the value of fire to a community may very well outweigh its dangerous attributes because controlled burns are valuable to the preservation of wildlife habitat and the regeneration of desirable vegatation and ground cover. Additionally, the magnitude of debris which would have to be disposed of by an alternative method, such as at a land fill site, would create an enormous burden on a waste disposal system which is already overtaxed.

Certainly there are situations in which fire can be considered inherently dangerous. However, the present case does not involve one of those situations and Petitioner would urge this court not to adopt a blanket rule which would hold employers of independent contractors liable every time there is damage resulting from a fire. Instead, the analysis of whether fire is inherently dangerous should be done on a case by case basis according to the circumstances of each. St. Louis I.M. & S. Ry. Co. v. Yonley, 53 Ark. 503, 14 S.W. 800 (1890).[1]

In the instant case, for example, the independent contractor, took every reasonable precaution by obtaining a burn permit prior to starting any fire. (R. 40; 206). There was no

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[1] The First District cited Yonley for the proposition that fire was inherently dangerous. Such a holding is not explicit in Yonley. Rather, Yonley states that fire may or may not be considered inherently dangerous depending on the circumstances. 53 Ark. at 508-09, 14 S.W. at 801 (emphasis added).

evidence that any damage resulted from the burn itself. Rather, the damages in this case occurred from the alleged accumulation of smoke in a rural area approximately one-quarter to one-half mile from the site of the actual burn. (R. 228-29). The independent contractor had even pushed the debris to be burned into discrete piles or "windrows" so that the burning could be better controlled. (R. 37-38). This is not a situation where the fire could be considered inherently dangerous because the danger of this fire was eliminated by the use of a high degree of care.

There is substantial precedent from other jurisdictions holding that fire, under certain circumstances, is not inherently dangerous. See Swift & Co. v. Bowling, 293 F. 279 (4th Cir. 1923) (fire started to keep concrete from freezing was not intrinsically dangerous); St. Louis, I. M. & S. Ry. Co. v. Yonley, 53 Ark. 503, 14 S.W. 800 (1890) (burning brush on a right of way may or may not be inherently dangerous, depending on the circumstances); Callahan v. The Burlington & Missouri River R.R. Co., 23 Iowa 562 (1867) (damage from fire was not caused by act itself but by the careless and negligent manner in which it was done); Kellogg v. Payne, 21 Iowa 575 (1866) (independent contractor is solely liable for damages resulting from fire due to the careless or negligent manner in which the contract was performed); Becker v. Northland Transportation Co., 200 Minn. 272, 274 N.W. 180 (burning of brush was not ultrahazardous activity), aff'd on rehearing, 200 Minn. 278, 275 N.W. 510 (1937); Rogers v. Parker, 159 Mich. 278, 123 N.W. 1109 (1909)

(landowner/employer was not liable for damages caused by fire set by independent contractor); Shute v. Town of Princeton, 58 Minn. 337, 59 N.W. 1050 (1894) (independent contractor is solely liable for damages from fire negligently set); Wright v. Holbrook, 52 N.H. 120 (1872) (independent contractor was solely liable for damages resulting from the escape of fire purposely set by him); Ferguson v. Hubbell, 97 N.Y. 507 (1884) (landowner not liable for damages caused by fire which burned adjoining lots where fire was set by independent contractor); Sorenson v. Switzer, 37 N.D. 536, 164 N.W. 136 (1917) (landowner not liable for damages caused by fire which was set by independent contractor where haystacks could have been burned without danger if proper precautions had been taken); Givens v. Terrell, 461 S.W.2d 201 (Tex. Civ. App. 1970) (burning field of wheat stubble is not inherently dangerous).

The first portion of the certified question as restated should be answered in the negative and the opinion below should be reversed. If a fire is inherently dangerous, it should only be determined as such on a case by case basis. The varying circumstances under which a fire is set are uniquely significant and the circumstances under which the present fire was set strongly suggest that this fire was not inherently dangerous as a matter of law.

B. Assuming that the clearing of land by fire is inherently dangerous, the production of smoke is not part of that inherent danger.

It has been held that a person is not liable for creating smoke which obscured a highway and later resulted in a car accident on the highway. In Bonilla v. Arrow Food Distributors, Inc., 202 So.2d 438 (La. Ct. App.), writ refused, 251 La. 399, 204 So.2d 577 (1967), a multiple vehicle accident occurred on a highway a short distance above the entrance to a city dump. One of the dump's employees testified that fires had been lit the day before the accident but were not still burning on the day of the collision. The accident occurred after several trucks drove into a heavy smog bank where the visibility was nil.

The Bonilla court found the city not liable for the accident for several reasons. First, no fires had been lit at the dump on the day of the accident although smoke was emanating from a few of the previous day's fires. Second, there was testimony that a fog bank which substantially reduced visibility had moved over the dump area just before the accident. Third, and most important, there was no evidence to establish weather conditions, humidity or any other factors which should have been considered before lighting a fire the previous day. See ~~also~~ Badeaux v. Patterson Truck Line, Inc., 247 So.2d 875 (La. Ct. App.) (garbage dump not liable for damages resulting from car accident caused by smoke from spontaneous combustion fires at dump), writ denied, 259 La. 77, 249 So.2d 209 (1971); Walden v. Employers Liability Assurance Corp., 197 So.2d 350 (La. Ct. App. 1967) (papermill not liable for car accident caused by smoke from smokestack).

Substantially similar facts are present in the instant case. The present fire had been lit and extinguished on the day

prior to the accident and testimony of record indicated there was heavy fog on the morning of the collision. (R. 238). Most importantly, Reaves had been issued a burn permit by the Division of Forestry indicating that, on the day the fire was started, weather conditions were favorable for burning. (R. 198-99). The fact that an accident later occurred is not proof of negligence, nor does it even imply negligence on the part of the independent contractor. Cassel v. Price, 396 So.2d 258 (Fla. 1st DCA) (mere occurrence of an accident does not give rise to an inference of negligence), review denied, 407 So.2d 1102 (Fla. 1981).

A landowner may be negligent in the use of his property including the generation of smoke and the emission of smoke from his land. Nevertheless, if generation and emission of smoke by an independent contractor is not an inherent danger, then the landowner can delegate his duty and avoid liability for the actions of the independent contractor. Petitioner has not found any cases which declare smoke to be inherently dangerous.

Even if this Court should find fire to be inherently dangerous, there should be no liability on the part of the landowner because this accident was beyond the scope of risk associated with fire. According to the Restatement (Second) of Torts, section 519(2) (1977), strict liability for an abnormally dangerous activity is "limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.''

The rule of strict liability for inherently dangerous activities "applies only to harm that is within the scope of the abnormal risk that is the basis of the liability. One who

carries on an abnormally dangerous activity is not under strict liability for every possible harm that may result from carrying it on." Restatement (Second) of Torts § 519, comment e (1977). At least one Florida appellate court has adopted section 519 of the Restatement (Second). Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp., 460 So.2d 510 (Fla. 3d DCA 1984).

All cases which have held fire to be inherently dangerous have dealt only with damages that resulted purely from the burning aspect of fire. Under certain circumstances, the potential for destruction by fire may be great, not because of the possibility of smoke production, but because of the capacity to burn. Persons who engage in activities which ordinarily are considered inherently dangerous may nonetheless be held not liable if the damage resulting from the activity is not what makes that particular activity dangerous. See Holt v. Texas-New Mexico Pipeline Co., 145 F.2d 862 (5th Cir. 1944) (even though dynamite is inherently dangerous, landowner was not liable for injuries to a workman injured when his pick hit a dynamite cap while leveling ditch), cert. denied, 325 U.S. 879, 65 S.Ct. 1570, 89 L.Ed. 1996 (1945); Harper v. Regency Dev. Co., 399 So.2d 248, 253 (Ala. 1981) ("one who detonates explosives on his own property may be responsible for the risk of harm to persons or property in the vicinity. If, however, no explosion takes place, but someone trips over the dynamite and breaks a leg, strict liability will not apply."); Smith v. Lucky Stores, Inc., 61 Cal.App.3d 826, 132 Cal.Rptr. 628 (1976) (no liability where plaintiff was injured by sign blown by gust of wind even though

sign had just been removed from building by a crane).

Stated another way, an employer will not be liable for the acts of an independent contractor even when performing inherently dangerous work if the contractor's negligence is merely casual or collateral to the risk. Smith v. Lucky Stores, 61 Cal. App. 3d at 830, 132 Cal. Rptr. at 630. According to 5 F. Harper, F. James and O. Gray, The Law of Torts, section 26.11 at page 94, (2d Ed. 1986), "conduct is 'collaterally negligent' when it does not involve the risks that made the work peculiarly dangerous."

The damages complained of in the instant case were allegedly caused by smoke being present on a highway. Smoke is not what makes a fire inherently dangerous especially when it occurs outside of an enclosed area. Rather, what gives fire its dangerous propensities is the capacity to burn persons or destroy property.

The alleged presence of smoke in this case was outside the scope of risk associated with fire and the certified question should be answered in the negative. The decision of the district court should be reversed and summary judgment in favor of the employer, Midyette, should be reinstated.

## CONCLUSION

The certified question should be answered in the negative. The opinion of the First District Court of Appeal should be reversed and the summary judgment granted in favor of Midyette should be reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to DAVID A. BARRETT, ESQ., Post Office Box **1501**, Tallahassee, Florida **32302**; MICHAEL **F.** COPPINS, ESQ., Post Office Box **1674**, Tallahassee, Florida **32302**; STEPHEN W. CARTER, ESQ., **17** East Pine Street, Orlando, Florida **32801**; DAVID P. HEATH, ESQ., Post Office Box **14129**, Tallahassee, Florida **32317**; DOMINIC M. CAPARELLO, ESQ., Post Office Box **1876**, Tallahassee, Florida **32302**; FRANCIS J. MILON, ESQ., **1500** American Heritage Life Building, Jacksonville, Florida **32202**; and RICHARD SMOAK, ESQ., Post Office Box **1579**, Panama City, Florida **32402**, by U.S. Mail, this 30th day of May, **1989.**

R. William Roland

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