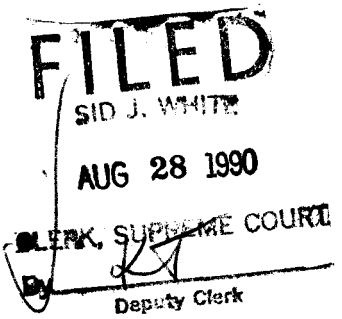
IN THE SUPREME COURT OF FLORIDA

CASE NO: 76,094



BAPTIST HOSPITAL OF MIAMI, INC.,

Petitioner,

v.

JAMES MALER, JR., a minor child etc., et al.,

Respondents.

BRIEF OF RESPONDENTS

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INTRODUCTION

Defendant/Petitioner BAPTIST HOSPITAL OF MIAMI, INC. (Baptist) will be referred to as Defendant, Petitioner or by name - Baptist. Plaintiffs/Respondents JAMES MALER, JR., a minor child, etc., et al. (Maler) will be referred to as Plaintiffs, Respondents or by name - Malers. References to the record in this court will be by the symbol "R." while references to the appendix to this brief will be by the symbol "App." Finally, all emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Baptist's Statement of the Case and Facts as well as the Third District's opinion - Maler v. Baptist Hospital of Miami, Inc., 559 So2d 1157 (Fla. 3dDCA 1989) (App. 1-7) correctly outline the course of proceedings and mindful of the applicable appellate rule, Fla.R.App.P. 9.210(c), the Malers' will not repeat the same. Baptist's outline of the facts however, omits evidence, which, in the Malers view undermines Baptist's position and which is necessary for this court to properly review the decision of the Third District.

Primarily, conspicuously absent from Baptist's initial brief is any reference to the fact that there was record evidence of insurance which in all likelihood served as the basis for the jury's discussions in this respect. As we pointed out to the Third District, during trial Baptist's Risk Manager testified regarding the subject of insurance. Following this testimony, Baptist

neither moved for a mistrial, moved to strike the testimony nor moved for a curative instruction. We thus took the position before the Third District that Baptist had waived any error predicated on the inadvertent admission of this testimony. The Third District of course agreed and specifically noted that:

> No outside influences were brought to bear on the jury;...and no facts were brought before the jury which were not introduced in evidence. Maler, supra, 559 So2d at 1162.

Also we submit that Baptist's position in the trial court and the basis for the trial court's ruling granting the interview, was not that there was a reasonable basis for a belief that there was an "agreement" entered into by the entire jury to purposely avoid the court's instructions. As the motion seeking the interview and the affidavit submitted by defense counsel indicate, it was Baptist's contention that any juror can impeach a verdict through testimony of improper motives. Neither the motion to interview nor either of the affidavits (attached hereto as Appendix 8-15) even use the word "agree" or "agreement." Contrary to Baptist's assertion what the affidavits do indicate is that the jurors were not entirely in agreement. In fact as attorney Parenti's sworn statement sets forth, the two jurors which he spoke to reached opposite conclusions about the case.

In any event as we know, the Third District rejected Baptist's attempts to "pigeon-hole" this case into the line of authority which permits interviews where affidavits of jurors set forth overt, independently verifiable facts showing that the verdict was determined quotient, lot, game of chance or other artificial or

improper manner. In so ruling, the Third District, of course, specifically disagreed with the Second District's opinion in Preast v. Amica Mutual Insurance Company, 483 So2d 83 (Fla. 2d DCA), rev.denied 492 So2d 1334 (Fla. 1986). The Third District subsequently certified this case as being in direct conflict with Priest and this petition followed.

SUMMARY OF THE ARGUMENT

As the Third District correctly recognized, Baptist's attempt to interview the jury constituted an attempt to inquire into the considerations which influenced their verdict. This, as the court further recognized, has uniformly been held to be impermissible since such an attempt seeks to impeach the verdict by the very matters which inhere within it-the subjective decision making process of the jury. Additionally, even if we could assume as Baptist contends, that the present situation could be analogized to cases dealing with quotient verdicts, the attempts to interview the jury should nevertheless be rejected since unlike the quotient verdict cases, the affidavits relied upon by Baptist do not demonstrate that all jurors "agreed" to render a verdict contrary to the evidence. In any event, even if we could assume that the affidavits did form a sufficient basis to demonstrate the aforementioned, the instant case is also distinguishable from the quotient verdict cases because it is impossible to demonstrate that all of the jurors adhered to the alleged improper "agreement" without inquiring into the subjective decision making process of each juror.

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Finally, even if we were to assume that the affidavits did form a sufficient basis for demonstrating an impropriety which did not inhere within the verdict, the Third District's ruling should nevertheless stand since it was clearly demonstrated that the jury was polled at Baptist's request and that each and every juror orally acknowledged the written verdict. This subsequent polling of the jury, as Florida courts have uniformly held, relieves the verdict of all objection.

ARGUMENT

The crux of Baptist's position, as evidenced by their initial brief, is the argument that the Motion to Interview Jurors presented a reasonable basis to believe that the jurors in this case agreed amongst themselves to disregard the evidence and instructions and to circumvent the law and to award damages they could not lawfully award otherwise. Baptist, of course, also contends that the same motion demonstrated a reasonable basis to believe that the jurors considered non-record evidence of insurance. In so arguing, Baptist vigorously contends that the general rule prohibiting inquiry into the thought processes of jurors to impeach a lawful verdict is not at issue in this case and the Motion to Interview along with the supporting affidavits accordingly do not relate to matters which inhere within the verdict. The question posed by this case is thus a simple one:

> Would the trial court's order granting the jury interview have permitted inquiry into the motives and influences by which the jury's deliberations were governed-an inquiry uniformly condemned by Florida courts. See E.g. Marks v. State Road Department, 69 So2d 771, 775, (Fla. 1954);

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State v. Ramirez, 73 So2d 218, 219 (Fla. 1954) and Astor Elec. Serv. v. Cabrera, 62 So2d 759, 762, (Fla. 1952).

There can be no question that the Third District's opinion specifically addresses this issue and answers it in the affirmative. As the Court stated:

> Without question, both of the trial courts proposed questions inquire into the reasoning process and motivations of the jury in reaching their verdict, namely, (1) Whether the jury agreed to decide the case for reasons outside the evidence, such as sympathy and insurance, and (2) Whether the jury agreed to find for the injured child even though, in their opinion, the greater weight of the evidence supported the verdict for Baptist Hospital. Maler, supra, 559 So2d 1157, 1159.

As the Third District correctly recognized, Baptist's attempt to interview the jury constituted a veiled request to inquire into the considerations which influenced their verdict. This, of course, is impermissible since it seeks to impeach the verdict by the very matters which inhere within in-the subjective decision making process of the jury. Velsor v. Allstate Insurance Company, 329 So2d 391, 1160 (Fla. 2dDCA) cert. dismissed, 336 So2d 1179 (Fla. 1976), cited with approval in Maler, supra, 559 So2d 1157, 1160, and Shofield v. Carnival Cruise Lines, 461 So2d 152, 155, (Fla.3dDCA 1984) rev. denied, 472 So2d 1182 (Fla. 1985).

The aforementioned rule constitutes the heart of the Third District's opinion. We would be hard-pressed to improve upon Judge Hubbard's excellent analysis of the parameters of this rule and his application of the rule to the argument presented by Baptist and instead of simply repeating that analysis we adopt it and add only

additional reasons why the court's ruling was proper.

To begin with, Baptist in its initial brief attempts to analogize the present situation to the "quotient verdict" cases asserting that "...There is no difference between proof of the fact of a preliminary agreement to reach an improper quotient verdict and proof of the fact of a preliminary agreement to disregard the evidence and reach an improper sympathy verdict." (Baptist's brief page 6). This analysis falls short for a variety of reasons.

First of all it is clear that Florida courts have indicated that if the jurors, although bound initially, subsequently abandon their agreement to be bound by the quotient or if the use of the quotient process was merely experimental and was never intended or assumed to be binding on any of the jurors, the verdict is not invalid as a quotient verdict. E.g. Marks v. State Road Dept., 69 So2d 771, (Fla. 1954) and Cromarty v. Ford Motor Company, 341 So2d 507 (Fla. 1976). Unlike the quotient verdict cases, however, were one by extrinsic objective evidence can and must demonstrate 1) that the jurors agreed prior to obtaining the quotient that they would be bound by it and accept it as their verdict; 2) that they use the quotient process at some stage of their deliberations and 3) that their verdict corresponded exactly or approximately to the amount of the quotient, Baptist cannot possibly demonstrate, even if their factual argument is accepted as true, anything more than the first requirement-that the individual jurors orally agreed at some stage of the proceeding to find for the plaintiff for reasons outside of the evidence despite the fact that the greater weight of

the evidence supported a verdict for the defendant.[1]

The reason is that unlike the quotient verdict cases where because of the unique nature of process and the mathematical probabilities involved, the amount of the verdict is considered to be prima facie evidence that the agreement to use or be bound by the quotient process was employed and adhered to, the verdict in this case by no means can be said to support the assertion that each and every juror returned his verdict based on extra-record considerations or based on the alleged improper agreement. In spite of what may have been said during deliberations in this case, no one can make an accurate determination that a particular juror's verdict is the result of improper motives. As the Third District correctly recognized, that knowledge rests in each juror's breast alone, and such an inquiry, unlike the inquiry in the quotient verdict cases, must by necessity delve into the individual jurors own motives or mental processes-a procedure which, again as the Third District recognized, is universally condemned by Florida courts.

The Third DCA's opinion in fact cites numerous cases where it

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[1] Even this possibility is suspect sincethe affidavits filed in support of the motion indicate that some of the jurors in this case were of the opinion that the plaintiffs should prevail. Since Cromary, supra indicates that in order to demonstrate a quotient verdict it must be shown that all jurors took part, we submit that the affidavits filed cannont lead to a reasonable inference that the impropriety complained of (the illegal agreement amongst the jurors) occurred. The defndnat has thus failed to demonstrate as it must, that there are grounds which will subject the juror's verdict to challenge prior to the interview. Cummings v. Sine, 461 So2d 152, 154; National Indemnity Company v. Andrews, 354 So2d 454 (Fla. 2dDCA) cert. denied, 359 So2d 1210 (Fla. 1978).

could be said that the jurors "agreed" to engage in misconduct yet the court rejected requests to interview the jury or where the courts held that the alleged misconduct related to matters which inhered within the verdict.

For example, in Mitchell v. State, 527 So2d 179 (Fla. 1988) this court recently held that statements by a juror that other jurors had improperly placed the burden on the defendant to prove his innocence "involved a jurors' deliberation and inhere in the verdict" and that accordingly it could not be used to impeach the juror's prior decision. 527 So2d 179, 181-182. In Mitchell there was certainly more evidence of a "agreement" to engage in misconduct that in the present case, but this court, as the Third District correctly recognized below, held that such matters inhere in the verdict. There are other cases where the same arguments made by Baptist could have been made and yet the courts reached an identical conclusion as that in Mitchell. E.g. State Department of Transportation v. Rejrat, 540 So2d 911 (Fla. 2dDCA 1989) (Request for jury interview denied despite affidavit indicating that the jury had improperly "agreed" to reduce the monetary award by allowing for the plaintiff's comparative negligence); Smith v. State, 330 So2d 59 (Fla. 1stDCA 1976) (Court refused to set aside a verdict despite the fact that the day after discharge all jurors unanimously "agreed" that they had convicted the defendant of an improper charge; Velsor v. Allstate Insurance Company, 329 So2d 391 (Fla. 2dDCA 1976) (Appellate Court reversed the trial judge's ordering of a new trial which was based on a finding that the jury

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"agreed" to ignore the court's instructions).

We believe the aforementioned cases correctly recognize and demonstrate that even if one could present evidence that there was a tacit agreement amongst the jurors to ignore the greater weight of the evidence and return a verdict based on improper motives, there are severe practical limitations which prevent one from impeaching the verdict. The best and only competent evidence of the jury's decision is their written verdict and their subsequent oral acknowledgment of it. Litigation should not be extended by endless "mini-trials" attempting to unearth whether or not the juror intended what they ultimately decided. As the Third District recognized in citing Branch v. State, 212 So2d 29 (Fla. 2dDCA 1968):

> The Second District, speaking through Judge (now Mr. Justice) Ben Overton, in Branch v.State, 212 So2d 29 (Fla. 2dDCA 1968) further states the applicable law:
>
> > It is improper and against public policy to permit jurors to testify to motives and influences by which their deliberations were governed. (citations omitted). To allow such an inquiry concerning the motives and influences and jurors would extend litigation to attempt to determine the imponderable issue of what, in fact, motivated and influenced each juror in arriving at his own independent judgment in reaching a verdict. Id. at 32.

Maler, supra, 559 So2d 1157, 1160. Wigmore, in his definitive work on evidence voiced similar concerns:

> A jury's verdict is one of the most

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> important acts illustrating the application of that principle (the parole evidence rule). To consider its application here is to separate the subject from its natural place, but is unavoidable.
>
> The principle is that where the existence and tenor of a jural action-i.e. an utterance to which legal effects are attached-are an issue, the outward utterance as finally and formally made, and not the prior and private intention, is taken as exclusively constituting the act; and therefore where the act is required (as judicial proceedings are) to be made in writing, the writing is the act...for this reason, the verdict as uttered is the sole embodiment of the jurys'act and must stand as such without regard to the motives or beliefs which have lead up to its act. The policy which requires this is the same which forbids a consideration of the negotiations of parties to a contract leading up to the final terms as deliberately embodied in their deed, namely, the loss of all certainty in the verdict, the impracticability of seeking definitiveness in the preliminary views, the risk of misrepresent-tions after disclosure of the verdict, and the impossibility of expecting any end to trials if the grounds for the verdict would allowed to effect its overthrow. 8 Wigmore on Evidence Section 2348-2349 (McNaughton rev. 1961).

The aforementioned principle outlined by Wigmore is controlling. Even if we were to assume that each and every juror would affirmatively answer the two questions formulated by the trial court, these answers or admissions are irrelevant in light of the fact that each and every juror at trial in the presence of his

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fellow jurors, the parties and within the sanctity of courtroom, acknowledged collectively in writing and individually through oral pronouncement that there was negligence on the part of the hospital that was the proximate cause of damage to the Maler child. There is no practical or legal reason why a contrary assertion by a juror made an extended period of time after the end of trial and after a juror has been exposed to extra judicial influences should be entitled to greater weight than this initial acknowledgment. Such a holding would entirely subvert the sanctity of the trial process by opening up all verdicts to a whole litany of potential abuses.

Additionally, the fact that the jury was polled at Baptist's request and that each juror orally acknowledged the written verdict, deserves emphasis. Despite extensive briefing and argument to date, Baptist has failed to point to a single case wherein a juror or jurors, having assented or consented to the verdict, have been permitted afterward for the purpose of setting it aside, to explain by affidavits the grounds for the train of reasoning by which they arrived at the result. The reason for the failure is that the Florida courts have uniformly held that where each juror is polled and announces the verdict to be his, it is improper to allow jurors to be interviewed. E.g. Marks v. State Road Dept., supra,; Florida Dept. of Transportation v. Weggies Banana Boat, 545 So2d 474 (Fla. 2dDCA 1989);[2] Schofield v.

[2] It is important to note that Weggies Banana Boat like Preast was decided by the Second District Court of Appeal. It is also important to note that in Weggies, there was certainly objective evidence of alleged impropriety, i.e. the fact that two of the jurors advised the foreman in the jury room that they did not agree

Carnival Cruise Lines, Inc., 461 So2d 152 (Fla. 3dDCA 1984); State v.Thomas, 405 So2d 220 (Fla. 3dDCA 1981) and Cummings v. Sine, 404 So2d 147 (Fla. 2dDCA 1981). Furthermore, the aforementioned principle has held to be applicable to be the exact situation and line of cases upon which Baptist relies-the quotient verdict cases. See Anderson v. Watson, 504 So2d 32 (Fla. 2dDCA 1987) (Motion for post-trial interview on basis of quotient verdict denied with the court relying upon Cummings v. Sine, supra, for the proposition that where each juror is polled and announces his verdict to be his or hers, it is improper to allow jurors to be interviewed); Lopez v. Cohen, 406 So2d 1253 (Fla. 4thDCA 1981) ("There is no record support for the finding of a probable quotient verdict. The transcript of the testimony reflects that the jury was polled by the clerk as to whether the verdict was their verdict and each answered in the affirmative." 406 So2d at 1256); Alicot v. Dade County, 132 So2d 302 (Fla. 3dDCA 1961) ("Even where there is a question as to propriety of the process adopting in arriving at the verdict, subsequent polling of the jury and the jurist's separate answers relieves the verdict of all objection." 132 So2d at 303; citing Marks v. State Road Dept.,supra, cases collected in 52 ALR 44 and Orange Belt Ry. Co. v. Kraver, 32 Fla. 28, 13 So. 444 (Fla.

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with the verdict. Despite this, the court refuses to permit those jurors to impeach the verdict holding not only that the statement of the jurors concerned matters which inhered within the verdict but also that the verdict could not be challenged since the jurors were polled. We believe Weggies directly supports the Third District's decision. Finally, it is also important to note that there is no indication on the face of Preast decision that the jury was in fact polled. Therefore, Preast as we asserted to the Third District may well be distinguishable from the case sub judice.

1893); C.F. Kirkland v. Robins, 385 So2d 694 (Fla. 5thDCA 1980); Aetna Casualty & Surety Company v. Kelley, 340 So2d 953 (Fla. 2dDCA 1976), See also 76 Am. Jur. 2d Trial Section 1136 ("It is well settled that although jurors divide the aggregate of their several estimates by the number of jurors and return the quotient as their verdict, it will not held invalid if, after an amount has been ascertained, the respective jurors deliberately assent to and accept it as in their opinion a just verdict," Section 1136, page 109-110).

We believe the aforementioned authorities amply demonstrate that any contention that the polling process is meaningless since the jurors affirmative response may represent nothing more than a continued willingness to adopt an improper method of agreement for determining liability is erroneous. These authorities, we submit, provide an additional reason, apart from the Third District's conclusion, why an interview is not warranted under the present circumstances.

In sum, we submit that the Third District's opinion should be adopted and that the court should take this opportunity to reject Preast. A close reading of Preast demonstrates why it was improperly decided. In holding that a jury which desires to award a plaintiff something despite the evidence is clearly a matter outside the record and if proven, is sufficient to overturn the verdict the court relied upon the following language from Marks, supra:

> When (a juror) has done an act entirely independent and outside of

> his duty and in violation of it and the law, there can be no sound public policy which should prevent a court from hearing the best evidence of which the matter is susceptible...(If a juror) steps aside from his duty, and does an unlawful act, he is a competent witness to prove such fact, and thereby prevent the sanction of the law from attaching to that which would otherwise be colorably lawful Marks, 69 So2d at 775-76 (quoting Wright v.Illinois and Mississippi Telegraph Co., 20 Ia. 195, 210 (Ia. 1866).

Priest, 483 So2d 83, 86. The Preast court's reliance on the aforementioned language for the holding that a jury's desire and sympathy to award a plaintiff something despite the evidence does not constitute a matter which inheres in the verdict itself, is simply wrong because the aforementioned language from Wright is taken out of context. The true holding of the Wright case which is quoted at length in Marks, 69 So2d at 771, at 774-776 is that:

> While every verdict necessarily involves the pleadings, the evidence, instructions, the deliberations, conversations, debates and judgments of the jurors themselves; and the affect or influence of any of these upon the juror's mind, must rest in his own breast, and he is and ought to be concluded thereon by his solemn assent to and rendition of the verdict. To allow a jury to make affidavit against the conclusiveness of the verdict by reason of and as to the effect and influence of any of these matters upon his mind, which in their very nature, are, though untrue, incapable of disproof, would be practically to

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> open the importunities and appliances of parties and their attorneys, and, of course, thereby to unsettle verdicts and destroy their sanctity and conclusiveness. But to receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance, or the like, is to receive as testimony as to a fact, which, if not true, can be readily and certainly disproved by his fellow juror. Marks, 69 So2d 771, at 775 (quoting Wright, 20 Ia. at 212.

A fair reading of Wright indicates that the affidavit of a juror will be admitted to impeach his verdict only in the latter circumstances. To imply, as the Second District did in Preast, that the holding of Wright is that a juror may testify as to motivations such as desire and sympathy which may have influenced the verdict, in order to impeach his verdict, is to emasculate Wright's holding. Such reasoning by the Second District in Preast is simply wrong, is contrary to Florida law on the subject and should be put to rest.

Finally, with respect to the insurance issue, it is important to note that there has been no evidence presented that the matters revealed by the two jurors, through defense counsel, were the result of anything other than intra-jury influences. They are an inevitable result of jury deliberation and do not warrant an interview since they concern motivations of jurors and are inherent within the verdict. See E.g. Holden v. Porter, 495 F.2d 878 (10th cir. 1969); Farmers Coop Lev. Ass'n v. Strand, 382 F.2d 224, (8th cir. 1967) cert. denied 389 US 1014 and Barsh v. Chrysler Corp.,

203 SE 2d 107 (SC 1974); C.f. Clark v. Merritt, 480 So2d 649 (Fla. 5th DCA 1985)(denial of defendant's request to interview juror based upon allegations of improper consideration of finances of defendants in negligence action was proper, absent extrinsic reasons for interview). Not only is there nothing contained within the affidavits which indicate that the jurors acted on special or independent facts regarding insurance which were not received in evidence, but as stated previously, we conclusively demonstrated to the Third District, that Baptist, through its representative, (App. 16-17) introduced evidence of insurance. Following this testimony, Baptist neither moved for a mistrial, to strike the testimony or for a curative instruction. Baptist has thus waived any error predicted upon inadvertent admission of this testimony. McKinney Supply Co. v. Orovitz, 96 So2d 209 (Fla. 1957); Carl's Market v. Meyer, 69 So2d 789 (Fla. 1953) and Allstate Insurance Company v. Wood, 535 So2d 699 (Fla. 1stDCA 1969). Accordingly, even if Baptist had demonstrated that there was non-record evidence of insurance which surfaced during the jury's deliberations, in light of the fact that there was record evidence of insurance, any attempts by the court through a jury interview to determine whether or not the jurists were influenced by the record evidence of insurance as opposed to the non-record evidence of insurance, will by necessity require inquiry into the subjective decision making process of the jury. This, as the prior analysis demonstrated, is simply not permissible.

To conclude we believe that the Third District was eminently

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correct in reaching the conclusion that it did. Contrary to Baptist's assertions, public policy and extensive holdings out of Florida courts dictate that the interview not take place. Such a process is an extraordinary and intrusive procedure which infringes upon the privacy rights of jurors. As this court recognized in Jackson Grain Company v. Hoskins, 75 So2d 306 (Fla. 1954), the undeniable effect of such unwarranted interviews is that:

> It would completely hamstring the jurors in their deliberations. It would subject jurors to such constant harassment and embarrassment that it would be even more difficult than it is now to procure competent and able jurors in the trials of civil and criminal cases. Moreover, if, after every trial, jurors are going to be followed around with investigators and other seeking affidavits, as was done in this case, when the going gets tough in the jury room there will be a natural inclination for all to agree on a defendant and thus to avoid any aftermath. 75 So2d 306, 311.

CONCLUSION

For the aforementioned reasons, we respectfully submit that this court should adopt the decision of the Third District, reject Preast and along with it, the attempt to interview the jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 27th day of August, 1990 mailed to Patrice A. Talisman, Esq., DANIELS & HICKS, P.A., 2400 New World Tower, 100 N. Biscayne Blvd., Miami, Florida 33132; Parenti & Falk, P.A., 1150 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130; and COOPER, WOLFE, & BOLOTIN, P.A., 700 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130.

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