

0-77

FILED

SID J. WHITE

MAR 13 1991

CLERK, SUPREME COURT

By *m*
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

BILLY G. SIBLEY,
Petitioner,

vs.

Case No. 77,357

ADJUSTCO, INC.,
Respondent.

ORIGINAL

PETITIONER'S INITIAL BRIEF

C. Kenneth Stuart, Jr., Esq.
W. JAMES KELLY, P.A.
1525 S. Florida Ave.
P. O. Box 2177
Lakeland, Florida 33806-2177
813/688-2405
Fla. Bar No. 309125
Co-Counsel for Petitioner

J. Michael McCarthy, Esq.
402 S. Kentucky Avenue
P. O. Box 3625
Lakeland, Florida 33802
813/683-5751
Fla. Bar No. 105125
Co-Counsel for Petitioner

TABLE OF CONTENTS

	<u>Page No.</u>
Citations of Authority	ii
Preliminary Statement	1
Statement of the Case and of the Facts	2
Issue	6
Summary of Argument	7
Argument	9
SECTION 440.37 DOES NOT REQUIRE A CRIMINAL ADJUDICATION OF GUILT AS A CONDITION TO MAINTAINING AN INDEPENDENT TORT ACTION FOR AN EMPLOYEE DEFRAUDED BY THE INSURANCE COMPANY OR SERVICING AGENT DURING A CHAPTER 440 PROCEEDING.	
Conclusion	18
Certificate of Service	19

CITATIONS OF AUTHORITY

	<u>Page No.</u>
<u>Byrd v. Richardson-Greenshields Securities, Inc.</u> 552 So.2d 1099 (Fla. 1989)	10,11
<u>Cunningham v. Anchor Hocking Corp.</u> 558 So.2d 93 (Fla. 1st DCA 1990)	10
<u>Duff Hotel Co. v Ficara,</u> 7 So.2d 790 (Fla. 1941)	7
<u>Fisher v. Shennendoah Const. Co.</u> 498 So.2d 882 (Fla. 1986)	9,12
<u>Florida Erections Services, Inc. v McDonald</u> 395 So.2d 203 (Fla. 1st DCA 1981)	16
<u>Gillespie v. Anderson,</u> 123 So.2d 458 (Fla. 1960)	7
<u>Lawton v. Alpine Engineering Prod., Inc.</u> 498 So.2d 879 (Fla. 1986)	9
<u>McLean v. Mundy,</u> 81 So.2d 501 (Fla. 1955)	7
<u>Sibley v. Adjustco, Inc.</u> 15 FLW D2959 (Fla. 2d DCA Dec. 7, 1990)	9,14,17
<u>So. Farm Bureau Cas. Ins. Co. v. Estate of Holland</u> 469 So.2d 55 (Miss. 1984)	12
<u>Vocelle v. Knight Bros. Paper Co.</u> 118 So.2d 664 (Fla. 1st DCA 1960)	15
 <u>Other Citations</u>	
Section 440.11, Florida Statutes	11
Section 440.37, Florida Statutes	4,7,9, 12,14,16
Section 440.37(1)(a), Florida Statutes	12,14

Section 440.37(1)(b), Florida Statutes	13,14
Section 440.37(2)(a), Florida Statutes	13
Section 330.37(2)(b)1, Florida Statutes	13,14
Section 440.37(2)(b)2, Florida Statutes	14,
Section 440.37(2)(b)3, Florida Statutes	13,
Section 440.37(2)(b), Florida Statutes	13
Florida Statutes Section 440.37(2)(c)	7,13,15
Florida Statutes Section 440.37(2)(d)	13
Florida Statutes Section 440.37(2)(e)	7,13,14,15
Florida Statutes Section 440.37(2)(f)	13,14
Florida Statutes Section 440.37(3)	14

PRELIMINARY STATEMENT

Petitioner, Billy G. Sibley, files his brief in this proceeding to review a question certified to be of great public importance raised by the opinion of the District Court of Appeal, Second District (DCA), entered December 7, 1990. Petitioner was plaintiff in the trial court. Respondent, Adjustco, Inc., was the defendant. The DCA upheld the final order of the trial court dismissing petitioner's second amended complaint with prejudice for lack of subject matter jurisdiction. That opinion is found at 15 FLW D2959 (Fla. 2nd DCA Dec. 7, 1990).

In this brief, Adjustco, Inc. will be referred to as "Adjustco" and Billy G. Sibley will be referred to as "Sibley". References to the record on appeal will be noted by the symbol "R" followed by the applicable page numbers. References to the transcript of the proceedings held October 2, 1989 in the trial court will be designated by the symbol "T" followed by the applicable page numbers.

STATEMENT OF THE CASE AND FACTS

Sibley suffered a heart attack on November 24, 1981, as a result of unusual stress related to his employment duties. (R10-11) At the time, Sibley was employed by Sunco Carriers, Inc., as a truck driver. (R10,123) The heart attack occurred as Sibley unloaded a cargo of 340 cases of orange juice. (R10,93) Doing so required him to individually lift each case and place it on a warehouse pallet. (R10) The pallets weighed 70-110 pounds each. (R10) The cases of orange juice weighed 25-30 pounds each. (R93)

Although Sibley was unloading the truck alone on the day of his heart attack, his usual routine was to employ contract labor to do the unloading or, at least, to be assisted by his wife, also a certified over the road driver. (R11) The strenuous labor involved on that day was not routinely performed by Sibley. (R11)

Following his crippling heart attack, Sibley claimed benefits under the Florida Workers' Compensation Act, Chapter 440, Florida Statutes (the Act). (R9,89) Adjustco was the adjusting company responsible for investigating industrial accidents and seeing to the payment of benefits for employees of Sunco Carriers, Inc. (R123) Adjustco was responsible for determining whether Sibley's claim would be accepted as compensable under the Act and assessing what benefits would be paid. (R123)

In investigating Sibley's claim, Adjustco had William Adams take a recorded statement from Sibley. (R123) This statement was

edited by Mr. Adams to delete certain facts and circumstances surrounding Sibley's heart attack which established his entitlement to workers' compensation benefits. (R14,124) Further, it was taken when Sibley was not in good physical condition and was not even fully aware of his surroundings. (R14,124) Due to his physical condition and medications, Sibley could not appreciate the import of the questions posed by Mr. Adams. (R14,124) As a consequence of Mr. Adams' alterations to the statement and his equally biased reports, Adjustco wrongfully refused payment of workers' compensation benefits to Sibley. (R124)

Sibley was compelled to file a claim for benefits under the Act. (R89,124) On April 12, 1984, Deputy Commissioner Charles C. Hurt entered an order following an evidentiary hearing, finding Sibley's injury compensable and ordering the employer/carrier to pay temporary, total disability benefits to Sibley from the period from November 24, 1981 through and including March 25, 1982. (R15) Other orders were subsequently entered by the Deputy Commissioner, all favorable to Sibley. (R21,31,32)

Sibley filed a civil suit against Adjustco. In his second amended complaint, filed August 30, 1988, he alleged Adjustco's conduct in the taking of his statement was tortuous and fraudulent in that it intentionally altered key evidence upon which the State of Florida initially relied in making a determination his claim was not compensable under the Act. (R87,88,126). As a result of Adjustco's intentional misconduct Sibley alleged he was wrongfully refused payment of

workers' compensation benefits. (R124) Sibley also alleged he suffered extreme emotional upset, had no income, and had to deplete his savings to provide for his family as a result of Adjustco's misconduct. (R127)

Adjustco filed a Motion for Summary Judgment on July 10, 1989. (R201-202) In its motion, Adjustco alleged the second amended complaint sought recovery for non-existent elements of damage and that the action was barred by the doctrine of res judicata. (R202) The trial court denied the motion holding the pleadings stated a cause of action for damages not covered by the benefit section of the Act and that a justiciable issue had been raised. (R215). The matter was scheduled for trial on October 2, 1989.

On the morning of trial, counsel for Adjustco raised the question of subject matter jurisdiction in a motion to dismiss. (T3) The trial court determined the Act provided blanket immunity to Adjustco for all acts committed in the investigation of workers' compensation claims and dismissed the cause with prejudice. (T21-22)

On appeal of the trial court's order, the DCA found the actions of Adjustco were susceptible to the civil remedies sought by Sibley but held that Section 440.37, Florida Statutes, required an adjudication of guilt in a criminal proceeding as a pre-requisite to any civil recovery. From its decision, the DCA certified as a question of great public importance the issue of whether the adjudication of guilt is a condition to the

maintenance of any tort action by an employee who claims to have been defrauded during a proceeding under Chapter 440 by an insurance or adjusting company.

ISSUE

(Certified Question)

WHEN AN EMPLOYEE CLAIMS INJURY ARISING FROM THE ALLEGED FRAUDULENT ACT OF AN EMPLOYER/CARRIER COMMITTED IN THE COURSE OF A PROCEEDING INITIATED PURSUANT TO CHAPTER 440, IS A CRIMINAL ADJUDICATION OF GUILT PRESCRIBED IN SECTION 440.37 A CONDITION TO THE MAINTENANCE OF AN INDEPENDENT TORT ACTION?

SUMMARY OF ARGUMENT

Sibley was injured by the intentional and fraudulent acts of Adjustco. Those tortuous acts are subject to a civil remedy in tort.

Sibley was denied a civil remedy in tort because the DCA misconstrued Section 440.37 as requiring an adjudication of guilt before any civil remedy would be available. The actions of Adjustco are directly addressed by Section 440.37(2)(e) but are not criminalized therein. Accordingly, an adjudication of guilt is not possible.

Moreover, if the acts did constitute a crime, Section 440.37(2)(c) automatically provides civil remedies following an adjudication of guilt. However, while Section 440.37(2)(e) addressed Adjustco's actions as improper but not criminal, it specifically provides for civil remedies upon the commission of those acts without reference to criminal adjudications. In that regard it is separate and distinct from Section 440.37(2)(c) which requires the adjudication.

Although not requiring an adjudication of guilt appears to place a higher standard on employers and carriers than on the other entities governed by Section 440.37, that is not an unreasonable or illogical legislative intent. Throughout the history of the Act in Florida, employers and carriers have been held to a high standard when dealing with injured workers seeking workers' compensation benefits since the purpose of the Act is to remove the burden of injured workers from society and place it on

industry's shoulders. See, e.g., Gillespie v. Anderson, 123 So.2d 458 (Fla. 1960) (liberal construction to be given); McLean v. Mundy, 81 So.2d 501 (Fla. 1955) (proof of fault not required); Duff Hotel Co. v. Ficara, 7 So.2d 790 (Fla. 1941) (workers compensation cases not bound by rigid rules of proof and interpretation in criminal and civil cases).

The trial court erred in believing any action of Adjustco during the pendency of Sibley's claim was immunized from tort recovery. The DCA's error was in believing an adjudication of guilt was required before a civil remedy could be obtained.

This Court should reverse and remand with instructions to allow this cause to proceed to a trial on the merits.

ARGUMENT

SECTION 440.37 DOES NOT
REQUIRE A CRIMINAL
ADJUDICATION OF GUILT AS A
CONDITION TO MAINTAINING AN
INDEPENDENT TORT ACTION FOR AN
EMPLOYEE DEFRAUDED BY THE
INSURANCE COMPANY OR SERVICING
AGENT DURING A CHAPTER 440
PROCEEDING.

The DCA was correct in disagreeing with the trial court and finding Adjustco potentially liable in tort for its actions. The appellate court's error was in misinterpreting the subsections of Section 440.37 and requiring a criminal adjudication of guilt as a pre-requisite to imposing tort liability.

Sibley suffered two distinct injuries in late November and early December of 1981. The first injury, a heart attack, occurred while he was in the course and scope of his employment and arose from that employment. The heart attack was no one's fault and was compensated by workers' compensation benefits.

The tort injury sustained by Sibley was caused by Adjustco's intentional and deliberate efforts to defraud him of workers' compensation. Implicit in the DCA's opinion is recognition that such conduct is not immunized by Section 440.11. Sibley v. Adjustco, Inc., 15 FLW D2959, 2960 (Fla. 2nd DCA Dec. 7, 1990).

This Court faced similar issues in the cases of Fisher v. Shennendoah Const. Co., 498 So.2d 882 (Fla. 1986) and Lawton v. Alpine Engineering Prod., Inc., 498 So.2d 879 (Fla. 1986).

Admittedly, those decisions are based on other, narrower grounds than raised by this appeal. However, both opinions deftly stop short of closing the door to recovery for intentional or fraudulent torts committed during proceedings under the Act. Indeed, the tenor of the opinions were so encouraging to injured workers that a later appellate court decision read the opinions as authority for allowing such a recovery. Cunningham v. Anchor Hocking Corp., 558 So.2d 93 (Fla. 1st DCA 1990).

Finally, in Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099 (Fla. 1989) this Court acknowledged some conduct must be accountable in tort even if the events constituting the tort occurred in the work place.

We find this conclusion harmonizes with the policies and scope of workers' compensation. As often has been noted, worker's compensation is directed essentially at compensating a worker for lost resources and earnings. This is a vastly different concern than it addressed by the sexual harassment laws. While work place injuries rob a person of resources, sexual harassment robs a person of dignity and self esteem. Worker's compensation addresses purely economic injury, sexual harassment laws are concerned with a much more intangible injury to personal rights. To the extent these injuries are separable, we believe that they both should be, and can be, enforced separately.

552 So.2d at 1104.

Although Bryd involved a claim for sexual harassment occurring in the work place, the opinion went further and attempted to define other situations when intentional acts would allow tort liability despite the immunizing effects of Section 440.11. The Bryd decision acknowledged an intentionally inflicted injury is not covered by workers' compensation "since workers' compensation was not established to excuse misconduct of this type." 552 So.2d at 1101, n5

The test set forth by the Bryd decision was two pronged. First, was the injury a risk inherent in the work environment? If so, did the injury originate within the "time and space" of work thereby creating a direct link between the injury and the work environment? 552 So.2d at 1104, n7 Negative answers to the questions are indicia that the injury is not covered by workers' compensation and traditional tort remedies become applicable.

The allegations of Sibley's second amended complaint clearly meet the criteria set forth in Bryd as justifying a tort remedy. Just as sexual harassment is not a "risk" inherent in the work environment, the intentional efforts of Adjustco to deceive and defraud Sibley were not inherent risks he assumed when he began employment as a truck driver. Sibley accepted the risk of traffic accidents, heart attacks, and other injuries as part of the job. However, in no sense did Sibley accept fraud and deceit as part of his regular work day hazards.

Similarly, the "time and space" of Sibley's employment were not involved in Adjustco's actions. The delivery and unloading of goods resulted in physical exertion by Sibley which lead to

his heart attack. That physical exertion stopped long before Adjustco intentionally committed its wrong. Surely no reasonable person would suggest Sibley's work activities set in motion a chain of events wherein Adjustco's fraud and deceit are merely a natural consequence of the work place exertions.

Other states have agreed with Sibley's position and held employer/carriers accountable for intentional or fraudulent torts. See, e.g., So. Farm Bureau Cas. Ins. Co. v. Estate of Holland, 469 So.2d 55 (Miss. 1984) See also cases cited by Justice Adkins in his dissenting opinion in Fisher v. Shennendoah Gen. Const. Co. supra at 884-85. In Holland the exclusionary provision of Mississippi workers' compensation law was held not to bar tort recovery by an injured worker claiming an injury resulting from intentional tortuous conduct. 469 So.2d at 58. As that court noted, workers' compensation does not contemplate intentional torts and the penalties provided under the compensation system are "hardly adequate to deter wilful actions of an overreaching insurance company" against an injured worker. 469 So.2d at 58. The same reasoning is applicable to Sibley and Adjustco.

Although it correctly recognized Adjustco's actions as reprehensible and subject to civil redress, the DCA's error arose from its convoluted reading of Section 440.37. Section 440.37 is structured as follows:

- I. 440.37(1)(a) defines as a third degree felony the presentation of any written or oral statement "as part of" or "in support of" a claim when the statement is known to contain false or misleading information.

- II. 440.37(1)(b) defines as a third degree felony the preparation or making of any statement "intended to be presented to any employer, insurance company, or self-insured program" when the statement is known to contain false or misleading information.
- III. 440.37(2)(a) provides language to be included in a claim form.
- IV. 440.37(2)(b)(1) defines as a third degree felony the commission of fraud during the handling of compensation claims by physicians, osteopaths, chiropractors, or other practitioners.
- V. 440.37(2)(b)2 defines as a third degree felony actions of an attorney that assist, conspire or urge the commission of a fraud in violation of the provisions of Chapter 440.
- VI. 440.37(2)(b)3 allows the imposition of administrative penalties upon persons or governmental entities licensed to maintain or operate a hospital who scheme, conspire, or fraudulently violate Chapter 440 provisions. Additionally, administrators and employees of the hospital may be guilty of a third degree felony if they are convicted of acting in the prescribed manner.
- VII. 440.37(2)(c) states any person damaged as a result of the violations has a civil remedy if there has been a criminal adjudication of guilty.
- VIII. 440.37(2)(d) is a definitional provision setting out what may constitute a "statement" for purposes of 440.37.
- IX. 440.37(2)(e) extends the "provisions of this subsection" to "any employer, insurer, self-insurer, adjusting firm, or agent or representative thereof who intentionally injures, defrauds, or deceives any claimant." The claimant is given "the right to recover the damages provided in this subsection."
- X. 440.37(2)(f) defines as a third degree felony the solicitation of workers' compensation cases.

XI. 440.37(3) requires any grievance committee finding probable cause of a violation of Section 440.37 to forward their findings to the appropriate state attorney.

The DCA found Adjustco included within the provisions defined by Section 440.37(1)(b). Sibley v. Adjustco, supra at 2960. A simple reading of the subsection indicates the interpretation is flawed. Section 440.37(1)(b) concerns statements intended to be presented to insurance companies or adjusting companies such as Adjustco. Adjustco's statement complained about by Sibley were intended to be presented to the Division of Workers' Compensation and the Deputy Commissioner (now Judge of Compensation Claims) by Adjustco, not by someone else to Adjustco. Adjustco's actions in obtaining and using a fraudulent statement obviously cannot constitute a fraud upon Adjustco. The fraud was upon Sibley and the Division of Workers' Compensation. Nowhere in Section 440.37(1)(b) are claimants or the Division of Workers' Compensation defined as persons to be protected.

Similarly, the other subsections of 440.37 do not apply to Adjustco except for Section 440.37(2)(e). Adjustco did not prepare the statement "in support of" the claim. §440.37(1)(a) Adjustco is not a physician, chiropractor, osteopath, or other practitioner. §440.37(2)(b)1 Adjustco is not an attorney or a hospital. §440.37(2)(b)2-3 Adjustco is not charged with solicitation of workers' compensation claims. §440.37(2)(f)

Consequently, the only statutory section applicable to Adjustco is Section 440.37(2)(e) and it does not define the actions described thereunder as criminal. No criminal sanction is set forth despite the fact the legislature clearly stated injuring, defrauding, or deceiving a workers' compensation claimant is improper. What sanction was provided by the legislature for the defined improper conduct? Section 440.37(2)(e) speaks of the "right" to recover the "damages" described, i.e., civil remedies under 440.37(2)(c).

It is axiomatic an adjudication of guilt can only occur when the acts are specifically defined as criminal. That simply is not done in Section 440.37(2)(e). Moreover, if Section 440.37(2)(e) were to be read as setting forth criminal conduct, why does the statute require any reference to civil damages? Once a criminal adjudication is entered, Section 440.37(2)(c) makes the civil remedies automatically available.

To accept the interpretation of the DCA renders the last sentence of Section 440.37(2)(e) concerning damages superfluous verbiage. That is improper statutory construction. Unless unreasonable or illogical, language in a statute should be given its plain meaning and every word or phrase should be construed as having significance. See, e.g., Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960).

The appropriate statutory construction is to recognize activities by employers, insurers, and adjusting firms such as Adjustco may not be criminal but may result in civil remedies. This construction was apparently accepted by the

District Court of Appeals, First District, in the landmark case of Fla. Erections Services, Inc. v. McDonald, 395 So.2d 203 (Fla. 1st DCA 1981) McDonald was decided following the 1979 amendment to the workers' compensation law which provided for sweeping changes in the workers' compensation system. While it is one of the earliest cases construing the effect of the amendments, McDonald continues to be considered a landmark decision in the area. The McDonald court stated:

A c t i v e c o n c e a l m e n t ,
misrepresentation, or a course of
dishonest dealing can be classified
as falling into the tort categories
of "fraud" or "deceit". We find
nothing in the workers'
compensation law to suggest that a
workers' compensation carrier
guilty of fraud or deceit might not
also be subject to an award of
punitive damages, as well as
attorneys' fees, although we are
not called upon and do not decide
that issue in this case. We do
note, however, that the act itself
has long contained a provision
(Section 440.37(2)(e)) imposing
liability for compensatory damages
and attorneys' fees against any
insurer or its agent who
"intentionally injures . . . any
claimant with regard to any claim".

395 So.2d at 208

The construction urged by Sibley is logical and reasonable and, unlike the DCA's construction, gives significance to each word or phrase in Section 440.37. Sibley urges the following statutory construction:

A. Some activities are defined as criminal and may be punished as felonies.

B. When criminal activity is involved, civil remedies are available only following an adjudication of guilt.

C. Some activities by employers, carriers, or adjusting companies like Adjustco are improper but not criminal. However, the improper but not criminal activities are amenable to civil remedies. Since the activities are not criminal, no adjudication of guilt is required (or even possible).

Finally, an adjudication of guilt requires Sibley to depend upon someone else, i.e. the state attorney, before he can proceed to redress for the tortuous wrong done him. As Judge Ryder noted in his dissent in this case, torts like those committed by Adjustco were never within the ambit of the Act and should not be potentially immunized by the "whim" of a state attorney to prosecute or not prosecute. Sibley, supra at 15 FLW D2960.

Judge Ryder's view is particularly true here when you consider the tortuous activities occurred in Louisiana. Questions arise as to whether Florida law would be applicable to those acts. Moreover, it is extremely doubtful a Florida state attorney would be willing to vigorously pursue prosecution even assuming he could.

Without a civil remedy available to those defrauded, Adjustco is effectively immunized for the torts of fraud and deceit. Such immunity has never been an articulated legislative intent and certainly runs contrary to the public policy of Florida. Sibley should be allowed a civil remedy and his day in court on the merits.

The trial court erred in believing any act committed by Adjustco was immunized solely because it was committed during a proceeding under the Act. The DCA correctly recognized some activities generated during a workers' compensation proceeding were tortuous and could be redressed by civil remedies. However, the DCA erred in requiring an adjudication of guilt for conduct which was not defined as criminal as a prerequisite to initiating an action for civil remedies.

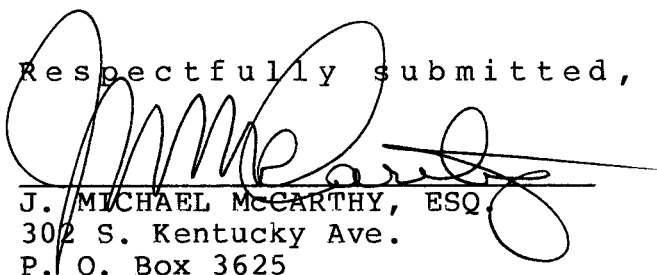
CONCLUSION

Sibley was harmed by tortuous acts committed by Adjustco. Section 440.37(2)(e) prohibits but does not criminalize those acts. Additionally Section 440.37(2)(e) provides for the exact civil remedies Sibley seeks herein.

This Court should answer the certified question in the negative, reverse the DCA and the trial court, and remand this cause for a trial on the merits.

C. Kenneth Stuart, Jr., Esq.
W. JAMES KELLY, P.A.
1525 S. Florida Avenue
P. O. Box 2177
Lakeland, Florida 33806-2177
813/688-2405
Fla. Bar No. 309125
Co-Counsel for Petitioner

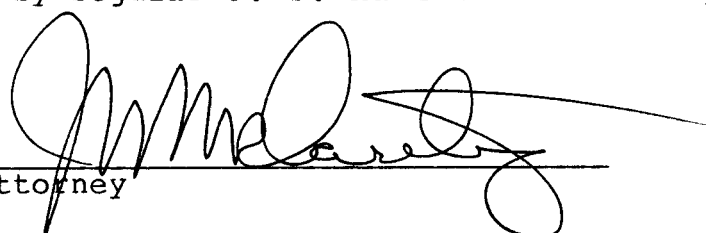
Respectfully submitted,



J. MICHAEL MCCARTHY, ESQ.
302 S. Kentucky Ave.
P. O. Box 3625
Lakeland, Florida 33802
813/688-5751
Fla. Bar No. 105125
Co-Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robin Gibson, Esq., P. O. Box 1199, Lake Wales, Florida 33859 and C. Kenneth Stuart, Jr., P. O. Box 2177, Lakeland, Florida 33806-2177 by regular U. S. Mail this 11th day of March, 1991.



Attorney