

W00A

23 P. 047  
**FILED**

SID J. WHITE

JUN 14 1993

IN THE SUPREME COURT  
OF THE STATE OF FLORIDA

CLERK, SUPREME COURT.

By \_\_\_\_\_  
Chief Deputy Clerk

CAROLANN D. KOZEL,  
Petitioner,

v. CASE NO. 80,380

D. STEVEN OSTENDORF, D.P.M.,  
Respondent.

---

BRIEF OF RESPONDENT ON MERITS

---

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT  
OF THE STATE OF FLORIDA

Gerald W. Pierce  
HENDERSON, FRANKLIN, STARNES & HOLT, P.A.  
Attorneys for Respondent  
Post Office Box 280  
Fort Myers, FL 33902-0280  
(813) 334-4121  
Fla. Bar No. 227803

TOPICAL INDEX

	<u>Page</u>
TABLE OF AUTHORITIES . . . . .	ii
STATEMENT OF THE CASE AND OF THE FACTS . . . . .	1
SUMMARY OF ARGUMENT . . . . .	5
ARGUMENT	
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THIS CASE BY DISMISSING THE PLAINTIFF'S COMPLAINT WHERE PLAINTIFF OFFERED NO REASONABLE EXPLANATION FOR HER FAILURE TO FILE AN AMENDED COMPLAINT FOR ONE HUNDRED FIFTY EIGHT DAYS AFTER THE EXPIRATION OF THE TIME FOR FILING. . . . .	7
CONCLUSION . . . . .	18
CERTIFICATE OF SERVICE . . . . .	19

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
Allstate Insurance Company v. Montgomery Ward, 538 So. 2d 974 (Fla. 5th DCA 1989) . . . . .	13
Beasley v. Girtten, 61 So. 2d 179 (Fla. 1952) . . . . .	16
Capers v. Lee, 91 So. 2d 337 (Fla. 1956) . . . . .	8,16
Commonwealth Fed. Sav. & Loan Ass'n v. Tubero, 569 So. 2d 1271 (Fla. 1990) . . . . .	15
E & E Electric Contractors, Inc. v. Singer, 236 So. 2d 195 (Fla. 3d DCA 1970), cert. dismissed, 239 So. 2d 827 (Fla. 1970) . . . . .	12
Edward L. Nezelek, Inc. v. Sunbeam Television Corp., 413 So. 2d 51 (Fla. 3d DCA 1982), review denied, 424 So. 2d 763 (Fla. 1982). . . . .	7
Kozel v. Ostendorf, 603 So. 2d 602 (Fla. 2d DCA 1992) . . . . .	4
Lasley v. Cushing, 244 So. 2d 770 (Fla. 1st DCA 1971) . . . . .	14
Miami Auto Auction, Inc. v. Friendly Enter., Inc., 257 So. 2d 69 (Fla. 3d DCA 1972) . . . . .	14
National Shawmut Bank of Boston v. Woodard, 220 So. 2d 636 (Fla. 3d DCA 1969), cert. denied, 225 So. 2d 917 (Fla. 1969) . . . . .	12,13
Neida's Boutique, Inc. v. Gabor and Company, 348 So. 2d 1196 (Fla. 3d DCA 1977), cert. denied, 366 So. 2d 883 (Fla. 1978). . . . .	10
New River Yachting Center, Inc. v. Bacchiocchi, 407 So. 2d 607 (Fla. 4th DCA 1981), review denied, 415 So. 2d 1360 (Fla. 1982) . . . . .	11
Reynolds v. Deep South Sports, Inc., 211 So. 2d 37 (Fla. 2d DCA 1968) . . . . .	14
Sekot Laboratories, Inc. v. Gleason, 585 So. 2d 286 (Fla. 3d DCA 1990) . . . . .	7

TABLE OF AUTHORITIES, Cont'd

	<u>Page</u>
<u>Other:</u>	
Fla. R. Civ. P. 1.420 . . . . .	10,11,14
Section 766.203(2), Florida Statutes (1989) . . . . .	1,9
Section 766.205, Florida Statutes (1989) . . . . .	1

STATEMENT OF THE CASE AND OF THE FACTS

Respondent, D. Steven Ostendorf, D.P.M., objects to the Statement of the Case and of the Facts in the Petitioner's brief. Petitioner's brief inaccurately represents facts and omits numerous facts which are relevant to the issues to be considered in this proceeding. This brief will refer to the parties as "Plaintiff" and "Defendant."

The Defendant filed a motion to dismiss the original complaint on two grounds. (R 6). First, the complaint did not specify any act or omission on the part of Dr. Ostendorf which allegedly departed from the appropriate standard of care. (R 6). Second, the Defendant asserted the failure of the Plaintiff to comply with Section 766.203(2), Florida Statutes (1989). (R 6). The motion also stated that the complaint showed on its face that the claim was barred by the statute of limitations, that the Plaintiff had failed to provide reasonable access to information in her possession or control, and that she had failed to cooperate by providing information necessary to facilitate evaluation of the claim as required by Section 766.205, Florida Statutes (1989). (R 6).

The trial court granted the motion to dismiss without specifying any grounds, and granted the Plaintiff until February 1, 1990, to file an amended complaint. (R 9). The amended complaint was not filed until July 23, 1990, and disregarded the trial court's prior order on Defendant's motion to strike by continuing to name Florida Podiatrist

Trust as a defendant. (R 10, 8). The only change from the original complaint was a brief new allegation which asserted compliance with Section 766.203(2). (R 11 at ¶ 7). The amended complaint was otherwise identical to the original complaint. (R 1-4, 10-14). There is nothing in the record between the entry of the order granting the motion to dismiss with leave to amend on January 12, 1990, and the filing of the amended complaint on July 23, 1990. (R 9-14).

The Defendant filed a motion to dismiss the amended complaint, asserting that Plaintiff had failed to file an amended complaint by February 1, 1990, as required by the order which had given her leave to file an amended complaint. (R 15-16). The motion acknowledged that four days after the time for filing an amended complaint had expired, counsel for plaintiff had requested a ten day extension within which to file the amended complaint, which would have made the complaint due on February 15, 1990. (R 15). The motion pointed out that the amended complaint was not filed until many months after the agreed time had expired, in willful violation of the trial court's order. (R 15). The motion further pointed out that the amended complaint continued to fail to specify any acts or omissions of Dr. Ostendorf which allegedly departed from the appropriate standard of care. (R 16).

Plaintiff responded by filing an untitled motion which requested leave to file the amended complaint. (R 19-20).

Counsel asserted in the motion that she had informed Defendant's counsel that surgery had been scheduled for the Plaintiff's foot, and that Plaintiff could not be sure what she should state in the amended complaint pending the outcome of the surgery. (R 19). There was no allegation that defense counsel agreed to the requested extension. (R 19-20). In her brief before this Court, the Plaintiff represents that the record indicates that her attorney believed that she had received oral consent from defense counsel to delay filing the amended complaint. (Brief at 6). There is no support in the record for that representation.

On August 13, 1990, at an unreported hearing, the trial court found that the Plaintiff had failed to comply with the order requiring an amended complaint to be filed by February 1, 1990, and that she had failed to file an amended complaint within the agreed ten day extension. (R 21-22). Noting that the amended complaint was not filed until 155 days after the extension granted by the Defendant, the Court granted the motion to dismiss with prejudice and entered judgment in favor of Defendant Ostendorf. (R 21-22). A motion for rehearing was filed ten days later, asserting that Defendant had granted a second extension of time because defense counsel did not respond when directed to notify Plaintiff's counsel of any objection. (R 19-20). The motion for rehearing asserted that defense counsel never objected to an extension. (R 24). The motion attached an affidavit from

Attorney Finn, in which she "confirmed" that Defendant in fact granted a second extension of time to file the amended complaint. (R 26). However, in describing this purported arrangement, Attorney Finn represented that in a telephone conversation with defense counsel's secretary, counsel had directed that if defense counsel had any objection to the filing of an amended complaint after Plaintiff's pending surgery, defense counsel should notify Ms. Finn so that she could file a motion for "protective order or motion to stay." (R 26-27). The affidavit admitted that Ms. Finn never spoke with defense counsel about an extension of time. (R 27). She simply directed the secretary to tell defense counsel that he should notify Ms. Finn if he had an objection, and that Ms. Finn relied upon the absence of a response by doing nothing in the file for six months. (R 26-28).

In affirming the order of dismissal with prejudice, the Second District Court of Appeal noted that it was within the discretion of the trial court to dismiss a complaint when the plaintiff fails timely to file an amendment pursuant to court order. *Kozel v. Ostendorf*, 603 So. 2d 602, 603 (Fla. 2d DCA 1992). The Court stated that it was not persuaded that dismissal under the circumstances was an abuse of discretion, particularly given the extreme delay in amending the complaint and the lack of any showing that the delay was solely the fault of counsel. *Id.*



### SUMMARY OF ARGUMENT

There are many appellate decisions in this state which review the exercise of discretion by a trial court in dismissing an action for failure to amend a pleading within the time allotted in an order of dismissal with leave to amend. The decision of the trial court and the decision of the District Court of Appeal in this case are entirely consistent with all of these appellate decisions. In her brief, the Plaintiff does not cite to any of the cases which involve this type of situation. Instead, she relies solely on cases which dismiss actions or strike pleadings as a sanction for willful misconduct. The instant case does not involve an allegation of willful misconduct.

An order dismissing a complaint with leave to amend is not an order requiring a party to amend a pleading. An order giving leave to amend does not order an amendment. It simply gives permission to do that which without the Court's permission would not be allowable. When a complaint is dismissed for failure to state a cause of action, but leave is given to file an amended complaint, failure to amend that complaint is not disobedience of a court order. It is merely a continuing failure to state a cause of action. When an order of dismissal with leave to amend is entered, a party is placed upon notice that failure to submit an amended pleading within the time allowed by the Court will result in a dismissal of the cause with prejudice.

The Plaintiff has offered no legitimate explanation for her failure to amend her complaint within the allotted time. She has offered no legitimate explanation for the extraordinary amount of time which passed before she filed the second amended complaint. A review of the numerous cases which have considered this type of situation indicates that the trial court acted well within its discretion in dismissing the action.

The trial court did not include a finding of a willful or deliberate violation of a court order because no such finding has ever been required in this type of situation. The Plaintiff was not sanctioned for violating a court order or ignoring discovery rules. She was on notice that her right to pursue any claim against Dr. Ostendorf was in severe jeopardy, yet she chose not to take advantage of the opportunity to amend her complaint. A requirement of a showing of willful, deliberate or contumacious disobedience to a court order as a condition precedent to a dismissal under these circumstances would mean that there would never be a dismissal. This case did not involve a dismissal as a sanction for willful misconduct, and the Plaintiff's reliance upon cases involving willful misconduct and discovery violations is inappropriate.

### ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THIS CASE BY DISMISSING THE PLAINTIFF'S COMPLAINT WHERE PLAINTIFF OFFERED NO REASONABLE EXPLANATION FOR HER FAILURE TO FILE AN AMENDED COMPLAINT FOR ONE HUNDRED FIFTY EIGHT DAYS AFTER THE EXPIRATION OF THE TIME FOR FILING.

The Plaintiff attempts to analogize this situation to the situation presented in cases where actions are dismissed or pleadings stricken as sanctions for misconduct in discovery or pretrial proceedings. The order of dismissal in this case was not a sanction for disobedience of a court order. An order dismissing a complaint with leave to amend is not an order requiring a party to amend a pleading. *Edward L. Nezelek, Inc. v. Sunbeam Television Corp.*, 413 So. 2d 51, 54 (Fla. 3d DCA 1982), *review denied*, 424 So. 2d 763 (Fla. 1982). An order giving leave to amend does not order an amendment; it simply gives the party permission to do that which without the Court's permission would not be allowable. *Id.* When a complaint is dismissed for failure to state a cause of action, but leave is given to file an amended complaint, failure to amend that complaint is not disobedience of a court order. *Id.* It is merely a continuing failure to state a cause of action. *See also Sekot Laboratories, Inc. v. Gleason*, 585 So. 2d 286, 289 (Fla. 3d DCA 1990). When an order of dismissal with leave to amend is entered, a party is placed upon notice that failure to submit an amended pleading within the time allowed by the Court will result in a dismissal of the cause

with prejudice. *Capers v. Lee*, 91 So. 2d 337, 339 (Fla. 1956).

The law governing the dismissal of a cause for failure to amend within the allotted time developed separate from and parallel to the development of the law upon which the Plaintiff relies. Nonetheless, in her brief, the Plaintiff has not cited to any of the numerous cases which have addressed this issue. Instead, she has cited solely to discovery abuse cases and pretrial compliance cases. A review of the cases which have actually considered the issue presented to the trial court in this case reveals that the trial court acted well within its discretion.

The Plaintiff has failed to recognize that the reason she gave for failing to file her amended complaint in a timely manner is totally devoid of substance on its face. She claims that she could not comply with the Court's time requirements because she "... was in the midst of surgery in Connecticut, the outcome of which was unknown at the time and entailed a possible loss of her entire foot." (R 23). She gave no explanation as to why her surgery would preclude her from filing an amended complaint which specified any negligence committed by Dr. Ostendorf and which alleged compliance with Section 766.203(2). She made no attempt to explain the fact that when she got around to filing an amended complaint many months after leave to amend expired, she simply filed the exact same complaint with the exception of the addition of two

lines which alleged compliance with Section 766.203(2). She does not and cannot explain why she was unable to file this amended complaint within the time limits set by the Court. Her alleged reason for the failure to comply with the time requirements is blatantly devoid of any substance.

The "stipulated second extension" was even more transparent. The first extension of time was obtained four days after the original deadline given in the order of dismissal. The Plaintiff requested and the Defendant agreed to an additional ten days for filing the amended complaint. Plaintiff's counsel testified that she called defense counsel's secretary and told her to tell defense counsel to advise of any objection to an additional open-ended extension of time. There was no further communication from either attorney for many months. Defense counsel stipulated to nothing, and Plaintiff's counsel did nothing. Finally, when the Plaintiff got around to filing the same (defective) complaint as an amended complaint, the Defendant moved to dismiss the suit because of the failure of the Plaintiff to plead within the time set by the Court or within the extended time to which counsel had agreed.

The reasons given for the lack of diligence by the Plaintiff are simply no reasons at all. The fact that further surgery may have been contemplated could not in any way preclude her attorney from complying with the Court's deadline. The surgery, if it occurred, was not mentioned in

any way in the amended complaint, which was finally filed many months after the deadline had passed. The fact is that for no legitimate reason, the Plaintiff simply ignored the Court ordered deadline and the agreed extended deadline. An amended complaint fully complying with the Court's ruling could have been filed at any time regardless of any pending surgery. Based upon the failure of the Plaintiff to meet the deadline, and based upon the total absence of a legitimate reason for that failure, the trial court dismissed the action under Fla. R. Civ. P. 1.420.

The Court's ruling was entirely consistent with relevant case law. In *Neida's Boutique, Inc. v. Gabor and Company*, 348 So. 2d 1196 (Fla. 3d DCA 1977), *cert. denied*, 366 So. 2d 883 (Fla. 1978), the second amended complaint was filed only twenty days after the time specified by the trial court, but the order of dismissal was nonetheless affirmed. The District Court found that there was no abuse of discretion in dismissing the complaint with prejudice under the circumstances because there was no record justification for the plaintiff's failure timely to file its pleading. In the instant case, the justification offered by the Plaintiff was nonsensical. The Plaintiff did not take advantage of leave granted by the Court to remedy the otherwise fatal flaws in her pleading. The Plaintiff was not disobeying the trial court's order. However, the failure to amend the complaint resulted in a continuing failure to state a cause of action in

this malpractice suit. The order of dismissal with leave to amend placed the Plaintiff on notice that her right to proceed was in severe jeopardy. The fact that the action was dismissed with prejudice for failure to amend was certainly no surprise.

The District Court in *New River Yachting Center, Inc. v. Bacchiocchi*, 407 So. 2d 607 (Fla. 4th DCA 1981), review denied, 415 So. 2d 1360 (Fla. 1982), considered a situation which was very similar to the situation in the instant case. In that case, the District Court held that the trial court did not abuse its discretion in denying a motion for leave to amend a crossclaim some seven months after the movant was granted twenty days within which to file an amended crossclaim. The Court pointed out that Rule 1.420 provides for involuntary dismissal for failure to comply with any order of the Court. The Court further noted that the rule has been applied to uphold a trial court's discretion in dismissing a pleading for failure to amend within the time limit set by the Court. The Court held that the application of the rule was solely within the discretion of the trial court, and noted that nothing appeared from the record to suggest that there was an abuse of that discretion. Similarly, in the instant case, the trial court properly exercised its discretion in refusing to permit the Plaintiff to amend her complaint over five months after the expiration of the time limit set by the

Court for amendment, where the Plaintiff gave no legitimate explanation for the failure to file an amended pleading.

In *E & E Electric Contractors, Inc. v. Singer*, 236 So. 2d 195 (Fla. 3d DCA 1970), cert. dismissed, 239 So. 2d 827 (Fla. 1970), the trial court refused to permit the plaintiff to amend its complaint sixty-three days after the expiration of the twenty day period granted by the Court for filing an amended complaint. The District Court found that the trial court had not abused its discretion in refusing to permit an amendment in light of the fact that the only reason given for the failure to plead within the allotted time was inadvertence or neglect of counsel. In the instant case, the Plaintiff consciously ignored the deadline set by the trial court, and she has given no legitimate reason for the failure to plead. The trial court did not abuse its discretion in refusing to permit the filing of an amended complaint almost half a year after the time limit set by the Court had run.

In *National Shawmut Bank of Boston v. Woodard*, 220 So. 2d 636 (Fla. 3d DCA 1969), cert. denied, 225 So. 2d 917 (Fla. 1969), the trial court dismissed an amended complaint with leave to file a second amended complaint within fifteen days. The plaintiff failed to amend within the fifteen days, but filed an unsuccessful interlocutory appeal without obtaining a stay within that fifteen day period. After the District Court affirmed the appealed order, the defendant moved for entry of final judgment because the plaintiff had failed to



amend within fifteen days as required by the order. The trial court granted the motion and dismissed the cause with prejudice. Since the filing of the interlocutory appeal had not tolled or suspended the time for filing an amended pleading, the District Court affirmed the dismissal of the complaint. In *National Shawmut Bank*, at least, the plaintiff had a legitimate excuse for failing to plead because it was under the impression that the filing of the interlocutory appeal would stay the time for filing an amended complaint. In the instant case, there is no excuse for the failure of the Plaintiff to plead. It is significant to note that the time periods in *National Shawmut Bank* are similar to the time periods in the instant case. In *National Shawmut Bank*, the order of dismissal granting leave to amend was entered on January 9, and the final order of dismissal was entered on June 15.

In *Allstate Insurance Company v. Montgomery Ward*, 538 So. 2d 974 (Fla. 5th DCA 1989), the District Court affirmed the dismissal of the plaintiffs' action for failure to file an amended complaint within the time limit set by the Court. The trial court had dismissed the complaint with leave to amend within thirty days. The amended complaint was not filed until approximately one year later. As in the instant case, the late filing of the amended complaint was followed by the filing of a motion to dismiss for failure to comply with the time limit set in the trial court's order. The attorney for

the plaintiffs filed an affidavit which claimed excusable neglect because of a breakdown in his diary system. The trial court nonetheless dismissed the action under Rule 1.420(b). On appeal, the District Court noted that Rule 1.420(b) is the rule which permits dismissal of an action for failure of the plaintiff to further plead. 538 So. 2d 975. The Court recognized that the rule has been applied in upholding the trial court's discretion in dismissing for failure to amend a pleading within the time limit set by the Court. The Court stated:

Here, the appellants clearly did not comply with the court order requiring that an amended complaint, if one was to be filed, be filed within 30 days from the date of the order, and the trial court had the discretion to dismiss the action for an egregious violation of that order.

538 So. 2d at 975.

In the instant case, the Plaintiff clearly did not comply with the Court order requiring that an amended complaint be filed by February 1, 1990. The trial court had the discretion to dismiss the action for the egregious violation of its order.

In other cases, the discretion of the trial courts has been upheld. See, e.g., *Miami Auto Auction, Inc. v. Friendly Enterprises, Inc.*, 257 So. 2d 69 (Fla. 3d DCA 1972); *Lasley v. Cushing*, 244 So. 2d 770 (Fla. 1st DCA 1971); *Reynolds v. Deep South Sports, Inc.*, 211 So. 2d 37 (Fla. 2d DCA 1968). The common thread in all of these cases seems to be that a party must establish at least some type of excusable neglect to

explain the failure to take advantage of the proffered opportunity to amend. It is clear that the standard is different from the standard applied in cases where proceedings are dismissed as a sanction for the violation of a discovery order as discussed by this Court in *Commonwealth Federal Savings and Loan Association v. Tubero*, 569 So. 2d 1271 (Fla. 1990). The law is well established, as noted in the cases discussed above, that the situations are handled differently. The dismissal in the instant case was not a sanction for violation of any order. Instead, it was the logical and predictable result of the Plaintiff's failure to take advantage of the opportunity to remedy defects in a complaint.

It is a fact that different standards have been applied when the Courts have reviewed dismissals for failure to amend pleadings within the allotted time and dismissals as sanctions for willful violations of discovery orders. The reason for the difference in treatment is obvious. A dismissal for a discovery violation is a sanction for contemptuous conduct. In the discovery sanction cases, the courts have required a written finding of willful misconduct in order to facilitate appellate review. A dismissal for failure to file an amended complaint within the allotted time has never required a finding of willful misconduct. A party whose complaint has been dismissed with leave to amend realizes that his or her ability to pursue the litigation further is in severe jeopardy. That party, nonetheless, has no obligation to file

an amended complaint. A party who fails to file an amended complaint pursuant to leave of court is not disobeying the court's order. A party whose pleading has been found to fail to state a cause of action and who does not take advantage of an opportunity to amend that pleading continues to fail to state a cause of action. The Plaintiff in the instant case does not contest the fact that her pleading did not state a cause of action. Although the original complaint was lengthy, it did not state a single action or inaction by Dr. Ostendorf which could constitute negligence. As noted by this Court in *Capers v. Lee, supra*, [a case which was decided several years after *Beasley v. Girten*, 61 So. 2d 179 (Fla. 1952)], a party whose pleading has been dismissed with leave to amend is placed upon notice that failure to amend within the allotted time will result in a dismissal of the action with prejudice. The Plaintiff in the instant case was on notice that her right to pursue any claim against Dr. Ostendorf was in severe jeopardy. Her inaction in failing to amend the complaint for such a lengthy period of time was not disobedience to the order of dismissal. Nonetheless, that failure to file an amended complaint resulted in a continuing failure to state a cause of action long after the allotted time for filing an amended complaint had expired. The ruling of the trial court and the decision of the District Court are entirely consistent with all decisions of the appellate courts in this state which have considered similar questions. In her brief, the

Plaintiff has failed to cite to any of these numerous cases. This case did not involve a dismissal as a sanction for willful misconduct, and the Plaintiff's reliance upon cases involving willful misconduct and discovery violations is inappropriate.

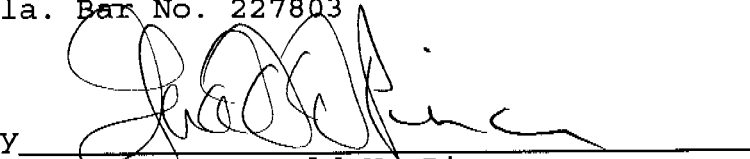
CONCLUSION

The District Court properly recognized that the trial court did not abuse its discretion in refusing to permit the Plaintiff to file an amended complaint 158 days after the expiration of the time for filing where the Plaintiff offered no reasonable explanation for her lack of diligence. Respondent, D. Steven Ostendorf, D.P.M., requests that this Court dismiss the petition for review or approve the decision of the District Court in affirming the dismissal of the action.

Respectfully submitted,

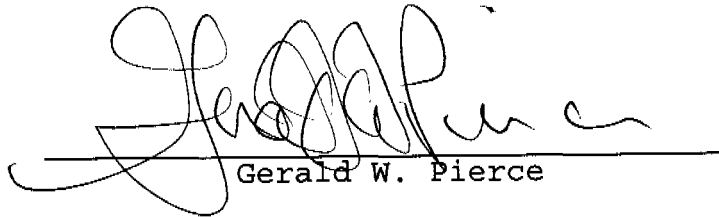
HENDERSON, FRANKLIN, STARNES & HOLT, P.A.  
Attorneys for Appellee  
Post Office Box 280  
Fort Myers, FL 33902-0280  
(813) 334-4121  
Fla. Bar No. 227803

By

  
\_\_\_\_\_  
Gerald W. Pierce

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to KELLEY A. FINN, ESQUIRE, Suite 900, Courthouse Plaza, 28 West Flagler Street, Miami, Florida, 33130, by regular United States Mail this 11th day of June, 1993.

  
Gerald W. Pierce