047

IN THE SUPREME COURT OF FLORIDA

HEIDE M. HESS JONES,

Appellant,

vs.

CURTIS LEE JONES,

Appellee.

_____/

CASE NO.: 80,809

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

LOWER COURT D.C.A.
CASE NO.: 91-2258

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE

The Appellee, CURTIS LEE JONES, agrees with the Statement of Case of HEIDE M. HESS JONES, with the exception that the facts dealing with the Wife's ability to afford the same visitation the Husband had or the extended visitation that she proposed in that that Wife cannot, by virtue of her financial statement at the time, afford what she proposed or what the Husband's visitation was and, further, that the lower court found that the parties could not afford her plan of extended visitation, let alone the same visitation that the Husband has now. (See Appendix A)

STATEMENT OF FACTS

The parties were married in Ormond Beach, Florida, June 4, 1983. (R.19) The Wife, a German resident, agreed to come to the United States to marry her husband and live in the United States. The Wife studied in the United States to gain certification as a registered nurse, a position she was trained for in Germany. On July 24, 1985, Robert Jones was born as issue of this marriage in St. Augustine, Florida. The Husband had a very close relationship with the minor child from birth because of the Wife's need to be recertified in the United States and her subsequent work as a nurse. (R.20) Because of her work and schooling the Husband was required to feed, clothe, bathe, and take care of all the child care needs for this, the parties' only child.

In 1986 the parties and the minor child went on vacation to Germany with round trip tickets. (R.19) Once in Germany the Wife indicated she would not return to the United States and secreted herself and the minor child in the Black Forest (Germany) and said she was not coming back. (R.19) After a return to the United States, the Husband went back to Germany to live with his wife and son because that was the only option he had if he wanted to see his son. (R.20)

In July 1987 the parties agreed that the Husband could vacation in the United States with the minor child for 90 days. (R.21, 22) The Wife came to the United States after 61 days and demanded the child so that she and the child could return to Germany. This prompted the Husband to file for divorce in

September 1987 in Volusia County, Florida. In October 1987 a temporary Order was entered awarding shared parental responsibility with the Husband as the primary custodian. (R.144) The Wife returned to Germany and the Husband performed all the child care functions for the minor child until the Wife returned to the United States in 1989. This reinforced the close relationship between the Husband and the minor child. (R.29) In late 1989 the case went to trial and Judge McFerrin Smith made a finding that the Wife should be the primary residential custodian and prevented her from taking the child out of the United States. (R.176, 177) The parties agreed not to submit a Final Judgment right away. Instead, they waited until they reached their own agreement and incorporated that into a Stipulated Final Judgment that was entered over six months later on May 29, 1990. The parties specifically agreed that the minor child could not be removed from the jurisdiction of the trial court for a period in excess of three weeks unless the other parent consented in writing or obtained a court order. (R.25 - paragraph 10, Final Judgment, May 29, 1990 [R.179, 180, 221-227]) This Final Judgment was not appealed and became the basis of the parties' agreement. Thereafter, continuing the Husband's close relationship with the minor child, he had physical custody on a rotating basis at least three full days and nights a week. (R.11) In addition, the Husband's mother, the paternal grandmother of the minor child, developed a very close

relationship. (R.46) This worked well until the Wife voluntarily changed her work schedule in January 1991 from nights to days with a fifteen (15) percent reduction in pay. (R.102, 103) The Wife abruptly reduced the Husband's visitation to every other weekend and one day a week when she would let him see the minor child or he screamed loud enough to let him see the child. (R.12)

This caused friction between the parties and did not work as well as the previous arrangement. This change occurred four months prior to the Wife filing the Petition for Modification to allow her to take the minor child to Germany permanently. The Husband complained that the Wife withheld visitation during this time. (R.104, 105)

At the time of the trial on the Petition for Modification, the Wife was employed as a registered nurse at Halifax Medical Center in Daytona Beach and the Husband in job retraining at Daytona Beach Community College in Daytona Beach after being laid off from his employment as a mechanic. The Wife is a United States resident alien with a permit to work in the United States and is in good standing at her job with excellent income and benefits in this area. The minor child while residing with his mother lives in a house that the two of them occupy. When the minor child is with the Husband, he resides in a single family home with his own yard, his own room and his own friends. When the minor child visits his paternal grandmother, he stays in a

single family house. The Wife testified she planned to move to Germany to stay with her sister, her sister's two children, and her grandmother in one house. The Wife believes this would enhance the child's life. The Husband disagrees and said it would be a detriment to the child. The minor child speaks very little German, two sentences, in fact, and does not understand even basic numbers one through four. (R.132) The minor child attends first grade at Warner Christian Academy in South Daytona and the Wife indicates he is doing well there. (R.113) The Wife believes it is in the best interest of the child to take him out of a school where he is doing well and enroll him in a school in Germany where the classes are taught in German until the fourth grade when English is taught. The Wife acknowledges the move to Germany would result in the child not going to school for a year because he does not speak the language. (R.113)

The minor child is a United States citizen with a United States passport and a United States birth certificate. The minor child has used the passport to enter Germany for three week vacations with his mother. The mother suggests the child is a German by birth but offered no written documentation to support that claim. The Wife suggested an alternate visitation plan of summer and holiday visitation which the Court found the parties could not afford. (R.43)

The Husband asserts that because of his close relationship and his continuing desire to be with Robert at least three

continuous days a week, a move to Germany would impair and impede that relationship. (R.41) Even if he got the child for the summer, his work schedule would prevent him from speding the time he gets with Robert now and would allow only maybe a week of significant time with him. (R.42) The paternal grandmother stated she would be devastated if the child were taken permanently to Germany. (R.122) The Wife testified she would not move to Germany without Robert. (R.108) The Wife is asking the Court to modify the Husband's ability to see Robert while she is not willing to accept the same for herself.

SUMMARY OF ARGUMENT

The lower court properly denied the Wife's Motion to Modify Final Judgment of Dissolution of Marriage to allow her to take the parties' six year old son to her native homeland of Germany where she voluntarily (emphasis added) decided to reside. The lower court properly applied Cole v. Cole, 530 So.2d 467 (Fla. 5th DCA 1988), Jones v. Vrba, 513 So.2d 1080 (Fla. 5th DCA 1987), Giachetti v. Giachetti, 416 So.2d 27 (Fla. 5th DCA 1982), and, in addition, correctly applied the standards and the six-part test set forth in Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989). The lower court, contrary to many lower court decisions, made specific findings in the Order (Final Judgment) to determine the best interest of the minor child which required that the Wife's Motion to move the child to Germany should be denied.

The Fifth District Court of Appeal properly affirmed the lower court's order (Final Judgment) and incorporated into the law of the Fifth District the reasoning and six-part test set forth in Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989), thereby aligning itself with the other districts that applied the Hill test to determine what the best interests of the minor child are when the custodial parent seeks to move to a foreign jurisdiction.

The opinion of the Fifth District in this case allows the trial judge to consider not only the reasoning of Giachetti v. Giachetti, Cole v. Cole, Jones v. Vbra, and

Mast v. Reed, as it applies to the parties, but also the best interest of the minor child as applied and required in the six-part test of Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989).

The Fifth District in its opinion in this case has paved the way for the trial judge who has the discretion by law to weigh on a case by case basis the residency requirements, lifestyles, work requirements, schooling requirements, financial resources, and other facts that would lead the trial judge to the ultimate decision based upon all those tests as to whether or not the move requested in the Motion of the party is in the best interest of the minor child.

ARGUMENT

A. The law of the Fifth District in post-dissolution marital cases where a custodial parent seeks to move to a foreign jurisdiction is not in direct conflict with the law announced in the Second, Third, and Fourth Districts.

The Fifth District Court of Appeal in a decision rendered in this case specifically adopts the six-part test set forth in Hill v. Hill (See Appendix B) because in the lower court the trial judge took the time to render a specific written opinion in this case wherein he specifically applied the standards of Cole v. Cole, 530 So.2d 467 (Fla. 5th DCA 1988), Jones v. Vbra, 513 So2d 1080 (Fla. 5th DCA 1987), Giachetti v. Giachetti, 416 So2d 27 (Fla. 5th DCA 1982), and also, but ultimately (emphasis added), in order to determine the best interest of the child, applied the standards of Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989) to incorporate all of this information in rendering the lower court decision. This detailed written opinion by the lower court judge was specifically affirmed by the Fifth District Court of Appeal.

The Appellant argues that the Fifth District is in conflict with the law announced in the Second, Third, and Fourth Districts; however, the Appellant is arguing in favor of the principles announced in Hill v. Hill which the Fifth District Court of Appeal has now adopted by this opinion which essentially

puts it in accord with the cases relied upon in the Second, Third, and Fourth Districts, which all apply the six-part test in Hill. These cases may factually be different from the case at hand; however, each District essentially relies upon the six-part test as outlined in Hill v. Hill to reach the ultimate conclusion as to the best interest of the minor child which was done by the trial judge in this case and which was affirmed by the Fifth District in this case. (See Appendix B)

The Appellant argues that a Petition for Modification would not be necessary in the Second, Third, or Fourth Districts. It is doubtful that any trial judge sitting in the Second, Third, or Fourth Districts would consider a Motion by a party who sought to move to Germany with a minor child who had previously been ordered not to remove the child from the state of Florida without the consent of the other party or a court order without applying the test as to whether or not there was a substantial and material change of circumstances as required by the case law that deals with modification and a material and substantial change of circumstances. It cannnot be reasonably argued that the relocation issue as it is factually portrayed in this case can be anything but a substantial and serious change as to the circumstances of the parties which would give rise to the trial judge having to make a decision based upon the circumstances of the parties and the best interest of the minor child as to what, based upon his discretion, his review of the evidence, and his

review of the testimony would wind up balancing the interest of the parties and the best interest of the minor child. See Giachetti v. Giachetti, supra; Cole v. Cole, supra; Jones v. Vbra, supra; and Hill v. Hill, supra.

The last part of the Appellant's argument in the Section entitled "A" begs the question of this Court to decide:

> "shall this Court adopt a position that sets a standard wherein the custodial parent may move wherever that parent wants and take the minor child with him or her to the detriment of the noncustodial parent simply because a trial judge has been required by the law of this state to designate one person as the custodial residential parent?"

Can this Court turn its cheek on the rights and the fate of the noncustodial parent who, if the Appellant is successful, would be cast into the darkness of not being afforded the meaningful, loving, frequent (emphasis added), and familial atmosphere that is required by the present law of this state? See Florida Statute 61.13(2)(b)1.

Will this Court allow, as the Appellant argues, the rights of the mother to move wherever she wants, which represents her personal wishes, to counteract simply because of that, the noncustodial parent's (male parent's) ability to have meaningful, loving, and frequent familial contact with his minor children? Will this Court penalize, for the most part, the male parent because of his money-making function and because he is probably trapped in that position in order to pay the support that is required by the laws of this state or will this Court raise this

issue to the requirement that treats both parents equally? See Florida Statute 61.13(2)(b)1.

It is submitted that it took two parents to create the minor child that is at issue in this case and every other case before this Court and that standard, that being two parents, should be the ultimate place upon which the Court should base its inquiry. Two parents are the best solutions to the problems and the best interest of caring for a minor child from infancy to adulthood. If this Court takes the position that a custodial parent, be it a male or a female, simply because that parent was granted custody, has the right to deprive the noncustodial parent by virtue of the custodial parent moving to a distance that makes it impossible or unaffordable or does not provide frequent, meaningful, continuing, familial, loving, and close contact between the noncustodial parent and the minor child, then this Court will be contributing to the exploding problem of delinquency, crime, disrepect, divorce rates and other social factors that are common with broken homes that do not have a close, frequent, continuing, familial, loving and meaningful contact by both parents.

A message needs to be sent to the parents of our state that if you bear a child, you bear a responsibility jointly to care for that child, support that child, and to have a close, frequent, continuing, familial, loving, and meaningful relationship with that child. This Court is asked by the Appellant to take the misguided direction that, simply because people get divorced and one of them gains custody, that that, in and of itself, should, because that person was awarded primary

responsibility, dictate whether or not the noncustodial parent effectively has any relationship at all with the minor child. This is contrary to the natural law and is contrary to the principles recited in Florida Statute 61.13(2(b)1. This Court simply needs to decide the ultimate question . . . will this Court allow one parent to do what the natural law and order requires two parents to do? Will this Court allow a custodial parent to deprive a noncustodial parent of a close, frequent, meaningful, loving, continuing, and familial relationship with their minor child simply because, as in this case, the parent is homesick and voluntarily (emphasis added) decides to relocate to her native Germany, a country to which her minor child really does not know, of which he does not speak the language, or with which he does not feel comfortable.

B. The evidence before the lower court did not meet the test of Hill v. Hill to warrant granting the Wife's Petition for Modification.

The evidence introduced below before the trial court did not meet the six-part requirements of Hill v. Hill. It is not often that a trial court judge takes the time and puts forth the effort to write an Order which is essentially the lower court's opinion with recitation of the law and application of the facts that he applied to the law. However, that is exactly the situation in

this case, since Judge Foxman, the trial court judge, prepared an extremely detailed Order. (See Appendix A)

The trial judge heard the evidence, had the responsibility to weigh the evidence, and had the discretion to apply the facts to the law in accordance with the test set forth in Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989). The following recitation of the portion of the lower court's Order recites each test and gives the Court's reasoning with regard to why the individual test was met or was not met:

"In trying to answer the ultimate question of what is Robert's best interests in this matter, the Court turns to the six part test set forth in Hill vs. Hill, 548 So.2d 705 (3rd DCA, 1989).

1. Whether the move would be likely to improve the general quality of life for both the primary residential spouse and the child(ren):

> There is a good chance that the move would improve Heide's quality of life. She is homesick. She misses her homeland and her family. She has a good job with good benefits waiting for her. She would be happier in Germany than in the United States. The Court does not believe the move will benefit Robert. He has lived here in Florida for four of his six years. He is happy here, well adjusted, and doing well in school. He is very close to his paternal grandmother who lives in Volusia County, Florida. Robert also has a very limited command of the German language. The Court feels that a move to Germany at this point would be a major disruption of Robert's life.

2. Whether the motive for seeking the move is for the express purpose of defeating visitation:

The move is not sought expressly to defeat visitation, although it will in effect defeat visitation.

3. Whether the custodial parent, once out of the jurisdiction, will be likely to comply with any substitute

visitation arrangements:

Although there is some question, the Court believes Heide would comply with any substitute visitation.

4. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or children and the non-custodial parent:

The Court does not believe any substitute visitation would adequately maintain the current meaningful relationship between Curtis and Robert.

5. Whether the cost of transportation is financially affordable by one or both of the parents:

At this point Curtis could not afford round trip fare to Germany, although he probably will be able to do so in the future. Heide can afford a portion of the transportation costs.

6. Whether the move is in the best interests of the child.

The contemplated move is not in the best interests of the child.

The Court concludes that an intended move does violate the Giachetti duty of the custodial parent. The Court also concludes that per the Hill test the move is not in the child's best interests. Finally, the intended move expressly violates Paragraph Ten of the Final Judgment.

It is clear, based upon the lower court's reasoning and application of the facts to the law, that he, the trial judge, appropriately applied the Hill test and, based upon the Hill test, the best interest of the child would not be served by moving a six year old child who does not speak the German language, who is well adjusted here in the United States, who is doing well in school, who has family ties and a very close relationship with his father and his father's family to a foreign country where he would be required to miss a year's school. Furthermore, he would be living in a congregate living situation with his mother's family as opposed to having his own bedroom,

own single family house or apartment which is what he has been used to for the part of his lifetime that he can remember and to which he can relate. (R.74, 75) Further, Robert's base language is English. A move to Germany, which would thrust him into the German school system, would cause him to be looked upon by the other children in the school as a foreigner. Contrary to what the Appellant argues, Robert does not have a deep German heritage since Robert has never attended a German school, has had no interaction with German children of his own age, and Robert would be treated by the German children as a foreigner, an American, in Germany. It would be very difficult for Robert to overcome the language barriers and then attempt to fit in with the German children who are native Germans and not troubled with the situation of having a German mother who resides in Germany and an American father who resides in the United States of America.

In the recent case of Petrullo v. Petrullo, 604 So.2d 536 (Fla. 4th DCA 1992), the Fourth District Court of Appeal held that the father was entitled to a change of custody from the wife who moved to Colorado where the Final Judgment, as is the case here, gave the husband substantial visitation. In the Petrullo case, the husband had visitation every other weekend, holidays, half the child's summer vacation, and, if the wife's employment required her to be gone overnight, she must give the husband the opportunity to provide care for the minor child. In our case,

the husband routinely kept the child for three out of seven days every week until just before the modification proceeding was filed. Then the Wife attempted to limit the Husband's visitation with the minor child. The visitation in this case is even greater than in the Petrullo case. It would appear that the Fourth District Court of Appeal, contrary to what the Appellant argues, recognizes the noncustodial parent's rights to the visitation that was granted to him/her in the Final Judgment, as is the case herein. Based upon the Petrullo decision, if it was applied in this case, it would require the wife to provide substitute visitation which would essentially mean flying the child from Germany every week and this clearly would not be affordable to the parties or the minor child. Emphasis should be made here that the lower court found that:

> "One of the key factors in the case is the fact that Heide's move to Germany is voluntary. She still has her job in Florida. She is not forced to move to Germany because of economic necessity." (See Appendix A)

Taking that finding one step further, should this Court turn its back on the noncustodial parent's right to see and have a close relationship with his son every week because the custodial parent is homesick? This Court should affirm the decision of the Fifth District Court of Appeal in this case. Clearly, the Fifth and the Fourth Districts recognize that when there is a close relationship between a minor child and the noncustodial parent, the Court should honor that relationship and foster that

visitation that is given to the noncustodial parent, even if it means transferring custody of the minor child to thenoncustodial parent in the event that the custodial parent moves from the jurisdiction of the Court.

C, D. The lower court's denial of the Appellant's petition to relocate to her native home in Germany was not an erroneous application of the law or an abuse of discretion and did not produce a different result in the application of the Hill test based upon other cases from other District Courts of Appeal.

The Appellee has combined his arguments against the issues raised by the Appellant in Issues C and D in this section. The Appellant argues that the lower court's denial of the Wife's Petition for Modification was an erroneous application of law based upon Giachetti and Jones v. Vbra. The Appellant has consistently throughout her argument failed to recognize that both the lower court and the Fifth District Court of Appeal recognized and cited to the lower court's proper application of the six-part test in Hill v. Hill. As previously argued, this essentially aligns the Fifth District with the other courts of appeal that have adopted the Hill v. Hill test. Clearly, the Appellant is wrong in arguing that the Fifth District has not offered any legal basis compelling the rule of law and decisions it has announced nor has it cited any statute or other Florida law other than its own decisions requiring its position. Once again, the Fifth District Court of Appeal specifically adopted and affirmed the ruling of the lower court in this case which specifically in the opinion written by the lower court applied

the six-part test in Hill v. Hill. Since the Fifth District Court of Appeal in the decision in this case has weighed the best interests of the parties with the best interest of the minor child, it is clear that the Fifth District has adopted an application of law that would combine what all the districts have considered in an application to relocate by a custodial parent.

The Appellant herein seems to argue that all discretion should be taken away from a trial judge in making a decision such as the one at hand. This clearly would be a dangerous rule of law and would upset the established principles of law that would allow the trial judge wide discretion in deciding what would be the best interest of a minor child and what would be an unreasonable interference with the custody and visitation plan adopted by the parties and incorporated into a Final Judgment such as in the case at hand. See Parker v. Parker, 519 So.2d 673 (Fla. 1st DCA 1988) It should again be noted as was recited in Parker v. Parker, supra:

> "The trial court is the proper forum for resolving disputes regarding removal of children from Florida, not the Appellate Court. It is the trial judge who has seen the parties and heard the testimony. This court, therefore, will not reverse the trial judge's decision in such matters, absent legal error or clear abuse of discretion."

This Court need only look to the detailed opinion of the lower court to determine that the trial court herein did not abuse its discretion to apply the testimony that it heard to the law, not only applicable in the Fifth District, but also in the Third,

which law in Hill v. Hill has been adopted by the Second and Fourth Districts.

The Appellant relies upon the decision in Tamari v. Turko Tamari, 599 So.2d 680 (Fla. 3rd DCA 1992); however, that case is factually distinguishable from this case in that the father in that case did not have a close, both in proximity and in visitation-type, relationship with the minor child. Furthermore, the father in that case was separated from his son prior to the move that was requested by the wife and lived in New York. The wife and the minor lived in Miami. Consequently, the request by the wife to move to a foreign country did not involve the noncustodial parent residing in Florida and did not involve a visitation schedule which, by final judgment, property settlement, or inference required that the minor child stay in a geographical area in order to accomplish the visitation and for which the parties had contracted or the court had ordered. See Petrullo v. Petrullo, supra. In this case, the noncustodial parent had visitation three days a week, then weekends, with a day during the week and holidays, all in the state of Florida, all in the same geographical location. Clearly, these facts are distinguishable from the facts that the court was faced with in the Tamari case.

This is precisely why the Court needs to affirm this decision and allow the trial judge the discretion to apply the principles announced by the Appellate Court in this case on a

case-by-case basis to weigh the best interest of the custodial parent against the noncustodial parent against the best interest of the minor child. The holding of the Fourth District in Costa v. Costa, 429 So.2d 1429 (Fla. 4th DCA 1982) looked at this issue and found:

> "Both of these parents have a fundamental, continual and permanent obligation to these children that can only be satisfied by the love and attention, the close proximity of the two of them can provide at this time. The Court can best serve the children's interests by making it possible that this occurs; thus, the wisdom of the restriction in the Final Judgment which is supported by substantial authority."

See also Giachetti v. Giachetti, 416 So.2d 27 (Fla. 5th DCA 1982)

Let the trial judge, not the Appellate Courts, decide what the best interest of a minor child should be on a case-by-case basis. No case cited by the Appellant is exactly the same as the case at hand and that is precisely why a trial judge needs the discretion to decide each individual case on a case-by-case basis, weighing the factors that I have specified herein.

E. This Court should adopt the Hill test and affirm the lower court's Order as well as the Fifth District Court of Appeal's opinion as it was applied in this case.

As I previously argued, the Fifth District Court of Appeal in this case specifically adopted the Hill test so I would agree with the Appellant herein to the extent that the Court should adopt the Hill test; however, the Court should adopt the Hill test in conjunction with the reasoning outlined in Giachetti v. Giachetti, Jones v. Vbra, and Cole v. Cole, which weigh the best interests of the parties, to wit: the right of the

custodial parent to be free to move throughout the country for good cause versus the noncustodial parent's right to earn a living and have a close, frequent, continuous, and geographically-close relationship with his or her minor child. A single test which did not provide for the rights of the noncustodial parent would clearly violate the spirit of Florida Statute 61.13(2)(b)1, which seems to indicate that the public policy of Florida is to assure frequent and continuing contact by the minor child with both parents after the separation or divorce. In this case, the Husband testified that having the summer visitation with his minor child as opposed to the visitation he was afforded prior to the modification would not be as meaningful because he would still be required to go to work and would not be able to spend the type of quality time that he wanted to with the child because of his work or his schooling and would leave him basically only to see the child in the evenings or over the weekends. (R.42) The cases that argue that summer visitation is an adequate substitute for the type of visitation schedule that was fashioned by the parties in their own plan and incorporated into a Final Judgment, affirmed by the trial judge as the best interest of the minor child and affirmed again by the Fifth District Court of Appeal, should not be taken lightly by this Court.

The Court should affirm the decision of the lower court in the Fifth District Court of Appeal in denying the petition of the Wife to modify the Final Judgment to move her son to Germany for noneconomic reasons simply because it is convenient and she is homesick, as no alternate plan of visitation would be affordable to the parties or could substitute what the parties had agreed upon themselves and which was confirmed by a Final Judgment.

CONCLUSION

The Appellee respectfully requests that the Court will affirm the judgment rendered below.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above and foregoing was furnished by mail this 10th day of June, 1993, to Jeffrey L. Dees, Esquire, 347 South Ridgewood Avenue, Daytona Beach, FL 32114.

PETER KEATING, Esquire
Attorney for Appellee