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SID J. WHITE
MAR 8 1993
CLERK, SUPREME COURT
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IN THE FLORIDA SUPREME COURT

THE OFFICE OF THE STATE ATTORNEY,
FOURTH JUDICIAL CIRCUIT OF FLORIDA,

Defendant/Petitioner,

vs. CASE NO. 81,229

TINA PARROTINO, as personal representative of the Estate of Diana L. McFarland,

Plaintiff/Respondent.
_____/

AMICUS CURIAE BRIEF OF THE STATE OF FLORIDA IN SUPPORT OF THE OFFICE OF THE STATE ATTORNEY, FOURTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

This case was filed in the Circuit Court of the Fourth Judicial Circuit by the personal representative of the Estate of Diana McFarland. The defendants were the City of Jacksonville and the Office of the State Attorney, Fourth Judicial Circuit. The complaint alleged the defendants had a duty to protect McFarland from attacks by James Wilson, and that their breach of that duty was the proximate cause of her death at the hands of Wilson. The trial court dismissed the complaint for failure to state a cause of action. On appeal, the District Court of Appeal, First District, affirmed the judgment in favor of the City of Jacksonville and reversed the judgment entered in favor of the State Attorney.

A. The Complaint

Because the trial court found the complaint failed to state a cause of action, the well-pleaded factual allegations of the complaint must be accepted as true.

The complaint alleges that McFarland terminated a personal relationship with James Harrell Wilson in the summer of 1986. Wilson, who had an extensive criminal background, began to threaten and harass McFarland and her family. On three occasions (in July, August and November 1986) Wilson attacked or threatened McFarland. Each time, the police were summoned. The police advised McFarland to

report Wilson's actions to the State Attorney, specifically to the Domestic Violence Program.

McFarland made this report on November 12, 1986, and requested that the State Attorney take action against Wilson. According to the complaint:

* * * *

> 30. Ms. McFarland was told that action would be taken against Wilson on her behalf. Ms. McFarland relied on this representation and believed that the Police and the STATE ATTORNEY would take the appropriate actions to protect her.
>
> 31. Wilson continued to assail, attack and threaten Ms. McFarland. Specifically, he harassed her in December 1986 and in January, February and March of 1987.
>
> * * * *
>
> 33. The STATE ATTORNEY assured Ms. McFarland that they would take action on her behalf to protect her form Wilson. Specifically, the STATE ATTORNEY was to obtain a Court Order restraining Wilson from any further contact with Ms. McFarland.
>
> 34. The STATE ATTORNEY was to assist the Police in taking action against Wilson which would prevent him from harassing Ms. McFarland and her family, and which would subject him to punishment for his previous actions. Such punishment was to serve as a deterrent to any further harassment or violence.
>
> 35. Ms. McFarland relied on the representations of the STATE ATTORNEY regarding their Domestic Violence Program. The objective of this Program is to assist people who are being

harassed, threatened and/or assaulted by people with whom they are acquainted. This Program is designed to obtain court and police assistance for people who need it. This Program is not set up for the sole activity of determining through prosecutorial discretion which people should be charged with crimes. Rather, this Program is intended to take an active role in the prevention of domestic violence.

36. Once the STATE ATTORNEY had agreed to provide assistance under this Program, the STATE ATTORNEY had an inherent duty which was special and specific to DIANA L. MCFARLAND, to perform their services with reasonable care and competence.

37. The STATE ATTORNEY never took any action on behalf of DIANA L. MCFARLAND. Unbeknown to Ms. McFarland, the STATE ATTORNEY never sought or obtained any Court Order, Police assistance or other help for her.

In May of 1987, Wilson shot and killed McFarland.

With respect to the defendant State Attorney, the complaint alleges:

38. The STATE ATTORNEY breached its duty to the decedent and was negligent in one or more of the following ways:

(a) By failing to take action against Wilson based on the numerous reliable reports supplied by the decedent;

(b) By failing to follow up with the Jacksonville Sheriff's Office to assure that appropriate measures were being taken to protect Ms. McFarland;

(c) By causing Ms. McFarland to forego other means of legal action, protection or services in reliance on the representations of the STATE ATTORNEY;

(d) By failing to thoroughly investigate the complaints against Wilson;

(e) By failing to keep adequate reports regarding the activities of Wilson;

(f) By misplacing or misfiling the documents submitted by Ms. McFarland;

(g) By taking no action on the documentation submitted by Ms. McFarland;

(h) By failing to institute appropriate procedures to assure that action would be taken on Ms. McFarland's complaint within an appropriate period of time.

39. As a direct and proximate result of the negligence of the Defendant, the STATE ATTORNEY, Ms. McFarland was killed by Wilson.

B. The Decision of the District Court of Appeal.

The decision of the district court of appeal found that the State Attorney had a common law duty of care rooted in §§ 315(b) and 323 Restatement (Second) of Torts. Specifically, the State Attorney's Office agreed to secure a restraining order and to assist the police in protecting McFarland. Although it termed the promise to assist the police "somewhat nebulous," the decision stated that:

> Significantly, the appellant also alleged McFarland's reliance upon these promises, her failure to seek protection elsewhere, the misplacing of the documents by the Office of the State Attorney, and McFarland's resulting death.

Parrotino v. City of Jacksonville, ___ So.2d ___ (Fla. 1st DCA 1993) (18 FLW D61, 62). The allegation of a promise to secure a restraining order and McFarland's reliance thereon and failure to seek other means of protection brought this case within the ambit of § 323 of the Restatement. Id. at 62.

Without further analysis, the district court concluded that the complaint sufficiently alleged a "causal nexus" between the State Attorney's alleged inaction and McFarland's death. Id. at 63.

The district court ruled that even though "prosecutors enjoyed broad immunity" under the common law, following the enactment of section 768.28, Fla.Stat., state attorneys "like other state agencies, are entitled to the defense of governmental immunity only when the act or omission involved is discretionary in nature, rather than operational." Id. Although finding the decision of the State Attorney's Office to assist McFarland by securing a restraining order a discretionary act, its actions in implementation of that decision and its alleged failure to carry through "were purely operational," and therefore not entitled to "governmental immunity." Id.

Curiously, the district court added:

> If the [State Attorney] had simply refused to provide assistance at the time of McFarland's report, or had chosen at that time not to seek a restraining order, there could have been

> no liability for those purely discretionary, policy determinations. The appellant's allegations that the appellee promised McFarland that it would secure a restraining order to protect her is all-important.

Finding its decisions involved issues of great public importance, the court certified the following questions:

> 1) DID A COMMON LAW DUTY OF CARE RUN FROM THE OFFICE OF THE STATE ATTORNEY TO THE VICTIM, MCFARLAND, DUE TO THE VICTIM'S RELIANCE TO HER DETRIMENT UPON THE VOLUNTARY ASSURANCES OF THE OFFICE OF THE STATE ATTORNEY THAT IT WOULD ACT ON HER BEHALF TO OBTAIN A RESTRAINING ORDER FOR THE PURPOSE OF PROTECTING HER FROM FURTHER HARASSMENT OR VIOLENCE BY JAMES WILSON?
>
> 2) IF SO, ARE THE ACTIONS AND OMISSIONS OF THE OFFICE OF THE STATE ATTORNEY IN CARRYING OUT ITS UNDERTAKING TO SECURE A RESTRAINING ORDER DISCRETIONARY ACTIVITIES FOR WHICH THE OFFICE OF THE STATE ATTORNEY IS IMMUNE FROM LIABILITY?

SUMMARY OF ARGUMENT

A. Under the common law, and for reasons of sound public policy, prosecutors were entitled to absolute immunity for acts performed in the exercise of their prosecutorial duties. Even following enactment of section 768.28, Fla.Stat., a limited waiver of sovereign immunity, prosecutorial actions have been considered discretionary in nature, hence carrying no duty of care. Therefore, the manner in which a prosecution is undertaken or not

undertaken is still a matter of governance and still immune from liability. The district court erred in ruling the State Attorney's actions were operational and thus carried a duty of care.

B. Even if various actions in the course of prosecution can be considered operational, no duty of care existed based on the State Attorney's alleged assurances that he would seek a restraining order. Such assurances do not amount to the explicit promise of protection that is required to establish a special relationship. In fact, the State Attorney did not promise to protect McFarland. Moreover, McFarland failed to plead any facts whatsoever showing she justifiably relied on the State Attorney's assurances over the course of the four or five months following their November meeting. During those months, McFarland was attacked on at least four occasions, and each time she called the police for protection. The complaint alleges no facts showing any reliance, much less justifiable reliance, on a restraining order that she never had reason to believe existed.

ARGUMENT

I. THE STATE ATTORNEY'S VOLUNTARY ASSURANCE THAT HE WOULD SEEK A RESTRAINING ORDER AND MS. MCFARLAND'S ALLEGED RELIANCE ON SUCH ASSURANCES DID NOT CREATE A COMMON LAW DUTY OF CARE.

A. The State Attorney's Immunity In The Performance Of His Duties And Discretionary Acts Is An Absolute Bar To Any Suit Based On The Performance Of Those Duties And Acts.

Heretofore, there has never been any doubt that under Florida law prosecutors enjoy absolute immunity for acts performed within the scope of their prosecutorial duties. In Berry v. State, 400 So.2d 80, 84 (Fla. 4th DCA 1981), the Fourth District Court of Appeal held:

> [W]e reject appellant's contention that the adoption of Section 768.28, Florida Statutes (1979), abrogated the long-held common law immunity of public prosecutors. For reasons of public policy, a prosecutor enjoys absolute immunity for damages when he acts within the scope of his prosecutorial duties.

The First District Court of Appeal reached the same conclusion in Weston v. State, 373 So.2d 701, 703 (Fla. 1st DCA 1979), reasoning that:

> It is necessary to the judicial process in the enforcement of the criminal laws of the state that the state attorney be free from any apprehension that he or she may subject the state to liability for acts performed in the exercise of the discretionary duties of the office.

The court in Berry v. State, quoting from Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), articulated the obvious underlying policy: the

prosecutor must be free from the harassment of unfounded litigation that would deflect his energies from his public duties and undermine the independence of judgment required by his public trust. 400 So.2d at 84. As noted in the dissenting opinion below, Berry was cited with approval in this Court's decision in Trianon Park Condominium Ass'n v. City of Hialeah, 468 So.2d 912, 920 (Fla. 1985).

The dissent thus correctly points out that there was no common law duty of care with respect to a prosecutor's exercise of his prosecutorial duties. Hence, even assuming the existence of a negligent act, there is no liability because there is no duty. As stated in Trianon Park:

> How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws is a matter of governance, for which there never has been a common law duty of care. This discretionary power to enforce compliance with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors, arresting officers, and other law enforcement officials. . . .

468 So.2d at 919.

To impose a duty upon a prosecutor to undertake a prosecution or to procure a restraining order and to do so without any arguable negligence would have precisely the untoward effect anticipated in Berry and Imbler v. Pachtman. Once prosecution is characterized as an operational act, the

manner of its undertaking is open to question at every turn because of the duty to act with care. That has never been the law in Florida or in any other jurisdiction. This Court has unequivocally stated that the State's waiver of sovereign immunity pursuant to § 768.28, Fla.Stat., "did not of itself create any new duties of care." Kaisner v. Kolb, 543 So.2d 732, 733 (Fla. 1989), citing Trianon Park Condominium Ass'n v. City of Hialeah, 468 So.2d 912, 917 (Fla. 1985).

The First District's reliance on § 323 of the Restatement (Second) of Torts (1965) is therefore misplaced. As this Court set forth in Trianon Park, category II governmental functions relating to law enforcement and protection of the public safety -- and explicitly including actions of state attorneys[1] -- are "matter[s] of governance, for which there has never been a common law duty of care." 468 So.2d at 919. By definition, the functions of a prosecutor are not operational in nature. Hence, while § 323 arguably may define a duty in the appropriate circumstances for category IV governmental functions, e.g., providing professional services, it cannot do so for category II functions. While the First District cited several cases in support of its conclusion, not one concerns the fundamental and absolute immunity accorded category II

[1] Trianon Park cited both Berry v. State and Weston v. State.

functions. It thus erred in ruling that the State Attorney's actions were operational and hence carried a duty of care.

The dissent correctly made the analogy to the doctrine of judicial immunity as explicated in the Supreme Court's recent decision in Mireles v. Waco, ___ U.S. ___, 112 S.Ct. 282, 116 L.Ed.2d 9 (1991). Finding a judge to be immune for having ordered an attorney to be brought before the court with "excessive force," the Court stated that "the relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself'." 112 S.Ct. 288-289.[2]

There is no doubt about the nature of the act questioned in this case. It was to undertake a prosecution of sorts, more specifically, to secure a restraining order against Wilson. Such an act is the essence of a prosecutor's function and has never been considered operational in nature. See Imbler v. Pachtman, 424 U.S. at 431 (recognizing prosecutor's immunity in initiating a prosecution and in presenting the State's case). That this was not done for whatever reason is unfortunate, but the State Attorney does not thereby lose his immunity. As this Court further stated in Trianon Park:

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[2] The Supreme Court noted some years ago that the "common law immunity of a prosecutor is based upon the same considerations that underlie the common law immunities of judges. . . ." Imbler v. Pachtman, 424 U.S. at 422-423.

> We find that there is no governmental tort liability for the action or inaction of governmental officials or employees in carrying out the discretionary functions ... there has never been a common law duty of care with respect to these ... and the statutory waiver of sovereign immunity did not create a new duty of care.

468 So.2d at 921 (emphasis added).

The plaintiff asks this Court to recognize a new tort, the negligent failure to prosecute, in fact negligence of any kind in the allegedly "operational" act of prosecution. How easily and surely this tort will expand into the negligent failure to investigate, the negligent misplacement of a file (both asserted here), the negligent failure to more fully investigate, the negligent failure to charge all who should be charged, the negligent failure to adduce the right evidence or subpoena the necessary witness, the negligent dismissal of a case, etc. And if a victim of a crime such as McFarland has a cause of action for the prosecutor's "operational" negligence, why not, in the right case, the acquitted criminal defendant, who but for various acts of alleged operational negligence would not have been brought to trial?

The decision below, in recognizing operational negligence, strikes at the very heart of prosecutorial immunity. The immunity left the prosecutor under the decision below is no immunity at all. A state attorney is immune only if he or she decides not to act. Once the

decision to act is made, the implementation of that decision is operational and thus subject to claims of negligence.

The question before this Court is preeminently a question of policy. Exposure of prosecutors to liability for alleged acts of "operational" negligence in prosecuting a case should only follow the most considered decision of the legislature.

B. The State Attorney's Assurances Were Not Sufficient To Create A Special Relationship And A Consequent Special Duty To Protect Ms. McFarland; Nor Does The Complaint State A Claim Of Justifiable Reliance On Those Assurances.

Florida case law recognizes that a common law duty of care may arise only in certain narrow circumstances where a "special relationship" exists between the governmental unit and the individual. Generally, this duty has been recognized only where the government or its agent: (1) takes the individual into custody; or (2) significantly limits his freedom or impairs his ability to act on his own, including his ability to protect himself; or (3) makes explicit promises of protection on which the individual justifiably relies. Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989); Everton v. Willard, 468 So.2d 936 (Fla. 1985).

The complaint fails to allege the occurrence of any of these events. It merely alleges that the State Attorney gave assurances that he would seek a court order restraining Wilson from further contact with Ms. McFarland

and would assist the police in taking action against Wilson. The majority opinion below characterized the latter allegation as "nebulous" but found the former stated a sufficient basis for finding a common law duty.

For all the reasons and authorities set forth in I.A., supra, it is submitted that no common law duty existed on the basis of the State Attorney's representation that he would seek a restraining order. This point aside, however, the alleged assurances were insufficient as a matter of law to create a special relationship.

A special relationship can arise only in the most narrow of circumstances, particularly in the field of law enforcement. In Everton v. Willard, 468 So.2d 936 (Fla. 1985), this Court stated:

> We recognize that, if a special relationship exists between an individual and a governmental entity, there could be a duty of care owed to the individual. This relationship is illustrated by the situation in which the police accept the responsibility to protect a particular person who has assisted them in the arrest or prosecution of criminal defendants and the individual is in danger due to that assistance. In such a case, a special duty to use reasonable care in the protection of the individual may arise. See, e.g., Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).
>
> A law enforcement officer's duty to protect the citizens is a general duty owed to the public as a whole. The victim of a criminal offense, which might have been prevented through

> reasonable law enforcement action, does not establish a common law duty of care to the individual citizen and resulting tort liability, absent a special duty to the victim.

The complaint does not allege that the State Attorney ever promised to protect McFarland or ever accepted the responsibility of protecting her. A restraining order itself hardly amounts to physical protection or a promise of such. Hence, one could not logically rely on it to the exclusion of other means of protection as one might the protection of a police force. There is a significant difference between a police officer and a piece of paper. As the dissent noted, it cannot reasonably be contended that the relatively mild sanction of contempt would have deterred Wilson when the penalties for murder did not.

Hence, it is only actual physical protection on which a person has an arguable right to rely, as illustrated by Everton's reference to Schuster v. City of New York, 5 N.Y.2d 75, 180 N.Y.S. 265, 154 N.E.2d 534 (1958). In that case, the New York Court of Appeals reversed a trial court's dismissal of a complaint for failure to state a cause of action. Schuster, a private citizen, had aided the police in the apprehension of a notorious criminal. Schuster's participation was publicized, threats made against him, and three weeks later he was shot to death. Although the court's decision in Schuster appears to use rather broad language in determining when and how a duty devolves upon a

municipality to provide police protection to individuals who assist the police in enforcing the law, the concurring opinion makes clear the police had assumed the duty of physically protecting Schuster and, according to the complaint, negligently terminated the protection. 154 N.E.2d at 541. This assumption of the duty is a critical element of the cause of action. By merely stating that he would seek a restraining order, the State Attorney did not promise protection or assume the duty of protecting McFarland. See, e.g., Chambers-Castanes v. King County, 100 Wash. 275, 669 P.2d 451 (Wash. 1983) (requiring "explicit assurances" of police protection).

It is clear from the face of the complaint that McFarland had no reason to think the State Attorney ever obtained a restraining order. It is also clear that after she saw the State Attorney in November 1986, Wilson attacked her on four separate occasions in the four months that followed. On each occasion, McFarland called the police, not the State Attorney. There is no allegation that she ever had any contact with the State Attorney's Office after the November meeting.

Even if the State Attorney's assurances amounted to an offer of protection, the complaint fails to allege any facts to support a claim of justifiable reliance and is thus insufficient as a matter of law. See Cuffy v. City of New York, 69 N.Y.S. 255, 513 N.Y.S.2d 372, 505 N.E.2d 937

(1987). In Cuffy a landlord and his family were threatened and attacked on several occasions by certain tenants. After one particular episode, the fearful landlord asked for police protection and was told the tenants would be arrested in the morning. The police took no action, and on the following night the landlord and members of his family were seriously injured in yet another altercation. The New York Court of Appeals reasoned that the landlord and his family knew or should have known by the middle of the following day that no police action would be forthcoming and therefore they could not claim any justifiable reliance on the police assurances.

Moreover, the court viewed the Cuffy's continued stay in the house as voluntary and ruled that they could not claim they were unable to take other measures to protect themselves.

> [I]t is noteworthy that, according to the uncontradicted evidence, Ms. Cuffy had entertained relatives that day, her husband had been in and out of the house twice that very evening and the couple had plans to go out to dinner later that night. Thus, it certainly cannot be said that, having remained in the house overnight in reliance on the officer's promise, the family was thereafter trapped and unable to take steps to protect itself when its members knew or should have known that police assistance would not be forthcoming.
>
> It may well be that the police were negligent in misjudging the seriousness of the threat to the Cuffys that the Aitkinses' continued presence posed and

> in not taking any serious steps to assure their safety. It may also be that the police had a "special duty" to Eleanor and Cyril Cuffy because of the promise that Lieutenant Moretti had made and those plaintiffs' overnight, justifiable reliance on that promise. It is clear, however, that those plaintiffs' justifiable reliance, which had dissipated by midday, was not causally related to their involvement in the imbroglio with the Aitkinses on the evening of July 28th. Thus, they too failed to meet the requirements of the doctrine allowing recovery for a municipality's failure to satisfy a "special duty," and their claims, like those of Ralston Cuffy, should have been dismissed.

505 N.E.2d at 942.

In this case, it is abundantly clear from the complaint that McFarland relied on the police, not the State Attorney. There are no allegations that the State Attorney said anything that would have caused McFarland to rely wholly on a restraining order as a sufficient safeguard against a man whose violent propensities were only too well-known to her. Despite Wilson's continuing attacks over a four month period following the November meeting, there is no allegation that McFarland ever reestablished contact with the State Attorney. Instead, she called the police each time there was trouble. This being so, she cannot claim to have justifiably relied on the State Attorney's November assurances.

The majority below believed that the complaint sufficiently stated a cause of action even though the

complaint's allegations of McFarland's reliance are the most terse and conclusory statements imaginable. (See Complaint, paragraphs 30, 35 and 38(c).) What little is pleaded about McFarland's reliance does not amount to ultimate facts. Plainly, no facts are alleged that would establish her justifiable reliance on the State Attorney. Those facts that are pleaded show that she relied exclusively on the police.

The pleading here is particularly deficient in light of the fact that prosecutorial and governmental immunities are a bar to trial, not just a defense to liability. As the Supreme Court has stated in the context of the qualified immunity of government officials to civil rights suits:

> The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985).

Unlike federal officials, state officials in Florida do not have the right to immediately appeal a state trial court ruling denying an immunity claim raised by a motion for dismissal or summary judgment. That is one reason, in addition of course to other applicable pleading requirements, that a complaint should plead some facts showing that a government official whose actions are

ordinarily immune is not entitled to immunity. As the Supreme Court counselled in Harlow, the entitlement means immunity from suit; it is not just another defense to liability.[3]

Here, the plaintiff failed to plead ultimate facts showing that the State Attorney promised protection and facts showing that she justifiably relied on that promise to the exclusion of other available means of protection.

Both certified questions should therefore be answered in the negative. The complaint fails to plead facts showing McFarland was promised protection and that she justifiably relied on that promise. Even if there were allegations of fact that would support these conclusions, the actions of the State Attorney were immune as a matter of law because prosecutorial immunity applies to all actions of the State Attorney taken (or not taken) within the scope of his official and discretionary duties.

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[3] In the case of Katie Tucker v. Donald George Resha, No. 80,991, pending before this Court, the Attorney General, in a brief amicus curiae, has urged this Court to adopt a rule permitting the immediate appeal of a trial court order denying a claim of governmental immunity. Of course, such a rule should not substitute in the first instance for a requirement that a plaintiff plead ultimate facts that would state a cause of action against an official whose actions are ordinarily entitled to immunity.

CONCLUSION

The decision of the First District Court of Appeal should be reversed, and the trial court's order of dismissal reinstated.

Respectfully submitted,

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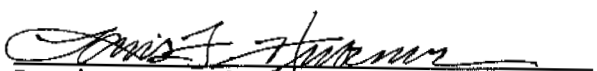
CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing **AMICUS CURIAE BRIEF OF THE STATE OF FLORIDA IN SUPPORT OF THE OFFICE OF THE STATE ATTORNEY, FOURTH JUDICIAL CIRCUIT** has been furnished by U.S. Mail to **ROBERT E. WARREN, Esquire**, and **J. BAXTER GILLESPIE, Esquire**, Taylor, Moseley & Joyner, 501 West Bay Street, Jacksonville, Florida 32202; **DARRYL D. KENDRICK, Esquire**, 1817 Atlantic Boulevard, Jacksonville, Florida 32207; **BRIAN J. DAVIS, Esquire**, Duval County Courthouse, Suite 605, Jacksonville, Florida 32202; and **ARTHUR I. JACOBS, Esquire**, Post Office Box 1110, Fernandina Beach, Florida 32034 this 8th day of March, 1993.



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