IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,375

SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.,

Petitioner,

vs.

PAIGE N. POLETZ, a minor, by and through her parents, WILLIAM RANDOLPH POLETZ, et al.

Respondents.

______________________________/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

REPLY BRIEF OF PETITIONER

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-and-
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TABLE OF CASES

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I.
STATEMENT OF THE CASE AND FACTS

With the single exception of the immaterial qualification footnoted below, we stand upon the adequacy and accuracy of our initial statement of the case and facts.[1] We also insist that the "additional facts" which the Poletzes have collected in their restatement of the case and facts are entirely irrelevant to the legal issue presented here. We will explain the utter irrelevance of these additional facts in the argument which follows.

II.
ARGUMENT

The legal issue presented here is how the reasonable value of a law firm's services is to be measured under the doctrine of quantum meruit, where the firm has been discharged

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[1] The Poletzes have challenged the accuracy of one sentence in our initial statement of the case and facts -- our assertion that, after his discharge by the Gary firm, "Mr. Taylor then found employment with the Montgomery firm, under an agreement by which he was to receive 50% of any fee recovered in the Poletzes' case." According to the Poletzes, "The agreement was that if Mr. Montgomery co-counseled the case with the Gary firm while Mr. Taylor was a member of that firm, the fee would be divided 50-50 between the two firms," but that there was no agreement to divide the fee after Mr. Taylor became an employee of the Montgomery firm. Most respectfully, the record does not support the Poletzes' assertion.

Mr. Montgomery testified that he agreed to split the fee with Mr. Taylor on April 21, 1992, but that he presently (i. e., at the time of trial of the charging lien) had no such agreement with him (T4. 201-02). The record reflects that Mr. Taylor and the Gary firm withdrew their representation of the Poletzes on March 31, 1992 (R. 899); that the Poletzes discharged the Searcy firm (for the second time) on April 17, 1992 (R. 899); and that Mr. Montgomery served his notice of appearance and motion to substitute his firm for the Searcy firm as the Poletzes' counsel on April 21, 1992 (R. 654, 657). It is therefore simply impossible that the agreement to which Mr. Montgomery testified was to be a co-counsel arrangement.

We have no idea what the facts are, except to the extent that they are reflected in the record; and if the record is correct, our initial assertion would appear to be far closer to the truth than the Poletzes' "correction" of it. In any event, the record is probably best characterized as ambiguous on the chronological sequence of the agreement and the employment, since it is at least possible that the fee division agreed upon on April 21, 1992, was for a "referral fee," and that Mr. Taylor was thereafter employed. This ambiguity is plainly irrelevant to the legal question before the Court, however, so in the final analysis there is no need whatsoever to resolve the ambiguity either way here.

without cause after substantially performing, but before fully completing, its contingent fee contract. Below, the trial court (1) concluded as a matter of law that the measure of the Searcy firm's quantum meruit recovery was governed by *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985); (2) found as a fact that the firm was entitled to be compensated for only 343.1 hours expended prior to its initial discharge as counsel of record on November 27, 1991; (3) found as a fact that the reasonable hourly rates of the various paralegals and attorneys involved were from $75.00 to $500.00; and (4) concluded as a matter of law that, based on those facts, the Searcy firm was entitled to a straight hourly fee award of $78,195.00, without consideration of any "contingency risk multiplier."

In our initial brief, we challenged only the trial court's *legal* conclusions. We argued that the trial court erred in concluding that the Searcy firm's recovery was to be measured by the factors set forth in *Rowe*; and we argued alternatively that, if *Rowe* applied, the trial court erred in declining to apply a "contingency risk multiplier" to the hourly fee computed under *Rowe*. The Poletzes have devoted hardly any responsive argument at all to our positions on those two *legal* questions. Instead, almost their *entire* brief is devoted to supporting a ruling which we did not even challenge here -- the trial court's determination to exclude the hours expended by the Searcy firm after November 27, 1991, from the computation required by *Rowe*. Most respectfully, the Poletzes have badly missed the point; they have argued nearly everything but the point here; and a large part of their brief is an utterly irrelevant response to an issue which was merely peripheral below, and which is now indisputably a non-issue here.

Of course, if the trial court's observations about the Searcy firm's *post*-November 27 efforts to retain its clients and protect its fees and costs had been factored in some way into its determination of the fees awarded for the services rendered *prior* to its initial discharge, then the Poletzes' lengthy diatribe about the Searcy firm would have had some relevance to the legal questions presented here (and we would have made it relevant by challenging the propriety of such a ruling). The trial court did *not* do that, however. All that the trial court did was exclude the hours expended by the Searcy firm after November 27 from its computation of the fees owing under *Rowe*. And because we were content to accept that ruling without complaint here, and to concentrate our efforts here upon obtaining a legally correct computation for the 343.1 hours which the trial court *did* accept as a starting point for its determination of the Searcy firm's fees, there was no justification whatsoever for the unseemly trashing of the Searcy firm which is the principal subject of the Poletzes' brief.[2/]

In any event, despite its irrelevance -- and as the Court might expect -- we cannot leave counsel's irrelevant trashing unanswered here. We cannot leave it unanswered because it is *thoroughly* undeserved. Once the Searcy firm was discharged without cause, and the Poletzes refused thereafter to pay any of its fees and costs, it had no choice whatsoever but to avail itself of the remedy provided by law and file its charging lien to protect those substantial sums. *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik v. Baucom*, 428 So.2d 1383 (Fla. 1983); *Conroy v. Conroy*, 392 So.2d 934 (Fla. 2d DCA 1980), *review denied*, 399 So.2d 1141 (Fla. 1981); *Litman v. Fine, Jacobson, Schwartz, Nash, Block & England*, 517 So.2d 88 (Fla. 3d DCA 1987), *review denied*, 525 So.2d 879 (Fla. 1988).

The Searcy firm also had a perfectly legal right to assert a retaining lien on the Poletzes' file to secure its fees and costs (and the Poletzes have admitted precisely that in their brief). *Daniel Mones, P.A. v. Smith*, 486 So.2d 559 (Fla. 1986); *Smith v. Patton*, 562 So.2d 859 (Fla. 1st DCA 1990); *Bonfiglio v. Hampton*, 574 So.2d 325 (Fla. 4th DCA 1991);

[2/] In addition, because we accepted the trial court's finding that only 343.1 hours were compensable, it was a cumulative exercise in irrelevancy for the Poletzes to point out that these hours were "reconstructed," rather than based upon contemporaneous time records, and that the Searcy firm attempted to prove at trial that it had actually expended more hours than the hours ultimately found by the trial court.

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Lewis, Vegosen & Rosenbach, P.A. v. A. C. Robertson II Construction, Inc., 584 So.2d 655 (Fla. 4th DCA 1991); *Dowda & Fields, P.A. v. Cobb*, 452 So.2d 1140 (Fla. 5th DCA 1984).

With respect to the Searcy firm's efforts to retain the Poletzes as clients after its initial discharge in November, 1991, we remind the Court (and the Poletzes' counsel) that Mr. Taylor's conduct in soliciting the Poletzes' case was adjudicated to be improper by a Circuit Court judge on November 27, 1991, and Mr. Taylor was enjoined from even communicating with the Poletzes thereafter. As a result, Mr. Taylor was required to withdraw, and the Searcy firm was reinstated as the Poletzes' counsel. While the hours expended in these activities may have been (at least arguably) properly excludable from the hours to which the Searcy firm was entitled to be compensated -- since, as the trial court observed, they were expended largely in the interests of the law firm rather than in advancing the Poletzes' lawsuit to a conclusion -- *nothing* which the Searcy firm did through the time it was actually reinstated as the Poletzes' counsel can even arguably justify the vicious mudslinging directed against it in the Poletzes' brief.

We also remind the Court that the Searcy firm was not finally discharged by the Poletzes until April 17, 1992 (which is why it was not inappropriate for the Searcy firm to submit the hours expended between November 27, 1991, and April 17, 1992, as evidentiary facts in support of its charging lien). The Montgomery firm was substituted without significant hassle less than three weeks later, and the Poletzes recovered the policy limits of one of the defendants, in the amount of $1,000,000.00, a few days thereafter. It should therefore be obvious that nothing which the Searcy firm did in that short, three-week period of time (if anything) prejudiced the Poletzes in any way -- so we fail altogether to understand the motivation for counsel's unseemly invective here.

Most respectfully, none of this would ever have occurred if the Poletzes had not discharged the Searcy firm without cause, in response to the unethical importuning of Mr.

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Taylor to follow him elsewhere. We do not deny, as the Poletzes righfully insist, that they had an absolute right to discharge the Searcy firm for any reason or no reason at all. We also do not deny that, when an associate attorney leaves a firm, a client has a right to follow him elsewhere. (The choice must be the client's, however; where the attorney directly solicits the client to discharge his former firm and follow him elsewhere, the resulting contract of employment is both unethical and illegal -- which is why Mr. Taylor was lawfully enjoined from representing the Poletzes.)

We do insist, however, that once the Poletzes exercised their legal right in that respect, the Searcy firm was absolutely entitled to exercise its own established legal rights in response to protect its fees and costs (and to ensure that the Poletzes' minor child was competently represented at a time when he clearly was not, since the second attorney whom the Poletzes chose for him had been enjoined from representing him) -- which is all that it did. We also respectfully submit that the Searcy firm deserves an apology from the Poletzes' counsel for the shameless name-calling in which he has engaged in an effort to distract the Court from the straightforward legal questions we have presented for review -- both because it was entirely irrelevant to the issues presented here and thoroughly unjustified on the facts.

Notwithstanding its irrelevance, however -- and ironically -- the Poletzes' argument actually provides the very best argument we can make here for the fairer rule of law which we seek from the Court. Assume for the moment that the Poletzes are correct that a discharged law firm's quantum meruit fee is to be measured solely as a straight hourly fee, as the trial court ruled in the instant case. If that is the law, then in every case which has been substantially prepared and is capable of being settled for a large amount with a modicum of additional work, there will be a *strong incentive* for associate attorneys or competing attorneys to steal it for themselves, as Mr. Taylor and Mr. Montgomery did in the instant case -- since they can then recover a substantial contingent fee for themselves with very little work. When that happens, of course, the firm which substantially prepared the case before its theft will have an *equally strong incentive* to attempt to convince the client to return to it, because a straight hourly fee guarantees that it will be badly undercompensated for its initial efforts and that the successor attorneys or the clients will receive a considerable windfall at its expense -- which is, of course, essentially what happened in the instant case.[3/] In short, the rule of law advocated by the Poletzes here almost guarantees that discharged attorneys will engage in precisely the type of post-discharge conduct of which the Poletzes have so loudly complained here.

In contrast, the equitable pro rata apportionment rule which we seek here, which is available under traditional principles of the doctrine of quantum meruit, will remove each of these undesirable incentives. If associate attorneys and competing attorneys know that they will receive only an equitable pro rata share of the "market price" of a contingent fee contract, based upon their contribution to the result, there will be no prospect of a substantial windfall to entice them to steal the case. Similarly, if the discharged firm is assured that it will receive an equitable pro rata apportionment of the "market price" of a contingent fee contract, based upon its contribution to the result, there will be no prospect of an economic bath to entice it to do battle with its former clients in an effort to retain them. Clients suffer not one whit from such a rule; they are still free to discharge their attorneys at any time, for any reason or no reason at all. They simply have to pay both sets of attorneys what is fair,

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[3/] Either the successor attorney or the client will receive the windfall, depending upon the contractual arrangement between them. If the contract calls for a full "market price" contingent fee (like 40%), less the fees which will be owing to the discharged attorneys (see footnote 4, *infra*), then the successor attorneys will receive the windfall. If the client can negotiate a smaller contingent fee (like 10-20%) because little work remains to be done, then the client will receive the windfall. That there will be a windfall to someone is simply undeniable, because the loss suffered by the discharged attorney must necessarily be a gain to someone else when the ledger is finally balanced.

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based upon the "market price" of the package of services they received, divided according to the respective contributions of each.[4/]

That is the way the doctrine of quantum meruit works in every other commercial context we can think of; that is the way the doctrine is supposed to work in the context presented here, according to the *Restatement of the Law Governing Lawyers* (Tentative Draft No. 4, April 10, 1991); that is the way the doctrine works in California, whose decisions this Court followed in *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982); and there is no reason why the rule should be different simply because Florida attorneys are involved. And because such a rule would go a long way toward eliminating the types of conduct of which *both* the Searcy firm and the Poletzes are unhappy in this case, it ought to be the rule of law announced in this case, within the framework of the equitable doctrine of quantum meruit -- so that the courts of this state will not have to deal with these types of controversies again.

The rule of law we seek here is not without additional precedent. In addition to the decisions cited in our initial brief, *see Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102 (La. 1979) (on rehearing). In that case, the Louisiana Supreme Court rejected the "contract rule," just as this Court did in *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982), and adopted the fairer, more flexible measure of recovery we have proposed here, for the reasons we have offered here -- explaining as follows:

> . . . Considering the peculiar nature of the contingency fee contract, its social importance, and its potential for abuse as

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[4/] Incidentally, under the pro rata apportionment rule we seek, there will be no risk that the client will ever pay more than the "market price" of a single contingent fee contract. Rule 4-1.5 of the Rules Regulating the Florida Bar places a cap on the total amount of contingent fees which can be charged to a client, no matter how many attorneys will share in the fee. In order to avoid charging an excessive fee in violation of the Rule, the successor attorney must therefore ensure that the total of his fee and the discharged attorney's quantum meruit fee does not exceed the Rule's specified "caps." The rule we propose therefore provides no disincentive to the client to discharge his initial attorney if he wishes to do so.

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well, in light of our duty to enforce the Disciplinary Rules, we conclude that only one contingency fee should be paid by the client, the amount of the fee to be determined according to the highest ethical contingency percentage to which the client contractually agreed in any of the contingency fee contracts which he executed. Further, that fee should in turn be allocated between or among the various attorneys involved in handling the claim in question, such fee apportionment to be on the basis of factors which are set forth in the Code of Professional Responsibility.

. . . In this way, the client is prevented from reaping any possible unfair advantage resulting from the discharge of his attorney. [FN 8] Similarly by this resolution the client is not exposed to the risk of being penalized by being required to pay excessive and duplicitous legal fees for having chosen to exercise his right to discharge one attorney and retain the services of another. In the future, both client and attorney involved in a contingency fee contract will realize that only one maximum contingency fee to which the client agrees will be paid.

This solution envisions apportionment of only the highest agreed upon contingent fee in accordance with factors set forth in the Code of Professional Responsibility. Thus the fee is to be apportioned according to the respective services and contributions of the attorneys for work performed and other relevant factors. Resort to the Code of Professional Responsibility also will have in the future a salutary effect of assuring that unethical conduct, such as solicitation on the part of one attorney of another's client, will not be countenanced or rewarded. Knowing that a contingent fee may have to be shared provides an incentive for successor attorneys to encourge a client who has no just cause for complaint to maintain relations with his first attorney. And it encourages the lawyer first retained to seek resolution of the client's misgivings, thereby avoiding needless controversy and engendering public respect. We believe that this resolution will discourage professional disputes and encourage out-of-court settlements since each attorney will be encouraged to emphasize the positive contribution he made to the end result and subsequent counsel will be less inclined to contend that there was cause to discharge all previous counsel. Perhaps more significant even than the foregoing reasons, which relate to governance of attorneys and the practice of law, is the fact

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> that this solution should assure fair treatment of the client who will never be compelled to pay more than one reasonable contingency fee in an amount he has agreed to pay. And it permits the client to change attorneys without acting to his financial peril, whether or not he has "cause" to make the change in attorneys.
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>
> FN8. The rationale of this holding would likewise thwart the client's last minute attempt to supplant his original attorney with another or to proceed in proper person so as to obviate responsibility for payment of a contingent fee after substantially all of the legal services contemplated by the contract have been performed and settlement or judgment has been obtained or is imminent.

373 So.2d at 118-19. We commend this sensible decision to the Court.

Incidentally, in responding to our plea for a fairer rule of pro rata apportionment based upon respective contributions to the result, the Poletzes have taken us to task for arguing that the Searcy firm is entitled to 90% of the "market price" of a contingent fee contract in this case, simply because 90% of the hours expended on the case by the two sets of attorneys were expended by the Searcy firm. We made no such argument, and the Poletzes' response is therefore entirely unfair. We were very careful to make it clear to the Court that we picked this number simply for illustrative purposes, and for ease of discussion, and that we were not asking for a ruling from this Court that we were entitled to 90% of the fees ultimately to be awarded in this case:

> We use these particular numbers simply because they are conveniently suggested by the facts proved below with respect to the $1,000,000.00 recovered prior to trial. We do not mean to suggest that a pro rata distribution of the total fees awarded necessarily has to be bottomed upon hours expended alone. Certainly, some discretion would exist to adjust these numbers for things like quality of performance, unnecessarily expended time, and the like. In addition, the percentages will necessarily change on remand when the post-trial recovery from the hospital becomes relevant to the equation. All of these things remain for determination on remand.

(Brief of Petitioner, p. 12 n. 9). Similar disclaimers appear throughout our initial brief.

We also think the Poletzes are way out of line in suggesting that this Court has already considered and rejected the fairer rule we seek, in *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982). The Court did no such thing. It rejected the "contract rule," which viewed the discharge of an attorney as a breach of contract and allowed the attorney to recover the full contract price in an action at law, and it adopted in its place the "quantum meruit rule," which allows the discharged attorney to recover in equity the reasonable value of his services, measured by "the totality of the circumstances," including "the attorney-client contract itself." 409 So.2d 1022. Nowhere in *Rosenberg* did the Court even hint that the measure of a discharged attorney's quantum meruit recovery should be limited to a straight hourly fee or be in any way straitjacketed by the restrictive factors of *Rowe* in determining fair compensation for the attorney.

The equitable pro rata apportionment rule which we have proposed here does not require reinstatement of any form of the "contract rule." It is bottomed upon traditional principles of the doctrine of quantum meruit. And we ask no more than that traditional principles of the equitable doctrine of quantum meruit not be straitjacketed by the different principles of *Rowe*, whose measure of recovery was designed for an altogether different purpose than the restitutionary purpose served by the doctrine of quantum meruit. Most respectfully, *Rosenberg* fully supports the Searcy firm's position here -- not the Poletzes' incomprehensible plea that they or the Montgomery firm be allowed to retain their substantial windfall at the Searcy firm's considerable expense.

A few loose ends remain to be tied. In the broader context of their unjustified trashing of the Searcy firm for its self-protective efforts after November 27, 1991, the Poletzes suggest that the trial court properly applied "equitable principles" to the determination of the Searcy firm's fee for services rendered prior to that date. The problem with this argument is that the trial court applied the "equitable principles" upon which the Poletzes rely to exclude all hours expended by the Searcy firm after November 27 from its computation of the fee; it did not apply "equitable principles" of any sort to the determination of the Searcy firm's fee for services rendered prior to that date. Neither, of course, could the trial court have properly done such a thing, because the 343.1 hours devoted to the Poletzes' case prior to November 27 were entirely blameless -- a point which is clearly implicit in the trial court's determination to compensate the Searcy firm for every one of those 343.1 hours. Most respectfully, the issue here is whether the trial court erred in compensating the Searcy firm for those 343.1 hours by applying *Rowe* (without a "contingency risk multiplier") -- and we ask the Court once again to keep its eye on the doughnut, rather than upon the irrelevant hole.

The Poletzes also suggest that the inadequate fee of which we complain here is justified by the Second District's decisions in *Loper v. Apfelbeck*, 541 So.2d 1222 (Fla. 2d DCA 1989), and *Phillips v. Nationwide Mutual Insurance Co.*, 347 So.2d 465 (Fla. 2d DCA 1977). Quite apart from the fact that the trial court bottomed its determination of the Searcy firm's fee squarely upon *Rowe*, rather than upon *Loper* or *Phillips*, neither of these decisions has any relevance whatsoever to the issue presented here. All that these decisions hold is that, at the conclusion of litigation in which a minor has recovered funds from which a contingent fee is owing to the attorney employed by the minor, a trial court has the authority to reduce an *unreasonable* contingent fee contract to a reasonable amount. Most respectfully, these decisions might have supported a reduction of the Montgomery firm's contractual fees on the facts in this case, but they provide no authority whatsoever for awarding the Searcy firm a fee, after its discharge without cause by the minor, substantially less than it was entitled to recover under the doctrine of quantum meruit.

The Poletzes also suggest, in response to our alternative complaint about the trial court's failure to apply a "contingency risk multiplier" to the straight hourly fee it computed, that the Court can simply overlook this omission because the various "hourly rates" found by the trial court were so high that the trial court obviously gave the Searcy firm the benefit of a multiplier in the straight hourly fee it ultimately computed. There are at least two significant problems with this argument. In the first place, the *Rowe* decision requires a trial court to specify its findings in writing so that an appellate court can determine exactly how it arrived at its bottom line. The trial court's order in the instant case therefore sets forth explicit findings of fact with respect to the "reasonable hourly rates" of the various paralegals and attorneys involved. And because those "reasonable hourly rates" are set forth as facts, without mention of any enhancement for the risk of contingency, this Court simply may not assume, as the Poletzes have asked it to do, that the trial court obviously meant something different than what it plainly said.

Moreover, the "reasonable hourly rates" found by the trial court are equal to or less than the Searcy firm's evidence on the issue would support (T1. 86-93; T2. 104-11) -- and the Poletzes presented *no evidence at all* contradicting any of this evidence. Indeed, our principal adversary here, the guardian ad litem, *agreed* with the reasonable hourly rates claimed by the Searcy firm (with one exception -- he thought a reasonable hourly rate for Mr. Taylor's services should be $150.00) -- and argued separately that no "contingency risk multiplier" should be applied once the "lodestar" was computed by multiplying the hours expended by these agreed-upon rates. *See* "Report of Guardian Ad Litem on Attorney's Fees"; exhibit 6 to respondents' appendix. Most respectfully, having agreed to nearly all of the hourly rates which the trial court ultimately found *without* any enhancement for the risk of contingency, the Poletzes are in an awfully poor position to argue here that the hourly rates by which the "lodestar" was determined, before application of any "contingency risk multiplier," are so high that the "lodestar" computed by the trial court obviously includes a

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silent "contingency risk multiplier." And this argument, like all the others, is therefore clearly without merit.

In our initial brief, we invited the Poletzes to justify the upside-down result reached below on any ground -- in logic, in fairness, or in sound public policy -- if they could. We also submitted that no such justification would be forthcoming. No such justification appears in the Poletzes' brief. Indeed, the Poletzes have largely *ignored* the legal arguments we made and devoted nearly their entire brief to a thoroughly undeserved trashing of the Searcy firm on a peripheral point which is not even in issue here (an exercise which, ironically, simply underscores and emphasizes the need for the fairer rule of law we seek). Most respectfully, the Poletzes' position here is non-responsive in the extreme. It is the doughnut which is at issue here, not the hole -- and we respectfully urge the Court to grant the Searcy firm the relief to which it was entitled under the law, as requested in the Conclusion to our initial brief.

Respectfully submitted,

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III.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 9th day of May, 1994, to: F. Wallace Pope, Jr., Esq., Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., 911 Chestnut Street, Clearwater, Fla. 34617.

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