FILED
SID J. WHITE
JAN 5 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

TIMES PUBLISHING COMPANY, a Florida corporation d/b/a ST. PETERSBURG TIMES,

Petitioner,

vs. CASE NO. 84,513

RICHARD AKE, as CLERK OF THE CIRCUIT COURT OF HILLSBOROUGH COUNTY, FLORIDA,

Respondent.
_____/

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

PETITIONER'S REPLY BRIEF

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This case presents the Court with the opportunity to reaffirm its commitment to the principle that public officials may not evade their official responsibilities under Florida's open records law by bringing litigation against members of the public. In essence, this case will determine whether Florida's citizens will continue to be able to exercise, in a timely and facile manner, rights central to informed self-governance.

From the beginning, the core elements of this case have been entangled in side issues, the simplicity of the central issue obscured. Reduced to its central points, the Clerk's Answer Brief ("Answer") supplies neither legal justification for the declaratory judgment action that began this litigation, nor authority for the Clerk's refusal to comply with the requests for electronic records made in March 1992 by Petitioner Times Publishing Company ("Times").\[1]

Instead, the Clerk argues that neither the public access rules set forth by this Court in *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla. 1982), and *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla. 1988), nor the Public Records Act apply to the electronic records requested by the Times, *but* that case law construing the Act provided him with both substantive standing to

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[1]/ The Clerk's brief would indicate the Times' request for bond estreature cards was a central issue in this case. It is not and never was. The Clerk's continued pursuit of this issue highlights the problem with permitting a public official to sue citizens over records requests. The Clerk, having "defined" the "dispute" initially, insists his definition is the correct one.

bring a declaratory judgment action against the Times and procedural guidelines by which to file it. In addition to being internally inconsistent, none of these arguments is legally correct.\[2]

I. THE ELECTONIC RECORDS SHOULD HAVE BEEN PRODUCED. *SEIGLE V. BARRY* DOES NOT CREATE AN EXCEPTION TO THE RULE THAT PUBLIC OFFICIALS MAY NOT SEEK JUDICIAL ADVICE WITH RESPECT TO THEIR PUBLIC RECORDS OBLIGATIONS, IN THE FORM OF A DECLARATORY JUDGMENT ACTION.

The Clerk's arguments and authorities, individually and as a whole, do not rebut the central, simple, premise presented by the Times in its initial Brief. The electronic records requested by the Times are public records, open to inspection *either* pursuant to Chapter 119 of the Florida Statutes *or* pursuant to the First Amendment to the United States Constitution and long-established Florida law. There is no third twilight zone of possibilities. Thus, of the two possibilities, the "category" into which the Records fell made no difference, and when the Times asked to see them, they should have been produced -- without delay, and, certainly, without litigation.

As the Clerk himself now acknowledges: "Public officials may not question a law they are duty bound to apply." Clerk's Answer

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[2]/ The Clerk's continued reliance on a "separation of powers" argument to avoid Chapter 119 is curious and *entirely undermined* by his and amicus curiae Florida Association of Court Clerks' request for a holding that a statute, § 28.24, *Fla. Stat.* (Supp. 1994), requires Clerks to charge $1.00 per page for copies of court records. This case did not involve section 28.24, but this Court's decision may preordain the outcome of infant litigation involving it.

at p. 34. As the Clerk also acknowledges, public officials may not seek declaratory relief from their official duties. *Id.* (*citing Department of Revenue v. Markham*, 396 So.2d 1120 (Fla. 1981)). Nevertheless, these are precisely the actions the Clerk took below.

In his Answer, the Clerk strives to defend those actions by reinterpreting settled precedent and the Record of this case.[3] However, no matter how it is described, this horse chestnut cannot be transformed into a chestnut horse.[4]

The Clerk's effort to convert the Fourth District Court of Appeals' decision in *Seigle v. Barry*, 422 So.2d 63 (Fla. 4th DCA 1982) -- a Public Records Act case -- into a legal basis for his declaratory judgment action, is but one example of the Answer's inconsistent reasoning. His sweeping statements to the contrary,[5]

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[3]/ The Clerk's attacks on the Times word choice -- having little bearing on the issues before this Court -- has needlessly complicated this case. It continues in the Answer. *See, e.g.*, Answer at p. 8 ("The Times' description of the issues is misleading; e.g., the Times characterizes Count I [of the Clerk's Complaint] as 'whether Chapter 119 applied to the Clerk of the Court . . .' implying its requests extended to Article VIII county records"); *compare* R.3 (Count I of the Clerk's Complaint) ("The Clerk is in doubt as to whether the Legislature by the enactment of Chapter 119 made it applicable to records he maintains for the Courts").

[4]/ *See The Lincoln-Douglas Debates*, 52 (R. Johannsen ed. 1965).

[5]/ *See, e.g.*, Answer at p.16 (no citations included in the original) ("The Times says public officials do not have standing to bring declaratory actions especially with respect to 'records' issues. Case law does not support that statement"). *Compare* Petitioner's Initial Brief at p. 34 (*citing Askew v. City of Ocala*, 348 So.2d 308 (Fla. 1977)) ("Declaratory judgment actions filed by public officials seeking judicial guidance as to the officials' duties under the Florida Statutes, and particularly Florida's

the Clerk lacked standing to seek declaratory relief in this matter.

A. The Public Records Act Supplies No Authority For the Declaratory Judgment Action Brought Below.

Despite his claims that the records sought by the Times are not "public records" governed by Chapter 119 of the Florida Statutes, the Clerk nevertheless argues throughout his brief and the record below that *Seigle* authorized him to sue the Times over its public records request. *See* Answer at pp. 24-30. The Clerk's interpretation of *Seigle* is simply incorrect. In his Answer, the Clerk states that: "Under *Seigle*, records custodians have discretionary authority to perform specialized programming, or a court may require a records custodian to do so after fact-finding. The Clerk declined to perform specialized programming and sought guidance in accordance with *Seigle*." Answer at p. 24. *Seigle* does not say that. Neither that case -- nor the Public Records Act, which it construes -- authorizes a custodian of public records to seek judicial "guidance" with regard to public records requests.

Seigle, by its own words, stands for the twin propositions that (a) "access to computerized records *shall* be given through the use of programs currently in use by the public official responsible for maintaining the public records" and (b) "access by the use of a specially designed program prepared by or at the expense of the

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Sunshine Laws, fail to state controversies justiciable by the courts of this State").

applicant *may* obviously be permitted in the discretion of the public official and pursuant to Section 119.07(1)." *Seigle*, 422 So.2d at 66. (emphasis added). The *Seigle* Court additionally held that, where a public official refuses to allow a requestor to use "a specially designed program" for which he is willing to pay, *and* where special circumstances exist that would preclude meaningful access without such a specialized program, a court "may permit access pursuant to the same statutory restraints." *Id.* at 66-67.

What *Seigle* does *not* do, contrary to the hypothesis offered by the Clerk, is create an "exemption" from this Court's decisions in *Askew v. City of Ocala*, 348 So.2d 308 (Fla. 1977), and *Markham*, *supra*, which prohibit public officials from sidestepping their responsibilities by means of declaratory judgment actions. The Clerk provides no support for his novel interpretation of *Seigle*; none exists.

This Court's pronouncement in *Markham* was clear: "As a general rule, a public official may only seek a declaratory judgment when he is 'willing to perform his duties, but . . . prevented from doing so by others.'" 396 So.2d at 1121 (*quoting Reid v. Kirk*, 257 So.2d 3, 4 (Fla. 1972)). In his Answer, the Clerk acknowledges this is the law, but claims that the present case "is distinguishable" because its "facts" are different. Answer at p. 33. They are not. As in *Markham*, the only entity preventing the public official here from performing his duties was the public official himself, and, as this Court has held, "Disagreement with

a constitutional or statutory duty, *or the means by which it is to be carried out*, does not create a justiciable controversy or provide an occasion to give an advisory judicial opinion." *Markham*, 396 So.2d at 1121 (emphasis added). That the Clerk is a records custodian and has a statutory duty to comply with the Public Records Act is clear from the law and the record of this case. *See* Op. Att'y Gen. Fla. 85-3 ("The provision of access to public records is a statutory duty imposed by the Legislature upon all records custodians . . ."); R. 4 (numbered paragraph 16 of the Clerk's Complaint) ("The Clerk of the Court" is "records custodian of the Court's records"); *See generally* § 28.13, *Fla. Stat.* (1991)(emphasis added) ("The *clerk of the circuit court* shall keep *all papers* filed in his office with the utmost care and security . . ."). Thus, however the records were characterized, their disclosure was mandatory.[6]

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[6]/ Even if some theoretical controversy had been created by the Times' routine request for records here, Florida precedent still would forbid the bringing of a declaratory judgment action, as standing in such cases also requires, *inter alia*, "that there is a bona fide, actual, present practical need for the declaration" concerning "some immunity, power, privilege or right of the *complaining* party." *Williams v. Howard*, 329 So.2d 277, 282 (*quoting May v. Holley*, 59 So.2d 636, 639 (Fla. 1952))(emphasis added). Yet, the Complaint in this case dealt with the Clerk's conjectures about what the Times might be planning to do in the future, see R. 4,8; and no "immunity, power, privilege or right" was alleged to have been jeopardized by the Times' request. *See generally* R.1-11. Instead, the Clerk alleged that his "obligations" were unclear. *Id.* Moreover, the Clerk's chief concern appears to have been with his nonjusticiable "doubt" as to "whether the Times has agreed to pay the full expense of reformatting" the computer records requested by the Times." *See* R. 7; *compare* R. 14 (Times' records request)("As a gesture of good

B. The Only "Controversy" Here is of the Clerk's Own Creation, and the Declaratory Action Filed by the Clerk Should Have Been Dismissed.

Illustrative of the inconsistencies in the Answer is the Clerk's statement that he "declined" the Times' public records request. *See* Answer at p. 32 (emphasis added).[7] The purpose of this eleventh-hour "admission" -- made for the first time during the appeal of this case -- apparently is to avoid the import of *Askew v. City of Ocala*, 348 So.2d 308, 310 (Fla. 1977) ("[T]here exists between respondents and the named petitioners no present dispute, only a desire by these public officials to meet in the future privately with their attorneys and to ward off possible consequences.")

Like the Clerk's characterizations of the Records and his Complaint, his characterization of his response to the records request does not change its *effect*. Indeed, if the Clerk did "deny" the public records request made by the Times, then he is absolutely responsible, pursuant to section 119.12 of the Florida

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faith, the St. Petersburg Times is willing to pay a pre-determined service charge for copying these records according to the guidelines found in Ch. 119.07(1)(b) *Fla. Stat.* (1991)").

[7] *Compare* Tr. 57 ("Instead of either doing it or saying no, . . . [the Clerk] came for guidance to the Court to direct us"); R.3 (paragraph 11 of the Clerk's Complaint)("The Times has advised the Clerk that it will seek legal remedies to compel production of the requested tapes and bond estreature cards *if the Clerk fails to comply with its request* . . .")(emphasis added).

Statutes (1991) for the Times' attorneys' fees.[8] And, in the alternative, if he did not deny the request, then there never was a "controversy" subject to judicial review. Either way, the Answer -- like the declaratory judgment action it purports to defend -- does not withstand careful scrutiny. Thus, the trial court's denial of the Times's motion to dismiss the declaratory judgment action should be reversed.[9] This Court should reaffirm the long line of Florida decisions holding that that public officials may not bring declaratory judgment actions to undermine the access laws.

II. A PUBLIC OFFICIAL MAY NOT USE LEGAL PROCESS TO FRUSTRATE THE LAW AND EVADE HIS RESPONSIBILITIES. IF HE DOES SO, HE SHOULD PAY ATTORNEY'S FEES AND COSTS.

The Clerk has never denied that he is "the legal custodian of court records and other records held pursuant to Chapter 119." In fact, he has admitted it. *See* R. 111 (Answer to Times' Counterclaim). Nor has he denied that among the records in his charge are "court records" and "Chapter 119 records" that are

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[8]/ Section 119.12, *Fla. Stat.* (1991), provides that attorney's fees *shall* be awarded where, as here, a public records request has been denied by a custodian, and the requestor has been forced to go to court in order to secure access to records.

[9]/ *See, e.g., Wille v. McDaniel*, Case No. CL-91-154-AE (Fla. 5th Cir. Ct. 1991) (dismissing Sheriff's Petition for Declaratory Judgment on grounds that "Under applicable case law, Sheriff Wille cannot litigate a declaratory judgment action to obtain judicial advice on how to perform his Public Records Law duties"); *Sarasota Herald-Tribune Co. v. Schaub*, Case No. 87-2949 (Fla. 12th Cir. Ct. 1988)(same). This issue is capable of repetion yet evading review. Moreover, both the interlocutory order denying the Times' Motion to Dismiss and the final order denying the Times' request for attorney's fees and costs were timely appealed. R. 375

charge are "court records" and "Chapter 119 records" that are "public" and available for inspection, examination and copying. *Id.*\[10] Nevertheless, he effectively denied access to these records to the Times -- without justification, and outside the boundaries of the law.\[11] Now the Clerk has asked this Court to place its imprimatur on his actions by affirming the trial court's denial of the Times' request for attorneys' fees, even if his actions were wrongful./[12]

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[10]/ Indeed, in his Answer, the Clerk claims that among the records requested by the Times were records to which "public access" was "provided through the court files themselves, computer screens, hard copy reports, and the Public Access Network." Answer at p. 28. *But see* R. 2-3 (Complaint) (emphasis added) ("The Clerk is *in the process of developing and installing* a Remote Electronic Public Access System . . . [which] will make almost all of the balance of the information on the requested magnetic tapes available to the public including the Times" "REAS" are authorized by section 119.085, *Fla. Stat.* (1991).

[11]/ *See* Answer at p. 16 ("the Backup Tapes are not designed for copying" and case law mandating access to court files provides "no guidance on the technical complexities of producing the Backup Tapes"); p. 27 (although the "backup tapes are prepared to 'perpetuate knowledge,'" this is done "not for the public access" and they "cannot be produced"). *Compare Shevin v. Byron, Harless, Schaffer, Reid & Asso.*, 379 So.2d 633 (Fla. 1980) (public records include "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge"); *Coleman v. Austin*, 521 So.2d 247, 248-49 (Fla. 1st DCA 1988) (state attorney's case file "which formalized knowledge" is public record subject to ch. 119; contrary to State Attorney's argument, application of ch. 119 to case file would not "allow the legislature to dictate judicial procedure in violation of state constitution").

[12]/ The Times argues public policy prohibits the Clerk from filing a declaratory action against the Times and not reimbursing the Times for its attorney's fees when the Clerk ultimately provided the records it requested. The Times' argument is fallacious because public officials have standing [and] the record is clear that the Clerk

The Court should decline the Clerk's invitation. The trial court cited no basis for its decision that the "Clerk's denial of the Times' request pursuant to *Fla. Stat.* Chapter 119 did not constitute an unlawful refusal." *See* R. 373-74. The Clerk has presented no persuasive authorities or arguments in support of this holding. The Times has established its right to fees in this case.

A. Government Records in this State Are Presumptively Open, and the Law Should be Interpreted in Favor of Access.

In Florida, the right to "inspect or copy" public records of all types -- including those of the judicial branch -- is fundamental, and is now of equal weight and dignity as the right to "speak, write and publish," the right not to be "deprived of life, liberty or property without due process" and the "right of the people to be secure in their persons, houses, papers and effects." *Fla. Const.*, Art. I, §§ 4, 9, 12 and 24(a). While the constitutional right of access to records was not in place at the time this litigation began, it has long been the "policy of this state that all state, county, and municipal records shall at all

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> did not unlawfully withhold public records *and will not provide the records requested unless directed to do so by a court . . . .*

Answer at p. 18-19 (emphasis added).

> Therefore, even if the court concludes that (1) these were not court records and (2) the Clerk is within the definition of "agency", the Times has not met its burden to overcome the presumption of correctness and the trial court's ruling should be affirmed.

Answer at p. 44.

times be open for a personal inspection by any person," § 119.01, *Fla. Stat.* (1991) *and* that all doubts regarding the status of a record be resolved in favor of the requestor. *See Tribune Co. v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA), *rev. denied*, 503 So.2d 372 (Fla. 1986) *quoting Bludworth v. Palm Beach Newspapers, Inc.*, 476 So.2d 775, 779 (Fla. 4th DCA), *cert. denied*, 488 So.2d 67 (Fla. 1985) (liberal construction mandated "in favor of 'open government to the extent possible in order to preserve our basic freedom'"). Indeed, as the Second District Court of Appeal has held: "the right to access public documents is virtually unfettered, save only the statutory exemptions designed to achieve a balance between an informed public and the ability of the government to maintain secrecy in the public interest." *Times Publishing Co. v. City of St. Petersburg*, 558 So.2d 487, 492 (Fla. 2d DCA 1990).

Rather than producing the records requested, with any exempt material redacted,\[13] the Clerk took legal action against the Times,

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[13]/ In his Complaint, the Clerk alleged that "Section 119.07(3)(q)" was pertinent to the Times' request, in that he had doubts "as to whether he is required by law to supply file structures necessary to make raw data usable or whether these proprietary files structures are exempt." R. 5. Even if the Times had not specifically stated that it would "like to obtain all the raw information within the database" and that it did *not* want "a copy of any database structure," R. 13, the Clerk did not need judicial "guidance" on this issue because the statute is plain. *See* § 119.07(3)(q), *Fla. Stat.* (defining "sensitive" software and the limits of exemptions for "sensitive" software). Moreover, if the Clerk believed that Section 119.07(3)(q) was relevant and applicable, it would make sense that the remaining portions of Chapter 119 were also relevant and applicable.

focusing his allegations on the supposed distinctions between "public records" and "court records," and suffusing them with a host of side issues that only served to confuse and enlarge the record below. *See, e.g.*, R. 4 ("The Times intends to make ongoing requests of [sic] all additions to these databases so that it will maintain a database of court records parallel to that maintained by the Clerk for information service it plans to sell for private gain").\[14]

Strategies designed to frustrate the policies of this State should be condemned, not condoned -- particularly where they are crafted by public officials. *See Times Publishing Co.*, 558 So.2d at 492-93 (where effect of officials' conduct is "evasion" of Public Records Law, trial court's order discharging officials from liability would be reversed); *see generally, Neely v. State*, 565 So.2d 337, 346 (Fla. 4th DCA 1990) ("the integrity of our justice system depends on strict adherence to . . . constitutional guarantee[s]"). To hold otherwise would be to encourage creative circumvention of cherished constitutional, statutory and common law rights long held by the citizens of Florida.

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[14]/ That the Public Records Act is applicable in this matter is clear from the Complaint filed by the Clerk, in which: (a) he acknowledged that he was a "records custodian" subject "to the public records law" to the "extent the Court has opened its records," R. 4; (b) he cited the Public Records Act as the basis for his request for "an immediate hearing," R. 4, 5, 7, 8, 10 and 11; and (c) he alleged that the records requested by the Times would be available shortly on a "Remote Electronic Public Access System," which, he said, "will make *Public Record* information available at the Courthouse also available at the user's place of business." R.7 (emphasis added).

B. Attorney's Fees Should Be Awarded to the Times.

As Florida's courts have recognized, the intent of the attorney's fees section of the Public Records Act "is to reimburse a party who incurs legal expenses when seeking permission to view records wrongfully withheld, even if access is denied based on a good faith but mistaken belief that the documents are exempt." *Times Publishing Co.*, 558 So.2d at 495, *citing News & Sun-Sentinel Co. v. Palm Beach County*, 517 So.2d 743 (Fla. 4th DCA 1987). Where, as here, legal expenses were incurred by a taxpayer because a public official sued it to *block* access to public records, an award of fees should be made. Public officials should not be permitted to take advantage of the procedural carrots offered by the Public Records Act,\[15] without bearing the burden of suffering the substantive sticks, as well.

Indeed, as this Court held:

> Section 119.12(1) is designed to encourage public agencies to voluntarily comply with the requirements of chapter 119, *thereby ensuring that the state's general policy is followed.* If public agencies are required to pay attorney's fees and costs to parties who are *wrongfully denied access* to the records of such agencies, then the agencies are less likely to deny proper requests for documents.

New York Times Co. v. PHH Mental Health Services, Inc., 616 So.2d 27, 29 (Fla. 1993) (emphasis added). Conversely, if public

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[15]/ *See* R. 4, 5, 7, 8, 10 and 11 (Clerk's citation of § 119.11, *Fla. Stat.*, as basis for request for "immediate hearing" on Clerk's Complaint); *see also* R. 5 (Clerk's citation of § 119.07(3)(q), *Fla. Stat.*, as basis for Clerk's alleged confusion over possible exempt nature of Records).

agencies are allowed to decline access and skirt the requirements of the fees provision by filing lawsuits,\[16] this State's policies are sure to be eroded.

There is no dispute that the records eventually produced to the Times were a form of public records, nor is there any dispute that these records could have been produced when they were originally requested. The Clerk's decision to respond to the Times' request with a lawsuit was wrongful, and fees should be awarded to the Times.

CONCLUSION

Instead of either complying with the Public Records Act "or saying no" to the Times' records request, the Clerk filed a lawsuit "for guidance". Tr. 57. This is not an option the law permits, nor does the law allow a public official to block access to public documents because of a belief that the requestor "intends to go into the information system business," see R. 8. Rather, the law provides just two alternatives: produce the records or suffer the consequences. In filing a declaratory judgment action against the

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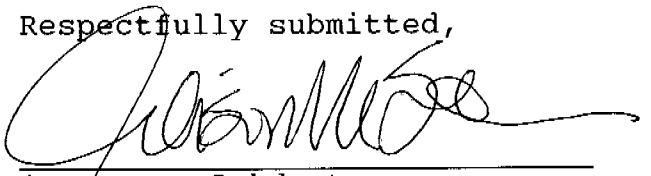
[16]/ That the Clerk's lawsuit presented no genuine "controversy" is demonstrated by the Clerk's behavior subsequent to its filing. Specifically, the Clerk eventually produced the electronic records requested by the Times. *See, e.g.*, Tr. 45 (production of criminal tapes was made by Clerk "within two weeks of filing the complaint"); Tr. 51 (in October 1992, clerk "wrote a program, a software program, to make the public information that was on those backup tapes available without disclosing either the sensitive information, the security codes, or the structure, or the non-public information"); Tr. 63 ("But the request was for the tapes, and the tapes inextricably intertwined with the sensitive information. It's impossible to segregate that information *without doing what the clerk ultimately did*, to write a specific program . . .")(emphasis added).

Times, the Clerk chose the latter.

Petitioner Times Publishing Company respectfully requests that this Court reform the certified question to conform to the actual issue in this case and answer it affirmatively; disapprove the Clerk's declaratory judgment action; and direct that the Times recover its attorneys' fees and costs.

Respectfully submitted,



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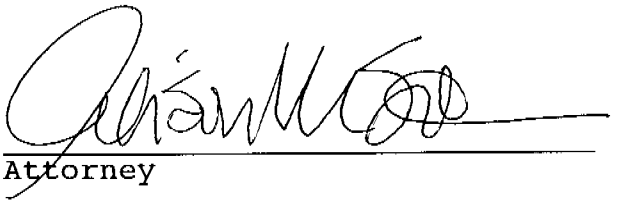
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Leslie E. Joughlin, III, Esq., P.O. Box 3350, Tampa, FL 33601; Lorence Jon Bielby, Esq., 101 East College Avenue, Tallahassee, FL 32301; and The Honorable Monroe W. Treiman, 950 Village Drive, Brooksville, FL 34601, this 30 day of January, 1995.



Attorney