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In The Supreme Court of Florida

CASE NO. 87,403

THE SCHOOL BOARD OF VOLUSIA COUNTY,

Petitioner,

v.

JAMES B. CLAYTON,

Respondent.

DISCRETIONARY APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT ON CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

CITATION OF AUTHORITIES

Cases: Page

Statutes:

Other Authorities:

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Petitioner School Board's initial brief contained all statements of the case and facts necessary and material to this Court's determination. Appendix references are to the Appendix of the Board's initial brief.

Respondent Clayton's answer brief attempts to add numerous statements of "fact" that are not in evidence, which are untruthful, and which are immaterial. He says, in essence, that counsel for the School Board was incompetent and unethical in its prosecution and settlement of a collateral eminent domain case. The trial court found otherwise:

> Aside from plaintiff's lack of standing, the court has considered the arguments of plaintiff regarding claimed defects in the eminent domain proceedings in Case No. 94-10866, including suggestions of fraud perpetrated on the court by counsel for the defendant School Board and/or for DeBary Estates Associates, Ltd., et al. The court finds these contentions to be unsubstantiated and not supported by the record. (Appendix -Tab 11; R-606).

Clayton falsely charges that the School Board never approved the reconfigured site description that came from the mediation conference in the eminent domain proceeding. The redesigned site is shown at R-280 (Appendix Tab 5, page 5) as part of the materials presented to the Board in connection with its ratification of the mediated settlement. Thereupon a stipulated Final Judgment was entered providing as follows:

> The legal description and the quantity of the estate taken by this final judgment is different from and larger than what was sought by Petitioner in the Petition. As a result, the Petition is *hereby deemed amended* to reflect the accurate legal description and quantity of estate taken by Petitioner *as described on Exhibit A* to this final judgment.[1]

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[1]Such an amendment does not deprive the court of jurisdiction. *See Florida Power & Light Co. v. Canal Authority, infra.*

Clayton says (brief, p. 3) that the "map attached to the final judgment reflected that 30 acres were purchased" and refers to "R-255-326". There is no such map attached to the final judgment in condemnation.[2] The cited pages refer to a request for judicial notice filed in this case, two weeks before entry of final judgment in the condemnation case.

He also says (p. 3) that the condemnee ultimately sought relief from the original stipulated judgment, and that "consequently" the trial judge extended a stay until January 3, 1995 citing again to "R-255-326". Those pages do not support his statement, and his facts are exactly backwards. The resolutions of condemnation (Appendix -3; R-270) included a described right of way parcel in order to gain access to the school site and offsite utilities. In May 1995, long after this appeal had commenced and after the Record was lodged in the District Court, the new City of DeBary joined the condemnee in requesting a modification of the right of way parcel so that it could be dedicated to the City rather than to the School Board. The School Board stipulated to a modification of the judgment so providing. (Appendix- Tab 12, p.3 ¶8). Clayton's confusion, and perhaps his underlying belief that the School Board overpaid, apparently arises out of the fact that the school site contained about 18 acres, and the right of way contained about 12 acres, for a *total* of 30 acres. The appraisals performed by the School Board during earlier attempts at voluntary purchase had covered only about 15 acres, whereas the site and appurtenant right of way transferred by the final judgment covered 30 acres. It is thus not surprising that the Board agreed to pay twice the appraised value of the original 15 acres.

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[2]The District Court said, with equal inaccuracy, that there was no legal description attached to the final judgment. *But see* Appendix -Tab 8, Exhibit A.

Clayton's other principal complaint is about the ethics of the Board's counsel. His statement of "facts" contains a tabloid-style, highly selective and misleading set of half-truths that have never been introduced into evidence. His record citations reveal that the documents on which he relies were merely exhibits to a memorandum of law he submitted at trial (R-105-274). Such bootstrapping is not evidence. The trial judge held the eminent domain proceeding to be free from Clayton's claim of defects and abuses.

Clayton's ethical slurs are immaterial, but he ought to tell the whole truth. The undersigned law firm had in 1988 represented a *former* owner in securing rezoning of land that included the condemned site. The Board's attorneys had also previously handled several unrelated matters for the condemnee, but had no relationship when condemnation was begun. When the Board's attorneys served requests for admissions, asking the condemnee to acknowledge certain zoning conditions that were matters of public record and which would affect valuation.[3] The condemnee responded with a motion for stay and injunctive relief, seeking disqualification of the Board's attorneys. The motion was vigorously contested, but the Board's interest was in the timely acquisition of the school site.[4] Rather than subject the Board to the risk of delay or appeal, Board counsel offered to withdraw if an attempt at mediation failed. Clayton forgets to tell this Court that the motion to disqualify the Board's

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[3]Assuming *arguendo* that representation of a former owner of land somehow inures to the benefit of a successor owner, Rule 4-1.9 of the Rules of Professional Conduct provides that a lawyer shall not use information relating to a former representation *unless "the information has become generally known."*

[4]*See, e.g.*, R-43 (Appendix, Tab 6, page 2):

> "It was our expectation that by late fall [1994] we would have enough information to resolve this case, or to bring it back to the Board for consideration of its conversion to a "quick taking" in order to meet the timetable for construction of this school and the relief of its overcrowded neighbors."

counsel was never adjudicated, and the motion and stipulated order were withdrawn. However, the former client's accusation (whether sincerely made, or tactical) of conflict was already a matter of public record. It is absurd to infer, as Clayton does, that the Board's attorneys would thereafter be predisposed to be "blatantly generous" to their accuser in order to conceal an accusation already public.

ISSUES ON APPEAL

I.

DOES RESPONDENT HAVE STANDING IN THE ABSENCE OF SPECIAL INJURY?

A. SHOULD THIS COURT RECONSIDER ITS DECISION IN *FORNES*?

B. [CERTIFIED QUESTION: IRRESPECTIVE OF *FORNES,*] DOES THE "UNIQUENESS OF THE PARTICULAR CASE" STANDARD PERMIT A TAXPAYER CHALLENGE TO THE ACTION OF A PUBLIC BOARD WHICH IS ALLEGED TO BE ACTING IN EXCESS OF ITS STATUTORY AUTHORITY AND WHICH ACTION EITHER INCREASES THE TAX BURDEN OR WASTES PUBLIC MONEY?

C. [ALTERNATIVE CERTIFIED QUESTION: IRRESPECTIVE OF *FORNES,*] DOES THE ACTION OF A PUBLIC BOARD WHICH EITHER INCREASES TAXES OR WASTES PUBLIC MONEY RISE TO THE LEVEL OF A CONSTITUTIONAL ISSUE WHEN IT IS ASSERTED THAT THE PUBLIC BOARD EXCEEDED ITS AUTHORITY GRANTED BY THE LEGISLATURE?

II.

IS EVERY SETTLEMENT IN EMINENT DOMAIN A PURCHASE OF LAND RATHER THAN A TAKING?

III.

IS A SETTLEMENT OF EMINENT DOMAIN PROCEEDINGS GOVERNED EXCLUSIVELY BY THE STANDARDS APPLICABLE TO VOLUNTARY PURCHASES OF LAND?

IV.

MAY MANDAMUS BE UTILIZED AS A MEANS OF COLLATERAL ATTACK ON AN UNAPPEALED CONDEMNATION JUDGMENT, WHERE THE CONDEMNEE IS NOT JOINED?

ARGUMENT

I. RESPONDENT HAS NO STANDING IN THE ABSENCE OF SPECIAL INJURY.

A. THIS COURT SHOULD REAFFIRM ITS DECISION IN *FORNES.*

B. [CERTIFIED QUESTION: IRRESPECTIVE OF *FORNES,*] DOES THE "UNIQUENESS OF THE PARTICULAR CASE" STANDARD PERMIT A TAXPAYER CHALLENGE TO THE ACTION OF A PUBLIC BOARD WHICH IS ALLEGED TO BE ACTING IN EXCESS OF ITS STATUTORY AUTHORITY AND WHICH ACTION EITHER INCREASES THE TAX BURDEN OR WASTES PUBLIC MONEY?

Clayton answers these points together, and urges the Court to reconsider its decision in *North Broward Hospital District v. Fornes*, 476 So.2d 154 (Fla. 1985), as if that decision were a historical aberration. In its opinion below, the District Court also urged the present Supreme Court to review the decision of "the 1985 supreme court", as if that were some different court. Yet it must be remembered throughout this case that the rule of *stare decisis* is an absolutely indispensable element of the "clear legal duty" enforceable in the kind of mandamus proceeding which Clayton advocates. If caselaw is to change *only* because new judges have been seated, there can be no clarity at all in the legal duty of those who must follow and

predict the Court's decisions. Granted, the law of standing is an amorphous one, closely tied to notions of judicial restraint and institutional competence. These are indeed "highly debatable policy choices". However, the debate is not merely whether the effect of *Fornes* unduly insulates government from citizen scrutiny. It is also about whether, in an increasingly litigious society, we should be increasing the scope of justiciability, and decreasing the incentive to resolve disputes in more collaborative, more democratic political and electoral processes. This is a debate already carried on within the courts, and the decisions in *Fornes* and *Godheim* contained spirited dissents. Thereafter, it became the duty of public attorneys such as the undersigned to instruct their public clients as to their clear legal duties. Now Clayton comes to the courts and says, notwithstanding the fact that no case has ever construed Fla. Stat. §235.054, and the Attorney General and Legislature have disagreed with him, that the School Board in this case nevertheless had a "clear legal duty" which "any citizen" may enforce by mandamus. The intimidating effect on the courage of public officers if that view were affirmed cannot be overestimated.

Actually, *Fornes* is squarely within the mainstream of 125 years of Florida jurisprudence, and Clayton's own citations do not support his position. An injury which is different in kind or degree from that suffered from the public generally is the very essence of justiciability. It is what separates the adjudicatory role of courts from the general legislative oversight role of the Auditor General.

Clayton says (brief, p. 13) that the inquiry should be "if the complaint would state a cause of action had it been brought against a private party, there is no good reason to deny standing." The School Board does not necessarily disagree with that formulation, which focuses on the entanglement of standing and justiciability, but the formulation is unhelpful to

his argument here. For example, if a speeding motorist passes Clayton on the interstate, a law has been broken but if there has been no accident injuring Clayton, may he sue the speeding motorist? If Wal-Mart violates wage and hour laws, incurs fines, and must increase its prices, the buying public is injured equally, but may Clayton thereby sue Wal-Mart? Different courts might answer either that he has no standing or that he has no cause of action. It thus begs the question to say that Clayton should have standing in the present case, for if the School Board were a private party in violation of the statute in question and the question were whether Clayton's claim stated a cause of action, the answer would clearly be "no".

Clayton suggests that the Florida constitutional guarantee of "redress of any injury" (Article I, §21) is a point of possible distinction from Federal concepts of justiciability. His argument again begs the question; in order to redress an injury, there must first be an injury. What *Fornes* and its antecedent *Rickman v. Whitehurst*, 74 So. 205 (Fla. 1917) and their progeny say is that in the absence of such injury, a citizen has no standing.

For example, Fla. Stat. §163.3215 gives standing to enforce local government comprehensive plans to "aggrieved or adversely affected" parties, defined as exceeding in degree the general interest in community good. If Clayton were correct, then this statute is an unconstitutional limitation of the right otherwise afforded under Article I, §21.

As another example, Fla. Stat. §60.05 expressly authorizes suits to abate public nuisances, by any citizen in the name of the State. However, the cases require special injury, with no thought at all for the notion that the reach of the Florida Constitution is any broader. *See Alden v. Pinney*, 12 Fla. 348 (1868); *Lutterloh v. Town of Cedar Keys*, 15 Fla. 306 (1875); *Page v. Niagara Chemical Division, Food Machinery & Chemical Corp.*, 68 So.2d 382 (Fla. 1953).

The Declaratory Judgment statute, Fla. Stat. §86.091, has been similarly construed. *Linning v. Board of County Commissioners of Duval County*, 176 So.2d 350 (Fla. 1st D.C.A. 1965); *Brooks-Garrison Hotel Corp. v. Sara Inv. Co.*. 61 So.2d 913 (Fla. 1952); *Wedmer v. Escambia Chemical Corp.*, 102 So.2d 631 (Fla. 1st D.C.A. 1958); *Dan Dee Corporation v. Samuels*, 124 So.2d 733 (Fla. 2d D.C.A. 1960).

The bond validation statute and eminent domain statutes have been similarly construed. *Rich v. State*, 663 So.2d 1321 (Fla. 1995); *City of Dania v. Broward County*, 658 So.2d 163 (Fla. 4th DCA 1995); *Tampa Suburban Utilities Corp. v.Hillsborough County Aviation Authority*, 195 So.2d 568 (Fla. 2d DCA), *cert.den.* 201 So.2d 898 (Fla.1967).[5]

Clayton argues that *Fornes* "might" be distinguished on the ground that it involved a request for injunctive relief, and he says that "standing rules might plausibly differ for such different forms of relief" (brief, p. 9). He then cites a number of cases for the proposition that Florida has permitted access to the courts by way of mandamus without alleging any special injury. His citations either do not support, or contradict, his argument.

He cites his own prior original petition in this Court, *State ex rel. Clayton v. Board of Regents*, 635 So.2d 937 (Fla. 1994). He says that the same arguments presented now were present in that case. But the text of the opinion says nothing that would illumine or support his argument here. Next, he cites *North Palm Beach v. Cochran*, 112 So.2d 1 (Fla. 1959), which appears never to have been cited in any other "standing" case in Florida, and must be considered superseded by *Fornes* to the extent of any inconsistency. However, there is no

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[5]A legitimate inquiry might be made as to whether, under the standards of this case, Clayton would have been entitled to intervene in the underlying eminent domain proceedings. If the answer is negative, then he ought not to be permitted to attack those proceedings collaterally.

such inconsistency. The facts and the language in *Cochran* suggest that the town and the people of the town were affected differently than the citizens of the state generally. He then cites *State ex rel. Ayres v. Gray*, 69 So.2d 187. But that case involved the constitutional question of whether there was a vacancy in the office of governor, for which the secretary of state might qualify candidates, after the death of the governor. The decision is thus squarely consistent with the constitutional-nonconstitutional dichotomy for special injury, first declared in *Department of Administration v. Horne*, 269 So.2d 659 (Fla. 1972). Next, he cites *State ex rel. Stewart v. Mayo*, 35 So.2d 13 (Fla. 1948). But in that case, Tom Stewart was a citrus grower, and this was found to give him sufficient standing to seek enforcement of the Commissioner of Agriculture's citrus testing duties. The Court thereupon quashed his writ anyway. Clayton then cites *Florida Industrial Commission v. State ex rel. Orange State Oil Co.*, 21 So.2d 599 (Fla. 1945). But this was not, as he asserts, a suit for enforcement of a public right by mandamus. It was an entirely private suit to compel refunds of unemployment compensation contributions by an employer.

Kneeland v. Tampa Northern R. Co., 116 So.2d 48 (Fla. 1927) is not a mandamus or public rights case at all.

Next, Clayton cites *Florida Cent. & P. Ry. Co. v. Tavares*, 31 Fla. 482, 13 So. 103 (1893), which predates the so-called Rickman Rule but is not necessarily inconsistent with it. As in *Cochran*, a public body rather than a private citizen was the complainant. He then cites *State v. Crawford*, 28 Fla. 441, 10 So. 118 (1891), another pre-Rickman decision. In *Crawford*, the Governor sued the Secretary of State in mandamus to compel the affixing of the state seal to a commission. If that decision meant what Clayton contends, the fact that the Governor was chief magistrate was irrelevant to his standing. The Court considered his status as magistrate

to be determinative of his standing to enforce the "public right" even though he was not the recipient of the commission.

Lastly, Clayton cites *Krantzler v. Board of County Commissioners of Dade County*, 354 So.2d 126 (Fla. 3d D.C.A. 1978). But this is not a mandamus case at all; it is an injunctive claim, and thus undercuts his entire argument that there is some historical distinction between the *Fornes* decision (an injunction case) and his mandamus petition.

> B. [ALTERNATIVE CERTIFIED QUESTION: IRRESPECTIVE OF *FORNES,*] DOES THE ACTION OF A PUBLIC BOARD WHICH EITHER INCREASES TAXES OR WASTES PUBLIC MONEY RISE TO THE LEVEL OF A CONSTITUTIONAL ISSUE WHEN IT IS ASSERTED THAT THE PUBLIC BOARD EXCEEDED ITS AUTHORITY GRANTED BY THE LEGISLATURE?

Krantzler is acknowledged, but not followed, in *Godheim v. City of Tampa*, 426 So.2d 1084 (Fla. 2d D.C.A. 1983). The facts in *Godheim* are strikingly similar to the instant case; the complaint alleged that the city had violated its own competitive bidding requirements, its ordinances, Fla. Stat. §287.055, and the Sunshine Law. Obviously, these assertions equated with the certified question here: "when it is asserted that the public board exceeded its authority granted by the legislature." Since this Court in *Fornes* joined the *Godheim* court in quoting and approving the policy arguments against standing in *Paul v. Blake*, 376 So.2d 256 (Fla. 3d D.C.A. 1979), there should not have been any doubt in the mind of the District Court below on this certified question.

Clayton does not answer the point that under Article IX, §4 of the Constitution, school boards have the constitutional power to "operate, control and supervise". Thus, the challenged

action cannot be said to violate the *Constitution* merely because an alleged statutory "authorization" was allegedly not followed.

The real question is whether, by virtue of either statute or constitution, the Board was under a "clear legal duty" to perform the "ministerial act" of rescinding its own previous vote. It is highly questionable whether any public body has a clear legal and ministerial duty to undo an action already taken. By what constitutional sorcery does a court direct the casting of votes in a legislative body in a particular fashion on a particular issue? And if so, which Board members must so vote as directed? All? A majority of three? A supermajority? If one or two board members need not join the vote in order to effect a rescission, which ones? The *effect* of the vote, as an action of the corporate entity itself, may be stayed by injunction or otherwise, if other requirements are met, but the decision on condemnation is clearly a discretionary act. The Board has previously cited *School Board of Broward County v. Viele*, 459 So.2d 354 (Fla. 4th D.C.A. 1984) for that proposition, and Clayton does not dispute it.

II. IS A SETTLEMENT OF EMINENT DOMAIN PROCEEDINGS GOVERNED EXCLUSIVELY BY THE STANDARDS APPLICABLE TO VOLUNTARY PURCHASES OF LAND?

III. FLA. STAT. 235.054 (1995) IS NOT THE EXCLUSIVE AUTHORITY FOR SCHOOL BOARD PURCHASES OF LAND.

The District Court's statement that the sole methods of acquiring property are purchase and eminent domain is overbroad, and threatens mischief. Schools have long been built on sites acquired by purchase, donation, dedication or condemnation.

Fla. Stat. §230.23(2) gives to school boards the power and authority to "receive, purchase, acquire by institution of condemnation proceedings if necessary, lease [real property], . . . receive, hold in trust, and administer [real property] granted, conveyed, devised or bequeathed for the benefit of the schools of the district." Dedication of school sites has often been made a condition or feature of major land development orders under zoning codes.

The statement of the District Court was obviously not intended to be so broad, but it invites inquiry into the sources and nature of the Board's power to acquire and manage property. That power is comprehensive, under Fla. Stat. §§ 230.03(2) and 230.23(2). The District Court's inquiry should have been not whether §235.054 is the source of authority, but to what extent it should be construed as limiting the otherwise broad authority of school boards to acquire property as an incident to their constitutional duty to "operate, control and supervise" their schools.

Clayton says that *because* the acquisition of the challenged site was not by eminent domain, it was therefore a purchase authorized *only* by Fla. Stat. §235.054. First of all, there is a flaw in his premise that this was not an acquisition in eminent domain.

Offers of judgment are expressly authorized and contemplated under the power of eminent domain. Fla. Stat. §73.032. But such offers are voluntary, as is the act of acceptance. Under the District Court's analysis, the making of an offer of judgment or its acceptance is therefore governed *exclusively* by Fla. Stat. §235.054.

This holding has some interesting corollaries. For example, are offers of judgment under Fla. Stat. §73.032 now "implicitly" exempt from the public records law under §235.054? If so, it will be the first "implicit" exception to open government laws ever recognized.

Clayton attempts to avoid such imponderables by saying that the Board in this case utterly failed to comply with the eminent domain statutes, and therefore "must" have acquired the property by purchase. In so doing, he ignores the unappealed holding that the condemnation proceedings were free from defect. (Appendix -Tab 11; R-606). He cannot now collaterally attack them. *See Florida Power & Light Co. v. Canal Authority*, 423 So.2d 421 (Fla. 5th D.C.A. 1982, *rev.den.* 434 So.2d 887 (Fla. 1983).

Clayton admits that the District Court relied on a later version of Fla. Stat. §235.054, not extant at the time of the actions of which he complains. But he says that the change is mere rearrangement, and the former language "*if* this procedure is utilized" does not undercut the District Court's holding that "this procedure" is the *exclusive* method of settling condemnation cases. He does not explain how the Board had a "clear legal duty" in 1994 to follow the 1995 language as the same was construed by the District Court on first impression. He attempts to distinguish the Attorney General's opinion and legislative clarification of the contemporaneous provisions of Fla. Stat. §§ 125.355 and 166.045, by saying that there was no such clarification of §235.054. With respect, that is nonsense. A law expressly intended to clarify a previous enactment cannot be said to clarify the intent of only two of its three identical provisions in the previous enactment.

Clayton engages in a long and tortuous explanation of why Fla. Stat. §§ 235.05 and 235.054 should be construed in pari materia. He forgets to include §73.032 in such a comparison.

Clayton also argues that *Seminole County v. Delco Oil, Inc.*, 669 So.2d 1162 (Fla. 5th D.C.A. 1996) has no bearing. While it is true that the applicability of Fla. Stat. §125.355 is not (yet) an issue in *Delco*, the case is interesting because Clayton's counsel was also counsel

for Delco, and if he wins here, his client Delco's settlement award is exposed to collateral attack there. Nor would he be entitled to an award of fees for settling, if a settlement is to be construed as a "voluntary purchase" under Fla. Stat. §125.355, either within the appraisals or approved by extraordinary vote. Actually, the School Board agrees with *Delco*: settlements in condemnation, and attorneys' fees thereon, are controlled by Chapter 73 and not by Fla. Stat. §§125.355 or 235.054.

IV. MAY MANDAMUS BE UTILIZED AS A MEANS OF COLLATERAL ATTACK ON AN UNAPPEALED CONDEMNATION JUDGMENT, WHERE THE CONDEMNEE IS NOT JOINED?

Clayton acknowledges that the answer to this issue is no. That should dispose of his case. But he argues that the School Board has not yet "put itself out of the power" to do the act demanded in his petition, because it may rescind its vote and proceed to a trial and verdict in eminent domain. He does not suggest how the trial court in the eminent domain proceeding is to reopen its unappealed judgment of February 1995. Nor does he suggest how the defendant landowner under that judgment is to be bound by these proceedings to return to court for trial.

Clayton also attempts to distinguish *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957). He correctly notes that there, the respondent School Board attempted in its defense to attack collaterally the completed adjudicatory proceeding which the petitioner sought to enforce. Here, the facts are a mirror; Clayton attempts in his petition to attack collaterally the completed adjudicatory proceeding with which the School Board is obliged to comply. But the net result is the same in both cases: in the ensuing mandamus action, the parties are bound by the result of the prior adjudicatory proceeding and cannot collaterally attack it.

It is fitting that Clayton's last citation is to the decision in *Robert G. Lassiter & Co. v. Taylor*, 128 So. 14 (Fla. 1930). Like so many others, this decision also does not stand for the proposition he asserts. In that case, Taylor (who had standing) sued to enjoin the City from paying Lassiter under an unauthorized contract, though Lassiter had already completed the work. *Lassiter was a party*, and ultimately the unsuccessful appellant. The attack was not collateral. In this case, Lassiter's equivalent, the condemnee, is clearly *not* a party to these proceedings. There, the payment was enjoined. Here, it has been received.

CONCLUSION

The District Court opinion should be reversed, with instructions to reinstate the Final Judgment of dismissal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Richard S. Graham, Esquire, 543 South Ridgewood Avenue, Daytona Beach, FL 32114, this 22 day of May, 1996.

C Allen Watts

Attorney