IN THE SUPREME COURT OF FLORIDA
CASE NO. 87,504

Y.H. INVESTMENTS, INC.,

Petitioner,

vs.

RAQUEL GODALES, individually and as guardian of Armando Rodriguez, a minor,

Respondent.

_____/

On Review of a Certified Question from the Third District Court of Appeal

# RESPONDENT'S ANSWER BRIEF

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## TABLE OF CONTENTS

## TABLE OF CITATIONS

## STATEMENT OF THE CASE AND FACTS

The Petitioner, Y.H. INVESTMENTS, INC., omits certain facts in the record and misstates some others that are germane to the arguments raised in the Respondent's Answer Brief. Accordingly, the Respondent, RAQUEL GODALES, makes these specific exceptions, and supplements the Petitioner's Statement of the Case and the Facts as follows:

Neither the Petitioner, nor any of its amici, specify the age of the child at the time this action accrued. The child was two years and ten months old when he was injured by falling under the guardrail of the apartment complex stairway. [SR. 26].

The Petitioner states on page 3 of its Brief that the child fell while his mother was putting a shoe on him. However, the evidence at trial was that the child was attempting to put on his own shoe when he leaned back and fell beneath the lower guardrail. [SR 19, 41]. The child's mother was not an active force in the child's fall, and the only liability asserted against her arose from the failure to properly supervise the child.

The Petitioner overstates the defense issue that was presented to the jury. The jury was instructed that the building owner was negligent as a matter of law. [R. 210]. The first issue for the jury was whether or not this negligence was a legal cause of injury to the child. [R. 210]. The defense issue for the jury's determination was not whether "anyone else" was negligent toward the child, as Petitioner states on page 4 of its Brief. The trial court agreed there was no evidence at trial to support a defense

charge on the negligence of any person or entity other than the child's mother, and the defense issue was limited to the mother's negligence in failing to supervise. [R. 204].

Neither the Petitioner, nor any of its amici, specify the provision of the South Florida Building Code that was the basis for the trial court's instruction to the jury that the apartment complex owner was negligent as a matter of law. At trial, GODALES proved that the apartment complex stairway was in violation of a provision of the South Florida Building Code which required apartment complex builders and owners to provide protection for children by constructing and maintaining guardrails on such stairways to reject a six-inch diameter object. [R. 197, 307]. The pertinent provision of the Code, §3108.2, states:

> . . . and for guardrails above the first floor of buildings of Group H and I Occupancy such guardrails shall provide protection for children by being designed and constructed to reject a six-inch diameter object.

[R. 197, 307]. At trial, it was shown that the opening between the tread of the step from which the child fell and the lower guardrail was some seventeen inches and in violation of this provision. [R. 307]. The trial court also found that this provision was intended to protect children and that the building owner's violation of this provision constituted negligence as a matter of law. [R. 197].

Petitioner correctly states on page 2 of its Brief that the Third District Court of Appeal reversed on two separate grounds. Aside from the issue of apportionment, which is the subject of this review, the District Court reversed and ordered a new trial on the

grounds that the jury's verdict was inconsistent in its damages award. [R. 312-313]. Accordingly, that portion of the District Court's order remanding the case for a new trial on damages should not be disturbed on review by this Court of the question certified.

## SUMMARY OF THE ARGUMENT

A child's parent, unlike a spouse or employer, is not a proper party for a proportionate fault question in a personal injury action that is for the benefit of the child. The Third District's decision in this case takes proper recognition of the common-law rule in Florida that a child's recovery may not be adversely affected by a parent's negligence, and construes Florida's comparative fault statute, as it should, in favor of the broadest possible retention of the pre-existing common-law rules.

The District Court's holding is consistent with the underlying rationale of prior Florida Supreme Court decisions and this Court's construction of other statutes. For example, the Uniform Contribution Among Tortfeasors Act, §768.31(3), Fla. Stat. (1975), expressly grants the right of a defendant to seek contribution from all other tortfeasors according to their relative degrees of fault. This statute was interpreted by the Florida Supreme Court to include the right to seek contribution even from co-tortfeasors who were immune from direct action, including co-tortfeasor spouses. Shor v. Paoli, 363 So.2d 825 (Fla. 1977). Yet, for policy reasons unique to the parent-child relationship this Court did not construe that statute to include a right to seek contribution from a co-tortfeasor parent. Joseph v. Quest, 414 So.2d 1063 (Fla. 1982).

Similarly, the comparative fault statute at issue in this case grants a defendant the right to apportion fault to all other participants to the accident. This statute has been interpreted by the Florida Supreme Court to include the right to apportion fault

among persons not made parties to the lawsuit, including immune nonparty spouses. For the same reasons that motivated this Court's decision in Joseph, this Court should also not construe the comparative fault statute as permitting apportionment to a co-tortfeasor parent. In Ard v. Ard, 414 So.2d 1066 (Fla. 1982), this Court affirmed its adherance to parental immunity on a similar rationale. The family's financial difficulties which stem from the child's injury are no less impacted by a contribution claim than by a direct reduction of the child's recovery due to a parent's fault. In the event that this Court on review discerns an irreconcilable conflict between the views expressed in Fabre and the pre-existing common-law rule, this Court should recede from that decision, or overrule it entirely.

The District Court's holding in this case should be affirmed for another reason. The infant in this case sued to recover for injuries resulting from a building owner's violation of a building code provision expressly intended to protect children. Comparative fault is not an available defense to one whose negligence consists in the violation of a statute or ordinance intended to protect a class of persons from their inability to exercise self-protective care. In Florida, children of tender years form such a class. For this reason alone, the decision of the Third District Court of Appeal should be affirmed.

## ARGUMENT

### I.

**FLORIDA'S COMPARATIVE FAULT STATUTE DOES NOT DISPLACE THE COMMON-LAW RULE THAT A CHILD'S RECOVERY FOR HIS OWN PERSONAL INJURY MAY NOT BE ADVERSELY AFFECTED BY A PARENT'S NEGLIGENCE.**

By properly applying the judicial rule of statutory construction to a pre-existing common-law rule, the Third District Court of Appeal correctly decided that, in a personal injury action for the benefit of a child, the child's recovery for his own damages may not be subject to reduction by the amount of comparative negligence attributable to the child's uninsured parent. Godales v. Y.H. Investments, Inc., 667 So.2d 871 (Fla. 3d DCA 1996). The district court's holding in Godales is supported not only by rules of statutory construction, but also by legal history and analysis of the principles underlying the common-law rule. The court's holding is also supported by decisions of other states that have interpreted their comparative negligence statute in the same manner as Florida and conclude that a parent is not a proper party for a proportionate fault question in a child's case.

It has long been the rule in Florida that a parent's negligence may not bar, diminish, or limit a child's recovery for his or her own damages in a tort action against a nonparent tortfeasor.[1] As these cases reveal, this has been the established

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[1]Jacksonville Electric Co. v. Adams, 50 Fla. 429, 39 So. 183, 185 (Fla. 1905); Burdine's v. McConnell, 1 So.2d 462 (Fla. 1941); Orefice v. Albert, 237 So.2d 142, 146 (Fla. 1970); Dubov v. Ropes, 124 So.2d 34, 35 (Fla. 3d DCA 1960); Flick v. Malino, 356 So.2d 904, 905 (Fla. 1st DCA 1978); McDonough Power Equipment, Inc. v.

law of Florida both before and after the adoption of the comparative fault statute. See, id. In Florida, whether operating under the law of contributory negligence as an absolute bar, or under the current law of comparative negligence, a parent's negligence has never been applied to reduce the child's recovery or to limit a third party's liability.

The Petitioner, Y.H. INVESTMENTS, INC., urges this Court to abandon this long established rule and now allow what the common law of Florida has never before allowed - a parent's negligence to adversely impact a child's recovery for his own damages. Petitioner and its supporting amici argue that Florida's comparative fault statute, §768.81 Fla. Stat. (1993), requires this. In fact, nothing in the language of §768.81 explicitly abrogates the common-law rule that a parent's negligence may not reduce or limit a child's recovery. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot co-exist, the statute will not be held to have changed the common law. Thornber v. City of Fort Walton Beach, 568 So.2d 914, 918 (Fla. 1990); Graham v. Edwards, 472 So.2d 803 (Fla. 3d DCA 1985), review denied, 482 So.2d 348 (Fla. 1986). Moreover, the statute is not so repugnant to the common law rule that it must replace it. Instead, what appears to Petitioner and its amici to be irreconcilable with the common-law rule is the interpretation given that statute in two subsequent

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Brown, 486 So.2d 609, 612 (Fla. 4th DCA 1986); Florida Power & Light Co. v. Macias, 507 So.2d 1113, 1116-7 (Fla. 3d DCA 1987).

decisions by this Court. See, Fabre v. Marin, 623 So.2d 1182 (Fla. 1993); Allied Signal, Inc. v. Fox, 623 So.2d 1180 (Fla. 1993). Those cases held that a defendant may reduce his share of liability on account of the fault attributed to a nonparty spouse (Fabre) or nonparty employer (Allied Signal), even though both are immune from suit in a direct action. Id. However, neither of those decisions addressed the issue of apportioning fault to a child's parent where the action for personal injury is for the benefit of the child. As set forth below, there are special public policy considerations when the plaintiff is a minor child and the potential at-fault person is the child's parent.

Florida's comparative fault statute, as interpreted in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), can co-exist with the common law rule that a child's recovery may not be adversely affected by the negligence of a parent, and does in other states. In its Fabre v. Marin opinion, this Court favorably cited other states that have similarly interpreted their comparative fault statute to require the finder of fact to consider the negligence of all persons involved in an accident, even immune nonparties. Kansas, Oklahoma, and Louisiana were among the states favorably cited by this Court. Id. at 1186-7. Even though the law in each of these states is, like Florida, that immune parties generally are included in fault apportionment, decisions from each of these states hold that a parent's percentage of fault cannot be used to reduce a child's recovery against a third party. See, Strong v. Allen, 768 P.2d 369, 370 (Okla. 1989); Barnes v. Robison, 712 F.Supp. 873, 876 (D.

Kan. 1989) (applying Kansas law); Dufrene v. Duncan, 634 So.2d 19, 21 (La. Ct. App. 1994).

The common-law rule that a child's recovery may not be adversely affected due to the negligence of a parent stems from fundamental notions concerning the parent-child relationship. A strong public policy which avoids placing a parent and child's interest in conflict has been the basis for prior rulings by this Court in areas of law governing rights of contribution and parental immunity. Nearly fifteen years ago, this Court considered abrogating the doctrine of parental immunity. Ard v. Ard, 414 So.2d 1066 (Fla. 1982). The decision of this Court to partially preserve parental immunity was motivated by a realization of the dangers inherent in placing a parent and child in conflict with respect to the financial outcome of a lawsuit to recover for the child's injury. In deciding to waive parental immunity only to the extent of a negligent parent's liability coverage, this Court wrote:

> "When insurance is involved, the action between parent and child is truly not adversary; both parties seek recovery from the insurance carrier to create a fund for the child's medical care and support without depleting the family's other assets. Far from a potential source of disharmony, the action is more likely to preserve the family unit in pursuit of a common goal - the easing of the financial difficulties stemming from the child's injuries."

Ard at 1068 (quoting Sorensen v. Sorensen, 369 Mass. 350, 339 N.E.2d 907 (Mass. 1975)).

This Court again recognized the danger of pitting the interests of a parent against those of a child in a case deciding rights of contribution. Joseph v. Quest, 414 So.2d 1063 (Fla. 1982). In Joseph, this Court considered whether the Uniform Contribution Among Tortfeasors Act, enacted by the Florida Legislature in 1975, applied to permit a tortfeasor the right to seek contribution from the negligent parent of an injured child where both the negligent parent and the nonparent tortfeasor contributed to the accident causing the injury. Id. The Uniform Contribution Among Tortfeasors Act expressly grants a joint tortfeasor the right to seek contribution from all other tortfeasors according to their relative degrees of fault. §768.31(3), Fla. Stat. (1975). That statute was interpreted by this Court to include the right to seek contribution even from co-tortfeasors who were immune from direct action, including co-tortfeasor spouses. Shor v. Paoli, 353 So.2d 825 (Fla. 1977). Yet, in the context of the parent-child relationship, this Court did not construe that statute to permit a right of contribution against a co-tortfeasor parent who was without liability insurance. Citing an important legal difference between the husband-wife relationship and that of parent-child, this Court in Joseph wrote:

> "However, we recognize a legal difference between the husband and wife relationship and that of parent-child. In the former, both are adults capable of bringing suit independently and with full knowledge of the financial relationship. Prior to institution of any suit either or both spouses can examine the relative strength of their financial positions, including insurance coverage and other assets. They can also evaluate the

> likelihood of success in the litigation process. With all this they can decide together or as individuals whether or not to bring suit with the possibility of contribution by the other spouse."

Joseph, at 1064. An infant injured through the combined negligence of a parent and a third party, this Court reasoned, would in most cases bring suit through a parent. The decision of whether or not to bring suit would rest entirely with the parent whose own negligence is a factor in the lawsuit. If the parent feared possible liability through contribution, then it would be their decision and not the child's to withhold suit. Id.

The same policy reasons that guided this Court in deciding whether to abrogate parental immunity or recognize a right of contribution against a co-tortfeasor parent are also instructive in deciding whether a parent is a proper party for proportionate fault in a child's suit against a nonparent tortfeasor. Percentages of fault are converted into monetary equivalents. By apportioning fault to a parent, the nonparent tortfeasor limits its own liability, and the child's recovery is reduced in proportion to the parent's percentage of fault. The strong policy considerations in favor of easing the family's financial difficulties stemming from the child's injuries is undermined. Because the child cannot get a full recovery for his injuries, the family's financial burden stemming from the child's injury is not eased. Furthermore, the prospect of litigating a child's case only to face a diminished recovery through apportionment of fault to the parent is no less a deterrent than the possibility of a contribution claim against the

parent. Indeed, the Fourth District Court of Appeal has held that the same policy reason which would not permit a parent's negligence to bar a child's recovery under contributory negligence would also not permit apportionment of fault to a child's parent. McDonough Power Equipment, Inc. v. Brown, 486 So.2d 609 (Fla. 4th DCA 1986). In McDonough, apportionment of an injured child's entire damages was placed on the defendant manufacturer, even though the child's parents were sixty percent at fault. Id.

The following year, in Florida Power & Light Co. v. Macias, 507 So.2d 1113 (Fla. 3d DCA 1987), it was held that evidence of a parent's negligence in failing to protect a child with seatbelts was properly excluded at trial. Recognizing the common law, the court in Macias held that a parent's negligence could not be imputed to diminish a child's recovery **or limit a third party's liability**. Id. at 1116 (emphasis added). By stating that a parent's negligence may not limit a third party's liability, the court acknowledged that apportionment of fault in fact operates to limit a third party's liability. Y.H. INVESTMENTS and its supporting amici discuss at great length in their briefs the distinction between imputing a parent's negligence to the child and apportioning fault to the parent as a co-tortfeasor. Amici Nationwide Mutual and the Defense Lawyers illustrate the distinction at page 14 of their joint amicus brief to show that imputing negligence to a plaintiff is not the equivalent of apportioning fault to a joint tortfeasor. The illustration that amici use is not unlike the actual facts in McDonough, supra. In

McDonough, the defendant manufacturer was not relieved of liability even though a jury attributed 60% of fault to the parents and 40% to the defendant. If the doctrine of imputed negligence were truly in operation in McDonough, then the parents' 60% fault would have been imputed to the child, who would then be deemed 60% at fault and unable to recover even his economic damages. That is because §768.81 abrogates joint and several liability for all non-economic damages and also for economic damages if the defendant's percentage of fault is less than the claimants. The McDonough court's decision clearly did not rest on the doctrine of imputed negligence. Imputed negligence is not the only force that drives the common-law rule. Imputed negligence is nothing more than a legal fiction that places upon one person responsibility for the negligence of another. Apportioning fault to a nonparty parent has the same effect on the child's net recovery as imputing the parent's negligence to the child does. In both cases, responsibility for the parent's negligence falls to the child. Apportioning fault to a parent in a child's suit is nothing more than an end run attempt to accomplish what the common law has never allowed.

This Court should not construe Florida's comparative fault statute as conferring a right of apportionment to an uninsured co-tortfeasor parent. Contrary to the Petitioner's claim, this Court would not be "creating an exception to the comparative fault statute" any more than it created an exception to the Uniform Contribution Among Tortfeasors Act in the Quest decision. Rather,

this Court would be construing the statute as it should - to preserve, not abrogate, the previously existing common law rule.

## II.

**THE DISTRICT COURT'S HOLDING WAS CORRECT FOR ANOTHER REASON AND MUST BE AFFIRMED ON THE GROUND THAT COMPARATIVE FAULT IS NOT A PROPER DEFENSE UNDER THE CIRCUMSTANCES PRESENTED IN THIS CASE.**

A decision by an appellate court that is right for any reason cannot be reversed. Landis v. Allstate Insurance Co., 546 So.2d 1051 (Fla. 1989); Applegate v. Barnett Bank, 377 So.2d 1150 (Fla. 1979); In Re Yohn's Estate, 238 So.2d 290 (Fla. 1970). Though it was not the basis for the Third District Court of Appeal's decision in this case, an additional and independent reason exists to affirm the court's holding that it was error to apportion fault for the infant's injury between the apartment complex owner and the infant's mother. The comparative fault of the infant's mother was not a defense available to the building owner in this case because the owner's negligence consisted in the violation of an ordinance intended to protect a class of persons deemed incapable of protecting themselves.[2]

In Florida, very young children comprise one such class of persons held as a matter of law to be incapable of exercising self-protective care. Swindell v. Hellkamp, 242 So.2d 708 (Fla. 1970) (holding that because children under six years of age are incapable of exercising self-protective care, they are conclusively presumed incapable of contributory negligence). Violation of a statute or ordinance intended to protect such a special class of persons

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[2]Tamiami Gun Shop v. Klein, 116 So.2d 421, 423 (Fla. 1959); Tampa Shipbuilding & Engineering v. Adams, 181 So. 403, 407 (Fla. 1938); Hurd v. Munford, Inc., 378 So.2d 86, 89 (Fla. 1st DCA 1979); Richardson v. Fountain, 154 So.2d 709, 711 (Fla. 2d DCA 1963).

against their inability to protect themselves renders the violator wholly responsible, even absent a showing of proximate cause. Tamiami Gun, 116 So.2d at 423. See also, Tampa Shipbuilding, 181 So. at 407. In these circumstances, total liability is imposed by operation of law. Since violation of this type of statute by a defendant is held to be the sole proximate cause of the harm which occurred, neither contributory negligence nor comparative negligence are available as defenses. This Court has held that violation of a statute intended to protect children will deny the defendant the right to establish at trial a parent's knowledge of the danger which the defendant created by violating the statute or ordinance. See id.

This doctrine constitutes an independent reason for affirming the district court's holding in this case. This case involved an infant who sued to recover for injuries resulting from a building owner's violation of a building code provision specifically intended to protect members of a class incapable of exercising self-protective care, i.e., small children. At trial, the plaintiff proved that the apartment complex stairway was in violation of a code provision requiring apartment complex builders and owners to provide protection for children by constructing and maintaining guardrails on outside stairways above the first floor to reject a six-inch diameter object. There can be no question that this provision of the building code was intended as protection for small children, and that its object was to prevent children from falling through or under the guardrails, because the provision

expressly states that it is for the protection of children. The trial court found the apartment complex owner negligent as a matter of law because at trial it was shown that the opening between the tread of the step from which the infant fell and the lower guardrail was some seventeen inches and a clear violation of the code provision. The trial court agreed that this provision was intended to protect a particular class of persons, namely, children. Under these circumstances, apportioning fault to the child's mother for negligent supervision was error since the entire fault is by law placed upon the defendant.

This doctrine is as viable after Fabre as it was before. The interpretation of Florida's comparative fault statute in Fabre, which requires that liability be apportioned to all participants in an accident in order to determine a defendant's percentage of fault, does nothing to alter the fact that the defense of comparative negligence is simply not available at all in cases where the defendant is found to have violated a statute or ordinance designed to protect a class of persons from their inability to exercise self-protective care.[3]

The Petitioner does not address this issue in its Brief on the Merits. Amici Nationwide Mutual and the Defense Lawyers do address this issue in their joint brief, but argue that the doctrine is not

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[3]Other comparative fault states with a similar interpretation, i.e., requiring apportionment of fault among all participants to an accident whether or not a party in the lawsuit, continue to recognize that comparative negligence is not a defense in cases where the defendant violates a statute designed to protect persons from their inability to protect themselves. See, Zerby v. Warren, 297 Minn. 134, 210 N.W.2d 58 (Minn. 1973).

applicable in this case because the relevant provision is not of the type intended to protect a particular class of persons from their inability to exercise self-protective care. This point can be settled simply by reading the provision of the code that is at issue in this case. Amici infer that this doctrine is limited in scope to only particular types of statutes, such as child labor laws or laws governing the sale of guns to minors. In fact, this doctrine has been employed in Florida cases involving a city ordinance regulating the height of street awnings and a statute regulating the type of containers in which gasoline may be dispensed. See, Richardson v. Fountain, 154 So.2d 709 (Fla. 2d DCA 1963); Hurd v. Munford, Inc., 378 So.2d 86 (Fla. 1st DCA 1979). This doctrine is applicable to any statute, ordinance, or regulation that has as its purpose the protection of a class of persons incapable of exercising self-protective care, such as the one involved in this case.

## III.

## FABRE WAS WRONGLY DECIDED AND THIS COURT SHOULD RECEDE FROM THAT DECISION OR COMPLETELY OVERRULE IT.

On August 26, 1993, this Court handed down a decision that fundamentally altered the rights of almost every individual involved in the pursuit of redress for personal injury or death under Florida's civil justice system. In Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), this Court embraced the view that a jury should be permitted to assign fault on the verdict form against individuals or entities who were not parties to the litigation. This holding virtually assures the inclusion of claims of liability against others who are not available as defendants in the principle action, or who are immune from suit.

This Court's decision in Fabre is inconsistent with other policies implemented by the Florida Legislature and with the policies long recognized in the common law. If the view expressed in Fabre is now extended to include parents as proper parties for proportionate fault in a personal injury action that is for the benefit of the child, the policies that motivated the decisions in Ard and Quest will be undermined. The harmful effects of this Court's decision in Fabre would then be most evident in cases where a child of tender years is injured. A case could almost always be made that a parent was not attentive enough in the care of a young child. The nonparent tortfeasor stands to lose nothing by asserting at least some fault to the parent for failure to supervise. A child under the age of six years is conclusively

presumed incapable of negligence. Under the current status of the law, the fault-free child cannot sue his or her uninsured parent concerning the manner in which he is cared for, i.e., negligent supervision. Moreover, this Court has held that a nonparent tortfeasor has no right to seek contribution from a co-tortfeasor parent. Yet, if Fabre is extended to include immune parents, it will be the fault-free child who will lose by going without a full recovery. This Court should recede from Fabre in the context of the parent-child relationship, or overrule that decision entirely.

## CONCLUSION

The Respondent respectfully requests that the decision of the Third District Court of Appeal in Godales v. Y.H. Investments, Inc., 667 So.2d 871 (Fla. 3d DCA 1996) be affirmed for the reasons stated in that opinion and for the additional reasons stated in this Answer Brief. In the alternative, to the extent this Court does discern an irreconcilable conflict between the view stated in Fabre v. Marin, 623 So.2d 1182 (Fla. 1993), and the pre-existing common law, Respondent respectfully requests that this Court recede from Fabre, or overrule that decision entirely.

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## CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was served on this 11th day of July, 1996, to: **G. Bart Billbrough, Esquire**, Walton, Lantaff, Schroeder & Carson, 25th Floor, One Biscayne Tower, Two South Biscayne Boulevard, Miami, Florida 33131; **Joel S. Perwin, Esquire**, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, 25 West Flagler Street, Suite 800, Miami, Florida 33130; **Carlos Lidsky, Esquire**, 145 East 49 Street, Hialeah, Florida 33012; **Tracey Raffles Gunn, Esquire**, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, Florida 33601; **James K. Clark, Esquire**, Suite 1800, Suntrust International Center, One SE Third Avenue, Miami, Florida 33131; and **Betsy E. Gallagher, Esquire**, Post Office Box 21548, Tampa, Florida 33622.

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