SUF'REME COURT OF FLORIDA

Case No. 89,128

[USDC No. 91-541-CV-UUB]

BERKSHIRE LIFE INSURANCE COMPANY,

Appellant,

v.

BRUCE ADELBERG,

Appellee.

Certified Question From
The United States Court of Appeals
For The Eleventh Circuit

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Originally, this was an appeal, from the United States District Court for the Southern District of Florida to the United States Court of Appeals for the Eleventh Circuit, by appellant Berkshire Life Insurance Company ("Berkshire") from a jury verdict for damages in favor of appellee Bruce Adelberg ("Adelberg") in a case involving a disability insurance policy issued by Berkshire. This appeal is before this Court pursuant to Fla. R. App. R. 9.150 from the following question certified by the Eleventh Circuit:

> WHEN THE TERM "OCCUPATION," IS LEFT UNDEFINED IN AN OCCUPATIONAL DISABILITY INSURANCE POLICY, DOES THE TERM "OCCUPATION" REFER TO PRECISELY (AND ONLY) THE JOB HELD BY THE INSURED AT THE TIME OF THE INJURY, OR SHOULD IT BE INTERPRETED MORE GENERALLY TO INCLUDE ANY JOB REQUIRING SIMILAR SKILLS AND PRODUCING COMPARABLE INCOME?

Course of Proceedings

Adelberg commenced this action by filing suit against Berkshire, on or about February 12, 1991, in the Circuit Court for Dade County, Florida. R1-1-6.[1] Berkshire was served with process on February 22, 1991. R1-1-4. It removed this action to the United States District Court for the Southern District of Florida on March 19, 1991, based on diversity of citizenship. R1-1-1. The case initially was assigned to Judge Spellman, but in May of 1991 it was transferred to the Hon. Kenneth L. Ryskamp. R1-3-1.

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[1] References to the record on appeal will be in the format RV-D-P, where V is the volume number, D the document number (if applicable), and P the page number. Citations to the trial transcript will be in the format RV-P.

Berkshire answered the complaint, denying liability to Adelberg, on April 17, 1991. R1-2-1. The parties proceeded with extensive discovery. Judge Ryskamp recused himself on September 3, 1991, R1-16-1, R1-17-1, and the case was reassigned to the Hon. Federico A. Moreno. R1-18-1. Discovery continued.

On March 13, 1992, Adelberg filed a motion for partial summary judgment. R1-41-1. Berkshire filed its opposition to the summary judgment motion on April 20, 1992. R1-48-1. The court denied the motion by order entered May 1, 1992. R2-60-1. Trial preparations resumed.

By order entered November 13, 1992, the case was reassigned again, to the Hon. Ursula Ungaro-Benages. R2-87-1. With leave of court, Adelberg filed an amended complaint on November 25, 1992. R2-92-1. Berkshire filed an answer to the amended complaint, again denying liability, on December 1, 1992. R2-93-1. Adelberg filed a second amended complaint on May 19, 1993. R2-19-93.

A jury trial began on December 6, 1994. R3-155-1, R6-1. On December 12, 1994, the jury returned a verdict in favor of plaintiff Adelberg on his claim for disability insurance benefits. R3-165-1, R10-615. The court entered a final judgment in favor of Adelberg and against Berkshire on January 27, 1995, in the amount of $224,236.93. R3-177-1. Berkshire filed a motion to alter or amend the judgment on February 2, 1995. R3-178-1. The court granted the motion by order entered February 13, 1995. R3-179-1. An amended judgment, again in the amount of $224,236.93, also was entered on February 13, 1995. R3-180-1.

The district court reserved jurisdiction over a claim for attorneys' fees. Id.

Berkshire filed its notice of appeal on February 22, 1995. R3-181-1. The parties filed their respective briefs with the Eleventh Circuit. In an opinion dated October 10, 1996, the Eleventh Circuit certified the following question to this Court:

> WHEN THE TERM "OCCUPATION," IS LEFT UNDEFINED IN AN OCCUPATIONAL DISABILITY INSURANCE POLICY, DOES THE TERM "OCCUPATION" REFER TO PRECISELY (AND ONLY) THE JOB HELD BY THE INSURED AT THE TIME OF THE INJURY, OR SHOULD IT BE INTERPRETED MORE GENERALLY TO INCLUDE ANY JOB REQUIRING SIMILAR SKILLS AND PRODUCING COMPARABLE INCOME?[2]

Facts

The basic facts relevant to the sole issue on appeal are essentially undisputed. Berkshire issued a disability insurance policy to Adelberg in the 1960s, when he worked as a jeweler. R8-311 to R8-312. In the late 1970s, Adelberg changed occupations and began to work as a salesman for a friend's company dealing in commodities such as sugar, rice, and beans. R8-312 to R8-313, R8-365. Adelberg alerted Berkshire to the change by filing a new application on which he listed his "occupation(s)" as "Vice Pres/Sales." RI-48 Ex A. The Berkshire policy covered him as a salesman. R8-294. Adelberg continued as a food commodities salesman until 1985, when the company entered bankruptcy and its president was convicted of Customs-related felonies. R8-315. Adelberg also was convicted on two felony

[2]In certifying this question, the Eleventh Circuit stated: "we do not intend the particular phrasing of [the question] to limit the court in its consideration of the problem posed by the case."

counts. R8-315 to R8-316. He paid a fine and was placed on probation. R8-395.

In 1986, Adelberg resumed work, this time selling yachts. R8-316. He was licensed by the state of Florida for this purpose. R8-317. His duties involved showing yachts to customers and walking, climbing and crawling through the various sections of each boat. R8-321 to R8-324. He earned a commission for each sale, R8-353, but no salary. R8-362. Adelberg's disability insurance policy with Berkshire remained in effect during this time. R8-325.

By 1990, Adelberg had come to believe that because of economic changes, selling boats was not a means of earning a living, and he began looking for other work. R8-369 to R8-370. In February of 1990, Adelberg injured his knee in a fall at an airport. R8-326. He received medical treatment for the injury. R8-326, R8-328 to R8-330. Discomfort and movement difficulties from the injury eventually caused Adelberg to abandon his work selling yachts. R8-326 to R8-327. His last sale was in March of 1990. R8-364. Adelberg attempted to resume work selling yachts later that year, but decided that he was unable to do so. R8-335 to R8-340.

After he stopped selling yachts, Adelberg began selling freight space for a trucking company, Carretta Trucking. R8-348. It grew into a full-time job. R-384. His duties required traveling to visit customers across the country. R8-383. He was able to perform all the walking, moving, and other physical tasks

required by his freight sales job, R8-251. Adelberg received commissions and, later, a salary. R8-388 to R8-389.

Adelberg filed his claim for disability benefits with Berkshire in August of 1990.[3] R8-204. The policy pays benefits for "total disability" when the insured is unable to perform the "material and substantial duties" of his occupation. R9-480, R1-41-17.[4] The policy does not expressly define the term "occupation." Berkshire paid benefits for several months in 1990, R8-334, but ultimately denied the claim on the basis that Adelberg was not totally disabled from working as a salesman. R8-293. No benefits were paid to Adelberg after October 1, 1990. R8-294.

In his motion for partial summary judgment as to liability, Adelberg argued that the "plain and ordinary meaning" of the term "occupation" was, in his case, "yacht salesman." Rl-41-7. He contended that "salesman" was too broad an occupational category. Id. Adelberg also argued that there was no issue of fact as to the existence of his disability. Rl-41-9. Berkshire argued in response to the contention regarding "occupation" that Adelberg was a salesman who sold food, then yachts, and then freight space. Rl-48-14. The district court, by Judge Moreno, denied Adelberg's motion for summary judgment without opinion, finding only that issues of fact were present. R2-60-1.

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[3]The question of the timeliness of Adelberg's notice of claim to Berkshire is not before the Eleventh Circuit on appeal.

[4]The original language of policy defined "total disability" as the inability to engage in one's occupation. Rl-41-17, R8-290 to R8-293. The language was updated in April of 1984. Rl-41-17.

On the day trial began, the district court, by Judge Ungaro-Benages, announced that it "wasn't happy with a ruling that was made by one of the predecessor judges," RG-2, and held as a matter of law that Adelberg's occupation was that of "yacht salesman." R6-2, R6-5. Berkshire expressed disagreement with the court's position. R6-5, R6-11. Berkshire also objected that the sudden, unanticipated reversal in the court's legal position changed the focus of the case and disrupted Berkshire's trial strategy. R6-28. The district court responded that it had, if anything, simplified the trial because it had "taken an issue out of the case." R6-29.

The trial featured extensive testimony regarding Adelberg's medical condition and the particular job duties and physical tasks involved in selling yachts." There was also evidence that Berkshire had denied Adelberg's disability claim because the company considered his occupation to be that of a salesman, not only a yacht salesman. R8-293 to R8-294.

Berkshire renewed its contention that Adelberg's occupation should be deemed that of salesman in a motion for directed verdict at the close of plaintiff's case. R8-401 to R8-402. The court denied the motion. R8-4030, R9-550. Berkshire objected to the court's proposed jury instructions because they defined Adelberg's occupation as that of yacht salesman. R9-556. The court instructed the jury as follows:

> In order for Bruce Adelberg to prevail, he must prove by a preponderance of the evidence

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'These issues are not before the Eleventh Circuit on appeal.

> that he was totally disabled in his occupation as a yacht salesman as a result of an injury or sickness under the terms of the policy.
>
> Total disability under the Berkshire policies is defined as the inability to perform the material and substantial duties of his occupation.
>
> Total disability does not mean the inability to perform all of the duties of the claimant's occupation.

R9-599. The court also directed Berkshire to remove the word "salesman" from an exhibit listing Adelberg's sequence of jobs. R9-553 to R9-554.

The jury found that Adelberg was entitled to benefits for total disability for the period from December 27, 1990, to December 12, 1994 (the date of the verdict). R10-615. Based on the benefit sum of $3,700 per month, the district court molded the verdict into a judgment for $224,236.93, including prejudgment interest at 12% and rebated premiums. R3-180-1. The district court also awarded attorney's fees to Adelberg pursuant to Florida Statutes section 627.428.

SUMMARY OF ARGUMENT

This case presents a pure question of law for this Court to review. The disability insurance policy in question unquestionably protects Adelberg against a disability that prevents him from performing the material and substantial duties of his occupation. The policy does not expressly define "occupation." It is undisputed that, at the time of his injury that resulted in the alleged disability, Adelberg worked selling yachts. It is also undisputed, however, that Adelberg worked as a salesman selling other goods both before and after his tenure as a "yacht salesman."

Under these circumstances, the term "occupation" should not be interpreted in an exceedingly narrow way, producing a hyperspecialized definition of Adelberg's work. Florida law does not compel such a counterintuitive and unfair result. The better view, which other courts have followed, is that where "occupation" is undefined in a disability policy, it should not be limited to the particular job held by the insured at the time of injury, but should apply to any similar position of the same general character,

ARGUMENT

The sole legal issue presented by this appeal -- how to define the term "occupation" as it relates to Adelberg -- is not directly controlled by binding precedent. Berkshire is unaware of any decision of this Court announcing the appropriate scope of a salesman's occupation for purposes of a policy of this type. The district court cited no cases in delivering its oral opinion. R6-2 to R6-6, R6-11. The better reasoned precedents available from other jurisdictions, however, support Berkshire's position that as a matter of law, in this context, Adelberg's occupation is that of a salesman, not merely a yacht salesman -- his particular job at the moment of his injury.

I. AN INSURED'S "OCCUPATION" UNDER A DISABILITY POLICY SHOULD BE DEFINED AS ALL SIMILAR POSITIONS OF THE SAME GENERAL CHARACTER IN THE FIELD IN WHICH HE WORKS, UNLESS HE IS EMPLOYED IN A FIELD WITH WELL-RECOGNIZED AND RIGOROUSLY DEFINED PROFESSIONAL SPECIALTIES.

As discussed above, there is no real dispute as to any of the material facts underlying this appeal.[6] The district court's overly narrow construction of "occupation" in the disability insurance policy was the sole issue before the Eleventh Circuit. The district court should have held instead that Adelberg was a salesman, and that the fact that he happened to be selling yachts at the time his knee injury occurred did not mean that he was forever and always a "yacht salesman" for purposes of the policy.

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[6] Berkshire does not agree with the jury's finding that Adelberg was unable, as result of his injury, to perform the material and substantial duties of a "yacht salesman," but Berkshire is not challenging this factual finding on appeal.

Florida law does not provide an absolutely certain, binding answer as to how "occupation" should be construed in a disability insurance policy like that of Berkshire when applied to a salesman who has sold varied goods in his career. Nevertheless, Florida decisions provide substantial support for Berkshire's position. In New York Life Insurance v. Lecks, 122 Fla. 1271, 165 So. 50 (1936), this Court considered the meaning of "occupation" in an "any occupation" type of disability insurance policy.[7] This Court stated that "[t]he term 'occupation' is itself a relative one, having relation to one's capabilities." Id. at 132, 165 So. at 52. This Court cited as examples of occupations those of "merchant," "mechanic," or "day laborer." Id. Clearly, although "salesman" meshes well with the court's list, "yacht salesman" appears entirely too narrow. See also Texas Co. v. Amos, 77 Fla. 327, 81 So. 471, 472 (1919) ("'Occupation,' as commonly understood, signifies the business which one principally engages in.").

More recently, the First District Court of Appeals held, in a case involving a worker's compensation award of disability benefits, that a claimant who merely switched from one sales job to another was not entitled to permanent partial disability

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[7]There are two principal types of employment disability insurance policies: those that protect against the inability to perform one's own occupation, and those that protect against the inability to perform any gainful occupation for which one is suited by virtue of education, training or experience. See, e.g., 31 Fla. Jur. 2d § 850. The Berkshire policy here is of the former type; it protects Adelberg against the inability to perform his own occupation. The question is whether Adelberg's own occupation is that of salesman or "yacht salesman."

benefits. Bill Bard Associates, Inc. v. Totten, 418 So.2d 418 (Fla. 1st DCA 1982). The claimant had worked as a salesman in the hotel promotion field, and he traveled extensively. Id. at 418. After a back injury, he resigned and began work as a sales agent for a data processing firm. Id, at 419. The court held that, in view of the claimant's continuing employment in the sales field, "the claimant was capable of working at his usual occupation, and of earning a salary comparable or greater than his pre-accident wage."[8] Id.

The significance of Totten is that the district court clearly considered the claimant's two sales positions to be more or less equivalent. The second job involved less travel than the first, and more sitting and attending trade shows. Id. It also involved a different subject -- data systems instead of hotels. The court, however, correctly viewed both positions as examples of the claimant's unusual occupation when it evaluated the evidence.

Totten can be readily applied to this case. Although disability policy benefits rather that worker's compensation benefits are at stake, the principle that sales positions are generally similar enough to be considered the same occupation

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'Berkshire attempted to introduce evidence of Adelberg's high level of compensation in his position as a salesman for Carretta Trucking, but the district court refused to permit such evidence to be introduced. R6-7. Thus, the jury was prevented from learning about the extent to which Adelberg would receive a windfall under the policy by receiving disability benefits at the same time he continued to be well-compensated as a working salesman. Like the rebuffed claimant in Totten, Adelberg remained capable of maintaining his income, even after his injury, in his chosen occupation as a salesman.

applies here just as in Totten. The only real distinction between Adelberg's pre-injury and post-injury sales jobs is that while working for Carretta Trucking, he did not have to maneuver inside tight engine compartments or climb ladders, as he had while selling yachts. He continued to deal with customers as a salesman, and continued to bear all the responsibilities associated with that role. This Court should consider Totten persuasive Florida authority, and follow its teaching here by holding that Adelberg was not disabled from engaging in his occupation as a salesman.

The First District Court of Appeals also has applied the doctrine of equitable estoppel to prevent an insured from exploiting "the ingenious argument that the definitions . . . stated in the policy permitted him at the same time to be both totally disabled and to work on a full time basis." Grauer v. Occidental Life Insurance Co., 363 So.2d 583, 585 (Fla. 1st DCA 1978), cert. denied, 372 So.2d 468 (Fla. 1979). The case did not turn on an interpretation of "occupation," but obviously the kind of manipulation of policy definitions that the court refused to countenance in Grauer is exactly what has occurred here. Adelberg has received a huge windfall due to a supposed total disability that prevents him from working as a "yacht salesman" at the same time that he has continued to work as a salesman selling freight space. As the Grauer court held, such a result is clearly inequitable, and contrary to Florida law.

Finally, the general rule under Florida law is that in considering a disability claim, courts must look to "the

insured's occupation as a whole" in order to determine whether he can perform his duties. Sun Life Insurance Co. of America v. Evans, 340 So. 2d 957, 959 (Fla. 3d DCA 1976); Lorber v. Aetna Life Insurance Co., 207 So. 2d 305, 308 (Fla. 3d DCA) cert. denied, 212 So.2d 876 (Fla. 1968). This rule implies that Adelberg's career work as a salesman, rather than his job for a time selling yachts, should be deemed his occupation. See also Danzig v. Reliance Standard Life Insurance Co., 668 F. Supp. 1551, 1553-54 (S.D. Fla. 1987) (holding that occupation as a whole must be examined, and finding no disability because the insured was capable of performing several other positions at his place of employment).

This Court should also look to other jurisdictions and general principles of law for guidance. Persuasive authority is available from outside Florida. A federal district court in New York recently announced a definition of "occupation" that is reasonable, equitable, consistent with the general principles of Florida law discussed above, and that should be followed here. In Dawes v. First Unum Life Insurance Co., 851 F. Supp. 118 (S.D.N.Y. 1994), the court addressed the term "regular occupation" in the insured's disability policy.[9] Id. at 121. The insured was a vice president and sales manager of a securities trading firm; he described himself as "'a highly visible chief "contact" salesperson."' Id. He insisted that this one particular position constituted his "regular

[9]One's "regular occupation" under the policy in Dawes is equivalent to one's "occupation" under the Berkshire policy.

occupation," but the insurance company contended that the term should be defined as "the principal business of one's life; a ... profession or other means of earning a living." Id. (internal quotation marks omitted).

The Dawes court reached an intermediate position. It first held that one's regular occupation is "not limited to the insured's particular job." Id. at 122 (emphasis added). The court then concluded, based on an analysis of case law, that

> the applicable definition of "regular occupation" shall be a position of the same general character as the insured's previous job, requiring similar skills and training, and involving comparable duties.

Id. As applied to the facts of the instant case, this test confirms that Adelberg's occupation is that of salesman, and not that of "yacht salesman", an overly narrow construction of the term "occupation". Adelberg has moved easily from one sales position to another in his career; clearly, these jobs are of "the same general character." Although every sales position requires at least some familiarity with the product sold, the core skills involved are interpersonal communication abilities, persistence, and persuasiveness. Adelberg's repeated transitions from one sales field to another attest to the transferability of these skills. Under the Dawes reasoning, then, limiting the term "occupation" to the insured's particular job is inappropriate. This Court should apply the sound reasoning of Dawes, and define the term "occupation" to include all similar positions of the same general character in the field in which an insured works,

unless the insured is employed in a field with well-recognized and rigorously defined professional specialties.

In accord with Dawes is the view that "even under the so-called 'occupational disability' policy the insured must also be unable to engage in any similar employment, in order to be regarded as totally disabled." 44 Am. Jur. 2d § 1477, at 438 (footnote omitted) (citing Kirkpatrick v. United Federation of Postal Clerk's Benefit Association, 66 111. App. 2d 13, 213 N.E.2d 636 (1965)). The Kirkpatrick test is similar to the Dawes test, although perhaps somewhat broader. In any event, the "any similar employment" view of occupation clearly supports Berkshire's position, that an insured's occupation is not the equivalent of the particular job held at the moment of the insured's injury. In this case, there can be no genuine dispute that a job of a freight salesman, or a commodities salesman, or a foodstuffs salesman, is at least "similar" to the job of a "yacht salesman." They are similar, of course, because they are all variants of the same occupation -- salesman. See Mason v. Connecticut General Life Insurance Co., 367 So.2d 1374, 1377 (Ala. 1979) (in "any occupation" policy context, stating that the claimant was "a salesman," and that the fact "that in all these forms of employment a different product was sold is of no importance"); cf. Guardian Life Insurance Co. of America v. Cooper, 829 F. Supp. 1247, 1248 (D. Kan, 1993) (holding that the insured's occupation under the policy was that of registered nurse, not that of her "specialty," cardiac care nursing).

Berkshire's disability policies are income replacement policies designed to insure against the loss of the ability to perform one's occupation, not the loss of a particular job, as reflected by the policy term "occupation." This prevents "double dipping," that is, the collection of benefits by insureds who are able to continue working in a different job in the same occupation. The law recognizes the distinction between occupation and job, as Dawes indicates. See 851 F. Supp. at 122 ("occupation" not limited to particular job); see also Public Service Co. v. Ingle, 794 P.2d 1374, 1376 (Colo. Ct. App. 1990) (stating that "'occupation,' in its plain and ordinary meaning, generally refers to the particular type of business, profession, or employment in which a worker regularly engages . . . 'Occupation' has a different meaning than 'job,' 'employment,' and 'work'"); Youngwirth v. State Farm Mutual Auto Insurance Co., 140 N.W.2d 881, 885 (Iowa 1966) ("occupation" applies "to that field of work in which one is regularly, ordinarily and usually engaged").

General legal principles also favor Berkshire's position. "The cardinal rule of contract law is that a court should strive to effectuate the intent of the parties." Hibiscus Associates Ltd. v. Board of Trustees, 50 F.3d 908, 919 (11th Cir. 1995), (citing Hughes v. Professional Ins. Corp., 140 So.2d 340, 345 (Fla. 1st DCA 1962). There is no evidence that Berkshire's intent was to recognize "yacht salesman" as an independently insurable occupation. Moreover, "when a policy provision is not defined, common everyday usage determines its meaning." Certain

British Underwriters v. Jet Charter, 789 F.2d 1534, 1536 (11th Cir. 1986) (citing Security Insurance Co. v. commercial Credit Equipment Corp., 399 So. 2d 31 (Fla. 3d DCA), cert. denied, 411 so. 2d 384 (Fla. 1981)). Under common everyday usage, "salesman" is a recognized occupation, but "yacht salesman" is a rather artificial subspecialty that is not a generally recognized occupation in its own right. One authority has defined "occupation" as follows:

> BY "occupation" is ordinarily meant the insured's general, regular employment or vocation, as distinguished from a temporary and independent activity or avocation . . . .

Couch on Insurance 2d § 37:337 (1983) (footnotes omitted). The term "vocation" also makes clear that an occupation can remain the same, while taking slightly different forms, over a period of time.

"Yacht salesman" is simply not, in normal experience, a well-established and recognized occupation, sufficiently distinct to be considered separate from "salesman" in general. This is not a field that demands a long-term commitment -- Adelberg began selling yachts because he liked them and had purchased one of his own. R8-316. The high degree of specialization required by, for example, a recognized specialty in medicine, is not present. It is, therefore, improper to define sales occupations in extremely narrow, specialized terms, based solely on the particular job the

salesman holds, or a particular product that the salesman sells, at the time of injury.[10]

In sum, persuasive authority, from Florida and other jurisdictions, compels the conclusion that the term "occupation" in an occupational disability policy, should be interpreted to include any job requiring similar skills and producing comparable income, rather than limited to only the particular job held by the insured at the time of the injury. In this case, Adelberg's occupation, as a matter of law, is that of salesman, not yacht salesman.

[10]Adelberg pointed out at trial that he was licensed to sell yachts by the state of Florida in support for his narrow construction of the term "occupation". State regulation, however, is virtually omnipresent in today's society, and cannot properly be regarded as an indicator of everyday recognition of anything.

CONCLUSION

Applying an unreasonably narrow definition of "occupation" will enable Adelberg to reap a windfall, collecting benefits for an inability to work as a "yacht salesman", while continuing to work as a freight salesman. This result is improper under the law, unfair to Berkshire, and unsupported by the policy language. Accordingly, this Court should find, as a matter of law, that the term "occupation", when undefined in an occupational disability policy, should be interpreted to include **all** similar positions of the same general character in the field in which he works, unless he is employed in a field with well-recognized and rigorously defined professional specialties,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 1996, a true and Correct copy of the foregoing Initial Brief of Appellant was served upon the following, by overnight delivery:

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