IN THE

SUPREME COURT OF FLORIDA

NO.: 95,054

GARY HERZFELD,

Appellant,

v.

FRANK HERZFELD,

Appellee.

APPEAL FROM THE THIRD DISTRICT COURT OF APPEALS OF FLORIDA

INITIAL BRIEF FOR APPELLANT GARY HERZFELD

Sharon L. Kegerreis
Florida Bar No. 852732
Mayda Prego
Florida Bar No. 0054100

Hughes Hubbard & Reed LLP
201 S. Biscayne Boulevard
Suite 2500
Miami, Florida 33131

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TABLE OF CONTENTS

(Footnote continued from previous page)

TABLE OF CITATIONS

CASES **PAGES**

(Footnote continued on next page)

CERTIFICATE OF TYPESET

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STATEMENT OF THE CASE AND FACTS

In 1988, when Appellee Frank Herzfeld was thirteen years old he was placed in the care of Appellant Gary Herzfeld as a foster child. (R. 1-10).[1] Three years later, Appellant adopted Appellee. (R. 1-10). On June 5, 1997, Appellee filed a four count civil complaint against Appellant alleging damages for the intentional torts of assault and battery, false imprisonment, and intentional infliction of emotional distress in counts I through III, and negligence in count IV. All four counts were based on allegations of sexual molestation. (R. 1-10). On July 21, 1997, Appellant filed a Motion to Dismiss Complaint. (R. 14-17). Later, Appellant filed an Amended and Restated Motion to Dismiss Complaint. (R. 18-22). Appellee did not file any memoranda in opposition to the Amended and Restated Motion to Dismiss.

By court order dated August 27, 1997, the trial court granted the Amended and Restated Motion to Dismiss Complaint as to counts I through III with prejudice and denied as to count IV. (R. 663). Subsequent to the trial court's dismissal of counts I through III of the complaint, Appellant filed a Motion for Summary Judgment as to the remaining count IV on negligence. (R. 41-81). In support, the Appellant filed copies of his liability insurance policies for all years from 1988 forward. (R. 41-81). After reviewing the insurance policies, the trial court found that there was no liability coverage for count IV of the complaint, and therefore, ruled that count IV was barred by the parental immunity doctrine. (R. 664-665).

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[1]. Notations to the record will be as follows: ("R. __ ").

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Appellee did not file any memoranda or affidavits in opposition to the Motion for Summary Judgment.

On February 18, 1998, Appellee filed a Notice of Appeal to the Third District Court of Appeals. After the parties submitted their briefs on the issues, the Third District Court of Appeals heard oral argument. On February 10, 1999, the Third District Court of Appeals rendered its opinion in Herzfeld v. Herzfeld, 24 Fla. L. Weekly D386 (Fla. 3rd DCA 1999), reversing the trial court's decision and held that the parental immunity doctrine did not bar a suit brought by a child against a parent for an intentional tort based on damages resulting from sexual abuse. (R. 683-692). The Third District Court of Appeals certified conflict with Richards v. Richards, 599 So. 2d 135 (Fla. 5th DCA 1992). Appellant then filed a notice of appeal to this Court.

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SUMMARY OF THE ARGUMENT

Florida has adhered to the long-standing doctrine of parental immunity. Firmly rooted in this State's common law is the principle that minor children cannot sue their parents except in cases of negligence where liability insurance exists. The parental immunity doctrine is based on the policy that children suing parents would disrupt the familial relationship and deplete family resources needed to support other family members.

In this case, the Third District Court of Appeals declined to follow Florida's well-established precedent and held that a minor child could sue a parent for an intentional tort in cases involving sexual abuse. This holding is in direct conflict with the law of this State and should be reversed. First, the policy reasons supporting parental immunity, particularly the prevention of the depletion of family assets and the minimization of family discord, do not warrant a judicial departure from the doctrine. The principle of stare decisis requires courts to follow the precedent unless there is a substantial reason to change it.

Second, by this ruling, the Third District Court of Appeals has greatly expanded parental liability in tort, a development more appropriately left to the legislative branch of government. Although the crafting of social policy is within the purview of the legislature, not the judiciary, it is clear from the Third District Court of Appeals' opinion that it was imposing its own social beliefs rather than applying established law to the facts before it. As the issue of parental immunity involves broad questions of social policy, the judiciary should defer to the legislature on whether and to what extent parental immunity should be abrogated. Accordingly, this Court should reverse the Third District Court of Appeal's ruling.

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ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEALS COMMITTED REVERSIBLE ERROR BECAUSE ITS RULING IS CONTRARY TO FLORIDA'S LONG-STANDING ADHERENCE TO THE PARENT-CHILD IMMUNITY DOCTRINE

A. Florida's Parent-Child Immunity Doctrine

For over a century, the immunity of parents from tort claims asserted by their children has been a well-established doctrine in the United States. See Ard v. Ard, 414 So. 2d 1066, 1067 (Fla. 1982). In applying the doctrine, courts have articulated the policy justifications for parental immunity which include: (1) maintaining family harmony and peace; (2) preventing the depletion of family assets; (3) warding against fraud and collusion between parent and child when insurance is involved; (4) preventing interference with parental care and discipline and control; and (5) preventing parents from inheriting the amount recovered by the child. See Ard, 414 So. 2d at 1068.

The parental immunity doctrine was first adopted in the American court system by the Mississippi Supreme Court in Hewellette v. George, 9 So. 885 (Miss. 1891). The Mississippi Supreme Court did not allow a suit to proceed by an unemancipated minor daughter against her mother for false imprisonment. See Hewellette, 9 So. at 887. The Hewellette court reasoned that

> [t]he peace of society, and of the families composing society, and a sound public policy, designed to subserve the

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> repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand.

Id. The Tennessee Supreme Court in McKelvey v. McKelvey, 77 S.W. 664 (Tenn. 1903), followed the Hewellette ruling in a case where a minor brought suit against her parents for "cruel and unusual treatment." The Tennessee Supreme Court stated that minor children had adequate redress through the criminal law. See McKelvey, 77 S.W. at 664.

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The Washington Supreme Court also followed Hewellette and held in Roller v. Roller, 79 P. 788 (Wash. 1905), that a minor child could not sue her father for rape. The court in Roller reasoned that

> if it be once established that a child has a right to sue a parent for tort, there is no practical line of demarkation which can be drawn, for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort. The principle permitting the action would be the same. The torts would be different only in degree. Hence all the disturbing confusion would be introduced which can be imagined under a system which would allow parents and children to be involved in litigation of this kind.

Roller, 79 P. at 788.

The first Florida court to recognize the parent-child immunity was the Second District Court of Appeals in Meehan v. Meehan, 133 So. 2d 776 (Fla. 2d DCA 1961), where the court found that a parent could not maintain an action in tort against his minor son for the wrongful death of another minor son. Later, the Second District Court of Appeals again dealt with the parent-child immunity in Rickard v. Rickard, 203 So. 2d 7 (Fla. 2d DCA 1967), and the court there found that the parent-child immunity barred a minor child from suing his parents for negligence for not providing a safe place to play. Similarly, the Fourth District Court of Appeals in Denault v. Denault, 220 So. 2d 27 (Fla. 4th DCA 1969), followed the Second District Court of Appeals' rulings in Meehan and Rickard and held that a minor child could not sue her mother for

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negligence in an automobile accident.

This Court ruled on the parent-child immunity for the first time in Orefice v. Albert, 237 So. 2d 142 (Fla. 1970), stating:

> [it] is established policy, evidenced by many decisions, that suits will not be allowed in this state among members of a family unit for tort. Spouses may not sue each other, nor children their parents. The purpose of this policy is to protect family harmony and resources.

Orefice, 237 So. 2d at 145. Florida courts are bound by the parental immunity doctrine set forth in Orefice. See Godales v. Y. H. Investments, 667 So. 2d 871, 872 (Fla. 3d DCA 1996), rev'd on other grounds, 690 So. 2d 1273 (Fla. 1997).

As the sole exception to this doctrine, this Court has abrogated the parent-child immunity in negligence cases only to the extent of the existence of available liability insurance. See Ard, 414 So. 2d at 1066-67. This Court in Ard recognized the exception because the depletion of family assets or the disruption of family harmony was not a concern in instances where liability insurance would cover any damages. Id. at 1068. As this Court explained:

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> Where such insurance exists, the domestic tranquility argument is hollow, for in reality the sought after litigation is not between child and parent but between child and parent's insurance carrier.

Id. (citations omitted). If there is no available liability insurance, however, then parental immunity will bar any action by a minor child against a parent. Id.

Apart from the instances where liability coverage is available, this Court "reaffirm[ed] . . . [its] adherence to parental/family immunity." Id. at 1066-67. This Court recognized that it is of public importance in Florida to "[p]rotect[] the family unit . . . from intrusion that might . . . affect the family relationship," such as a litigation. Id. at 1067. Consequently, in intentional tort cases, Florida courts have strictly applied the family immunity doctrine to bar any claims by a child for damages attributed to the intentional tort of a parent. See Richards, 599 So. 2d at 135. For example, in Richards, the court applied the family immunity doctrine to preclude a child from suing her father for sexual assault. See Richards, 599 So. 2d at 136. Therefore, even though parental immunity has been abrogated in negligence cases to the extent of insurance liability coverage, the immunity remains viable for intentional torts.

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B. The Public Policy Supporting the Parental Immunity Doctrine Has Not Changed

The Third District Court of Appeals has abruptly departed from established precedent and the long-standing public policy of Florida on parental immunity by ruling that children could sue parents for intentional tort in cases of sexual abuse. This decision represents a significant change in the law governing relationships of parents and children. Indeed, to abolish parental immunity would expose parents to potential litigation for accepted forms of punishment or discipline, which could easily be alleged to constitute the torts of assault, battery or false imprisonment. Thus, to adopt the ruling of the Third District Court of Appeals would represent an unjustified expansion of the legal rights of children and a corresponding level of interference in matters of family governance. See Richards, 599 So. 2d at 136.

The Third District Court of Appeals erred by failing to follow this Court's holding in Orefice. In so doing, the Third District Court of Appeals violated the central tenet of our jurisprudence, the principle of stare decisis. In affirming the importance of stare decisis, Justice Overton stated in his oft-quoted concurring opinion in Perez v. State, 620 So. 2d 1256, 1258 (Fla. 1993), that

> [t]he doctrine of precedent is basic to our system of justice. In simple terms, it ensures that similarly situated individuals are treated alike rather than in accordance with the personal view of any judge. In other words, precedent requires, that, when the facts are the same, the law should be applied the same.

Perez, 620 So. 2d at 1258.

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To change a rule of common law there has to be "some justifiable reason . . . over and above the conclusion that the prior decision was simply erroneous." Id.; see also Ard, 414 So. 2d at 1069. There has to be a change in the circumstance that originally justified the rule. See Perez, 620 So. 2d at 1258. "Among the questions to be considered are the possible significance of intervening events, the possible impact on settled expectations, and the risk of undermining public confidence in the stability of our basic rules of law." Id. (citing John P. Stevens, The Life Span of a Judge-Made Rule, 58 N.Y.U.L. Rev. 1, 9 (1983)). To ignore existing precedent undermines the rule of law and supplants it with the views of judges. See id. at 1260 (citing Lewis F. Powell, Jr., Stare Decisis and Judicial Restraint, 47 Wash. & Lee L. Rev. 281, 288 (1990)).

Contrary to the lower court's conclusion, the preservation of family assets is still a valid and important reason to preserve parental immunity. This Court found in Ard that by not allowing a child to sue a parent for damages, the parental immunity doctrine protects scarce family resources. See Ard, 414 So. 2d at 1067. As this Court explained in Ard:

> To reduce the available assets of the family through a straight suit is to reduce the amount available for the support, education, and protection of the family as a whole. Protecting the family unit is a significant public policy behind parental immunity. We are greatly concerned by any intrusion that might affect the family relationship. Litigation between family members would be such an intrusion.

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Id. at 1068 (emphasis added). Following this reasoning, the Fifth District Court of Appeals in Richards, 599 So. 2d at 136, correctly applied parental immunity to disallow a minor child from suing her father for alleged damages resulting from sexual assault in order to prevent the depletion of family assets available for the support of the family unit.

Here, Third District Court of Appeals rejected the depletion of family assets as a compelling policy, concluding that family assets would nevertheless be depleted in cases where the parent is sued by a child not his own. A non-family member child suing a parent, however, is a very different circumstance from a child suing his own parent. In cases where a non-family member child sues a parent, the entire family's resources are affected jointly. In cases where a child sues his own parent, the family unit and its resources run the risk of being disproportionately allocated to one child over other members of the family. Moreover, since insurance coverage is generally not available for intentional torts, the abrogation of parental immunity would plainly increase the vulnerability of the family resources to additional damage suits. See Ard, 414 So. 2d at 1067. Thus, the public policy against depletion of family assets favors upholding the parental immunity doctrine as it is currently applied.

Nor does the fact that this Court abrogated spousal immunity in Waite v. Waite, 618 So. 2d 1360 (Fla. 1993), give this Court a basis for abrogating parental immunity, as the lower court suggests. The family immunity doctrine is supported by policy reasons entirely different from those underlying the spousal immunity doctrine. This

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Court abrogated spousal immunity because the common law concept of the unity of husband and wife has long since been abolished. See Waite, 618 So. 2d at 1361. This Court recognized that the spousal immunity doctrine was no longer justified by the common law unity concept of marriage because "it can no longer be said that a woman becomes part of an entity represented by the husband." Sturiano v. Brooks, 523 So. 2d (Fla. 1988). The avoidance of acts that could foster marital discord was another policy reason traditionally stated as supporting the spousal immunity doctrine. The Waite court concluded, however, that when one spouse sues another for injuries intentionally

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caused by the other, the marital union is already broken. See Waite, 618 So. 2d at 1361.

Spousal and filial relationships merit different treatment because these relationships are entirely distinguishable. Entirely different interests are involved when a child sues a parent in tort for injuries caused by that parent. As the court in Wapner v. Somers, 630 A.2d 885 (Pa. Super. Ct. 1993) noted, the difference lies in that

> [s]pouses enter into their relationship freely and by choice and do so to bind one another together into a permanent unity. A child, however, has no control over the commencement of the parent/child relationship, and rather then [sic] trying to become one with his parents, he perpetually strives to develop from a totally dependent person to one which is entirely independent. Although both relationships involve love, companionship, affection, guidance and care, the nature of those elements, the means by which they reach those ends is subtly but intrinsically different. Therefore, although identical labels can be attached to the elements of the spousal relationship and the parent/child relationship, substantively the relationships are different and not comparable.

Wapner, 630 A.2d at 886 (emphasis added). Thus, while one child may be at odds with other family members, the parents' marriage, and the remainder of the family unit are not necessarily affected. As a result, the abrogation of spousal immunity should have no effect on the continued validity of parental immunity.

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II. THE LEGISLATURE, AND NOT THE JUDICIARY, SHOULD ADDRESS THE ABROGATION OF PARENTAL IMMUNITY IN THE FIRST INSTANCE

By rewriting the common law on parental immunity, the Third District Court of Appeals has issued an opinion which affects broad social issues more appropriately addressed by the legislative branch. Through its elected representatives, the legislature can best consider the competing interests involved in addressing the complex problem of sexual abuse within the family.

Here, the Third District Court of Appeals imposed its social beliefs regarding sexual abuse to expand the realm of previously cognizable tort liability. Contrary to the Richards court, which properly recognized that it should not decide complex social issues based upon the facts of a single case, the Third District boldly wrote "[w]e, however, cannot in good conscience follow this Procrustean precedent." Herzfeld, 24 Fla. L. Weekly at D387. Instead, the Third District Court of Appeals should have followed this Court's ruling in Orefice on parental immunity. See Gelaro v. State Farm Mutual Automobile Ins. Co., 502 So. 2d 497 (Fla. 1st DCA 1987) ("We are without authority to abandon the parental immunity doctrine . . . .").

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For this Court to allow a lawsuit for damages for sexual abuse would create a serious burden on the court system, because children would be able to sue their parents for any type of intentional tort. A court cannot delineate a civil remedy to cover only sexual torts since there is no tort of sexual assault, but only the tort of assault itself. See Section 784.011, Florida Statutes. To recognize this intentional tort cause of action would open the flood gates to tort actions brought by children against parents. A parent who had imposed physical punishment on a child, even a minor spanking, could be sued for battery. A "time-out" could be charged as false imprisonment. Parents would no longer be immune even from suits charging intentional infliction of emotional distress. A court cannot fashion a rule that would limit the lawsuits minor children could file against parents to only those actions based upon sexual assault or gross bodily injury. Such a determination would necessarily involve a fact-based inquiry that could only be conducted through a trial on the merits.

Under the fundamental principle of separation of powers, the judiciary should properly defer to the legislature in deciding issues affecting broad social policy. See United States v. Capeletti Bros., Inc., 621 F.2d 1309, 1312 (5th Cir. 1980). Courts interpret the laws, and should not act as lawmaking bodies. See Lanier v. Bronson, 215 So. 2d 776, 780 (Fla. 4th DCA 1968). "Under a democratic society, the legislature is the policy making authority. . . . " Rotwein v. Gersten, 36 So. 2d 419 (Fla. 1948). "[M]atters of individual rights, social mores and of state policy are to be settled in the caldron of the people's representative government, the Legislature, by such

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representatives as the people choose to elect, upon whatever they may have represented to the people that their standards are." Ryan v. Ryan, 277 So. 2d 266, 274 (Fla. 1973).

This Court recognized that it is within the ambit of the legislature to make social policy when it stated in State v. Ashley that

> [a]s we have said time and again, the making of social policy is a matter within the purview of the legislature -- not this Court:
>
> [O]f the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus.

701 So. 2d 338, 343 (Fla. 1997) (citing Shands Teaching Hospital & Clinics, Inc. v. Smith, 497 So. 2d 644, 646 (Fla. 1986)); see also Bankston v. Brennan, 507 So. 2d 1385 (Fla. 1987) (judicially creating a cause of action that has broad ramifications, even though socially desirable, "the legislature is best equipped to resolve the competing considerations implicated by such a cause of action."). Thus, "courts . . . [cannot] substitute . . . [their] social and economic beliefs for the judgment of legislative bodies, [which] are elected to pass laws." Kahn v. Shevin, 416 U.S. 351 (1974).

The Florida legislature is better equipped than the judiciary to determine whether to abrogate parental immunity to allow a child to sue a parent for intentional torts. The Richards court correctly found that

> if the parent/child immunity doctrine is to be abrogated to allow a child to bring an intentional tort action against a

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> parent it should be done by statute. The legislative setting is better equipped to solve such a complex social issue as that presented by this case. In a legislative setting, the whole spectrum of competing interests can be considered, and a broad solution can be crafted. In the judicial setting, the complex social issue of sexual abuse comes before the court upon a set of facts by a single case.

Richards, 414 So. 2d at 136 (emphasis added). Moreover, if this Court abrogates parental immunity, it would expand tort liability without proper consideration of the societal costs and effects, which the legislature is more appropriately designed to address. See Wapner, 630 A.2d at 886, ("The legislature would be better to weigh the costs to society . . . [and] would also be able to set limits as to the amount and types of claims which could be brought.").

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The fact is that the Florida legislature has addressed the matter of sexual abuse in the criminal laws. See Section 794.011, Florida Statutes. For child sexual abuse, Florida law already provides that a parent can be criminally liable, see section 827.04, Florida Statutes, or may have parental rights terminated, see Section 39.806(1)(g), Florida Statutes. The criminal justice system, as the court in Richards noted, is also more appropriately suited to handle sexual abuse cases, particularly because of the sensitive nature of these investigations. See Richards, 414 So. 2d at 136. The lower court does not contend that the criminal justice system has failed to be an effective advocate for child victims, nor does it suggest that children could represent themselves more effectively in a civil suit for damages against a parent.

The Florida legislature has chosen not to create a civil remedy for sexual abuse, even though it has created civil remedies for other criminal activities. See 772.101, Florida Statutes. Similarly, while the legislature abrogated spousal immunity for battery by statute, see section 741.235, Florida Statutes, it declined to alter parental immunity for this tort. See Richards, 559 So. 2d at 136 n.1. Until the Florida legislature creates a civil cause of action for the sexual abuse of children by parents, Florida courts should not venture to do so. See State v. Arango, 400 So. 2d 765 (Fla. 1981) ("The legislature has broad discretion in determining necessary measures for the protection of the public health, safety, and welfare, and . . . [courts] may not substitute . . . [their] judgment for that of the legislature as to the wisdom or policy of a legislative act."); University of

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Miami v. Echarte, 618 So. 2d 189 (Fla. 1993) ("The Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts.").

In sum, while the issue of sexual abuse may stir many emotions, the courts should limit their role to the interpretation of laws and not encroach on the powers of the legislature. See Ryan, 277 So. 2d at 274. Accordingly, based on the substantial public policy reasons supporting the parental immunity doctrine, as well as the complex social issues that are involved in cases of alleged sexual abuse, this Court should not abrogate the parental immunity doctrine. Therefore, this Court should reverse the Third District Court of Appeals' holding and reinstate the decisions of the trial court dismissing Appellee's intentional tort claims and entering summary judgment against him on the negligence count.

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CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court enter an order that (1) reverses the Third District Court of Appeals' ruling in Herzfeld, (2) sustains the Appellant's Motion to Dismiss on counts I through III of the complaint, and the Motion for Summary Judgment on count IV of the complaint based on the parent-child immunity doctrine, (3) rules that the parental immunity doctrine bars intentional tort actions commenced by unemancipated children against a parent; and (4) grants such other and further relief as the Court deems necessary.

Dated: May 7, 1999

HUGHES HUBBARD & REED LLP

By:_____

Sharon Kegerreis
Florida Bar No. 852732
Mayda Prego
Florida Bar No. 0054100
201 S. Biscayne Boulevard, Suite 2500
Miami, Florida 33129
Tel. 305-358-1666
Fax. 305-371-8759

Attorneys for Appellant Gary Herzfeld

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via Federal Express on this 7th day of May, 1999 to David C. Rash, Esq., Law Office of Douglas P. Johnson, 1509 N.E. 4th Avenue, Ft. Lauderdale, Florida 33304.

_____
Mayda Prego

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