IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-943

TABLEAU FINE ART GROUP, INC.,
and TOD TARRANT,

Petitioners,

vs.

JOSEPH J. JACOBONI, et al.,

Respondents.

_____/

RESPONDENTS' ANSWER BRIEF ON THE MERITS

On Discretionary Review from a
Decision of the District Court of Appeal,
Third District

CARLTON FIELDS, P.A.
4000 Bank of America Tower
100 S.E. Second Street
Miami, Florida 33131
Telephone: (305) 530-0050
Attorneys for Respondents
By: GARY M. PAPPAS
JEFFREY A. COHEN

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INTRODUCTION

The Third District Court of Appeal correctly held that a violation of Florida Rule of Judicial Administration 2.160(e) or (f) by failing to immediately rule on a motion to disqualify is not grounds for disqualification. Tarrant v. Jacoboni, 780 So. 2d 344 (Fla. 3d DCA 2001). It also correctly held that a trial judge may take necessary time to consider such a motion. Finally, the trial court's comments on the evidence presented at the hearing on Plaintiff's motion to amend his complaint to seek punitive damages were not improper and did not warrant disqualification. The Court should approve the decision below, and disapprove the decision in Anderson v. Glass, 727 So. 2d 1147 (Fla. 5th DCA 1999).

The parties will be referred to by proper name or as they appeared below. Petitioners' Appendix will be referred to "Pet. App. ___ at ___."

STATEMENT OF THE CASE AND FACTS

This action arises out of the sale of a piece of art, an Alexander Calder mobile. Jacoboni sued Defendants, an art brokering firm (Tableau) and its president (Tarrant), alleging fraud, civil theft, negligent misrepresentation and a violation of Florida Statute section 501.201 et seq. due to the Defendants' frauds that induced the September 28, 1998 sale. (See Pet. App. 5)

A. Defendants' Fraudulent Conduct Forming the Basis for Jacoboni's Motion for Leave to Seek Punitive Damages – And the Trial Judge's Comments.

Tarrant admitted making numerous false statements to the persons involved in the sale. Tarrant admitted lying to Dawn Gideon, who represented the seller, Ms. Stone, to keep the deal together. (Pltf's Response to Defs' Motion to Disqualify, Pet. App. 7 at 2-3)

[1] Tarrant misrepresented to Ms. Gideon that the buyer was his long-time client, although he had no relationship with the buyer. (Id. at 2) ("Naturally I have represented him as a long term client of mine"); Id. (he "maintained the same façade, that the client was mine, it was a private individual that resided in Aspen").

Tarrant also misrepresented to Ms. Gideon that the buyer was someone else, who was not interested in purchasing the mobile. (Id. at 2-3) Tarrant suggested to Jacoboni's agent, Robert Lombard of Robert Thomas Gallery ("RTG"), that Jacoboni claim to be the other person. (Id.) If Tarrant had told Ms. Gideon the truth, the deal would have fallen through and he would have lost his financial interest. (Id. at

[1] Plaintiff's response contains specific citations to Tarrant's deposition and to the transcript of the hearing on Jacoboni's motion to amend the complaint to seek punitive damages. That transcript was included at Petitioner's Appendix 2.

3)

Tarrant composed letters to RTG containing numerous misstatements. In a September 11, 1998 letter, Tarrant claimed that Stone was "his seller,"

[2] but admitted in deposition that she was Gideon's seller. (Id.) He claimed in the letter to have the exclusive right to sell the piece, but Gideon changed her mind on a daily basis regarding his "exclusive right." (Id. at 4).

Tarrant's letter said that Mrs. Stone was confused about the initial pricing, but he admitted that this was false because he had no personal contact with her. (Id. at 3) Further, Tarrant stated that he would receive a commission regardless of who purchased the mobile, but admitted in deposition that this was not true. (Id. at 4)

On September 22, 1998, Tarrant sent another letter containing false financial terms. (Id.) The letter stated: "The financial details are simple: $1.5 M[illion] to the Seller plus $50K to me." (Id. at 4) Tarrant testified, however, that the seller's price was $1.3 million, not $1.5 million, resulting in a $200,000 undisclosed additional commission. (Id.) As Tarrant admitted, "Obviously, there's a difference between what the seller received and what was paid." (Id. at 5)

Tarrant also lied to Lombard about the price of the mobile. He claimed that the seller had raised the price of the mobile from $1.5 million to $1.6 million. In fact, Tarrant raised the price to increase his undisclosed commission because he could not participate in the backside, or resale, of the piece. (Id.)

Finally, Tarrant insinuated that he was in collusion with Lombard. (Id. at 5-6) Tarrant claimed he lied to everyone else to keep the deal going because Lombard told him it was necessary. (Id. at 7) Nevertheless, Tarrant admitted that his claims regarding Lombard's "involvement" and "knowledge" were contradicted by the documents in evidence. (Id. at 6)

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[2] Tarrant claims this was a grammatical error. (Pet. App. 7 at 3)

[3] Tarrant claimed that the September 11, 1998 letter was drafted with input from Lombard and that Lombard asked him to prepare the September 22, 1998 letter with false information. (Id. at 6) Tarrant

(continued...)

Tarrant claims that in the art business, these kinds of "contradictory statements" are made all the time. (Id. at 5) It was just common sense. Everyone involved in art transactions knows that the broker is going to take whatever he can get above the seller's asking price. (Id.)

B. The Motion to Amend And the Hearing Before The Honorable Amy Steele Donner.

Based on Tarrant's testimony, Jacoboni moved for leave to amend his complaint to assert a claim for punitive damages. The trial judge, the Honorable Amy Steele Donner, conducted a hearing on July 25, 2000. After hearing argument of counsel, and after being presented with Tarrant's admitted fraudulent statements, Judge Donner made the following comments:

> I have read those letters. He deliberately misstated the truth to everyone. And if that's how the art business does work, that's how they really do business, I think there would be some legitimate dealers who would say – who would come in and say that's not true. I just can't believe everyone in the art business lies outright to everyone, because that's what your client did in these letters. (Pet. App. 2 at 35)

The Court further stated:

> He lied. Lying is fraud. He fraudulently stated that he would only make $50,000. His commission was stated up front. That's not the case. Now whether or not he had a deal with Ms. Gideon and Mr. Lombard to split that $300,000.00, which I suspect might be true, that's going to be a problem some place down the line. (Id. at 36)

C. Defendants' Motion To Disqualify and Petition For Writ of Prohibition.

(...continued)
claimed that he and Lombard discussed the fact that the $1.5 million to the seller was false, and that Lombard knew that there was a margin between what Stone would receive and what was stated in the September 22, 1998 letter. (Id.)

On August 3, 2000, Defendants moved to disqualify Judge Donner based on her comments. At the September 28, 2001 hearing, the trial judge said that she was "going to issue my order on the first motion." An order denying the motion was entered on November 20, 2000. (Pet. App. 3, 11, 12).

Defendants filed a petition for writ of prohibition from the Third District Court of Appeal. The petition was denied. On motion for certification, the Third District certified a conflict with the decision in Anderson v. Glass, 727 So. 2d 1147 (Fla. 5th DCA 1999). The Third District stated: "We decline to follow the Anderson rule requiring automatic disqualification where there has been a delay of thirty days or more. We certify direct conflict with Anderson." Tarrant v. Jacoboni, 780 So. 2d 344, 345 (Fla. 3d DCA 2001).

SUMMARY OF ARGUMENT

Nothing in Florida Rule of Judicial Administration 2.160 says that a trial judge must be disqualified when he or she fails to comply with time requirements of the rule. Instead, a party must take additional steps if the time requirements are violated: specifically, if a party reasonably believes that a delay in ruling on a motion for disqualification is evidence of bias, the party should file a motion, pursuant to rule 2.160(2), stating just that. Or, as the Third District suggested, a party can file a petition for writ of mandamus from a district court to secure a ruling.

In any event, there was no violation of Rule 2.160 in this case. Although Rule 2.160 provides for immediate presentation of motions to disqualify, and also for immediate rulings, the rule does not provide that a judge may not deliberate on the motion. Absent some evidence that the judge was acting improperly when deliberating on the motion, there can be no suggestion that the rule was violated, given the presumption of impartiality accorded to trial judges in this State.

Finally, the trial judge correctly denied Defendants' motion to disqualify. The judge's comments to the effect that the Defendants lied were supported by the evidence and proper in the context within which they were made. This Court should affirm and approve the Third District Court of Appeal's well-reasoned decision.

ARGUMENT

I. THE TIME REQUIREMENTS OF RULE 2.160 DO NOT REQUIRE DISQUALIFICATION OF THE TRIAL JUDGE IN THIS CASE.

A. The Failure to Immediately Rule is Not Grounds to Require Disqualification.

Florida Rule of Judicial Administration 2.160 is very clear. A trial judge must disqualify herself if a party files a properly supported and timely motion to disqualify demonstrating that the party has a well grounded fear that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge. See Fla.R.Jud.Admin. 2.160(d). Accord § 38.10, Fla. Stat. A judge must rule on the motion immediately: granting it if the motion is proper; denying it if not. Rule 2.160 does not, however, state that the failure to strictly follow its time requirements is grounds for disqualification. The Court should decline Defendants' offer to rewrite the rule to do so.

If trial judges do not rule on motions to disqualify immediately,

[4] they are in violation of the rule. Fuster-Escalona v. Wisotsky, 781 So. 2d 1063, 1065 (Fla. 2000). If the rule is violated, an appellate court will vacate a judgment that flows from that error. Id. If a court rules while a motion to disqualify is pending, or after violating the rule, the ruling will be stricken. Id. (citing cases). But the rule itself does not require disqualification if its terms are violated. Tarrant v. Jacoboni, 780 So. 2d at 345.

Defendants argue that a trial judge's failure to comply with the time requirements of Rule 2.160(d-

[4] The definition of "immediately" is addressed below.

e) creates a reasonable fear of bias. Citing Anderson v. Glass, 727 So. 2d at 1147, they state that "prompt rulings promote public confidence in the impartiality of the trial judge while delayed rulings not only slow the litigation process but call into question the trial judge's motives." They argue that the Third District gave Anderson's concerns, and those underlying Rule 2.160, short shrift. (Petitioners' Br. at 20-22)

If a judge does not rule "immediately,"a party *may* question the judge's motive. But at that point, a party has an obligation to act: if the failure to rule causes a fear of bias, then the party must file a motion pursuant to Rule 2.160 saying just that. Otherwise, there is no way for a trial judge to consider the party's fear and whether it is a proper ground for disqualification — especially given the presumption of impartiality accorded to trial judges in this State. See City of Lakeland v. Vocelle, 656 So. 2d 612, 614 (Fla. 1st DCA 1995) (there is a presumption of judicial impartiality even where counsel has opposed the election of a judge); Paul v. Nichols, 627 So. 2d 122, 123 (Fla. 5th DCA 1993) (same). Of course, a party can also follow the Third District's suggested procedure of filing a petition for mandamus asking for a ruling. Tarrant, 788 So. 2d at 345. See also Moody v. Moody, 705 So. 2d 700 (Fla. 1st DCA 1998) (issuing writ of mandamus to compel trial judge to render order on motion to disqualify); D'Ambosio v. State, 746 So. 2d 508, 509 (Fla. 5th DCA 1999) (reviewing ruling on motion to disqualify pursuant to writ of mandamus from appellate court).

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This is why Anderson is wrongly decided. The Fifth District never accounted for the fact that the failure to comply with the time requirements of Rule 2.160 is not itself grounds for disqualification unless a party raises that as a ground. Indeed, Defendants cite no case for such a proposition. And it is a bad proposition in any case.

If a judge fails to rule "immediately," and if Defendants position is adhered to, then the judge must be disqualified. If that is to be the case, a party *loses the incentive* to have a motion to disqualify quickly

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[5] For this reason, -EscalonaRule 2.160 was itself grounds for disqualification, nor did the Court hold that a party need not file a motion to disqualify on the basis that the time delay should be grounds for reversal.

heard or quickly decided because, if the judge does not hear the motion immediately *and* decide it immediately, then the judge will be disqualified whether the motion was sufficient or not. The party making the motion would have two bites at the apple: the stated grounds and the delay. If they want both bites, this Court must say that the party must file a new motion articulating both grounds. And because these Defendants did not file such a motion, the alleged violation of Rule 2.160's time requirements cannot warrant disqualification.

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B. The Requirement that a Trial Judge Issue an Immediate Ruling does Not Preclude Deliberation over a Motion to Disqualify.

Rule 2.160(e) provides that a motion to disqualify "shall be promptly presented to the court for an immediate ruling." Immediate resolution is accorded its "plain meaning, which ... requires action that is 'prompt' and 'with dispatch.'" - EscalonaThe Florida Bar Re: Amendment to Florida Rules of Judicial Administration

609 So. 2d 465 (Fla. 1992)Rule 2.160(f) provides that if the motion "is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action." If the motion "is legally insufficient, an order denying the motion shall immediately be entered." Id. Thus, the rule provides that if a motion is sufficient, it must be immediately granted, and if it is not, it should be immediately denied. Nothing in the rule says that a trial court should not

[6] Jacoboni acknowledges that Defendants made every effort to have their original motion heard in the trial court.

take the time necessary to determine if a motion to disqualify is sufficient or not.

As the Third District below recognized, a trial judge may need time to determine to sufficiency of the motion. Tarrant v. Jacoboni, 780 So. 2d at 345. Parties often submit memoranda citing a number of the abundant cases interpreting Rule 2.160's various subsections. As such, "a trial court may take a disqualification motion under advisement in order to ... consider the memoranda filed by the parties" or to perform its own legal research. Tarrant, 780 So. 2d at 345. Given the vast demands on a judge's time, they may not be able to conduct that research or deliberate that day or that week or that month. Cf. In re Certification of Need for Additional Judges, 780 So. 2d 906, 909 (Fla. 2001) (certifying need for 44 additional judges and noting "[o]ver the past twenty years, ... anecdotal evidence and experience have suggested that judicial workload continues to increase").

In this case, Defendants filed a motion to disqualify. Jacoboni filed a memoranda containing extensive citations to the testimony and to case law. Although the court did not rule on the motion when it was filed in August 2000 or when orally presented in September, there is no reason to presume anything other than that, as soon as the trial judge came to a decision, she immediately issued her ruling. Cf. City of Lakeland v. Vocelle, 656 So. 2d at 614 (there is a presumption of judicial impartiality even where counsel has opposed the election of a

judge); Paul v. Nichols, 627 So. 2d at 123.

[7]

If the trial judge needed time to consider Defendants' motion and affidavit, the Plaintiff's response, the citations to Tarrant's deposition and the court's own comments, then the trial judge would commit a disservice to both the parties and the court system in general not to take that time.

Defendants say that the trial judge in this case took too long to rule. Unfortunately, too long is completely arbitrary as a standard because there is no way to determine the context; i.e., no one can ask the trial judge why she took the time she did and receive an answer. See Fla.R.Jud.Admin. 2.160(f). Two months might be too long in some circumstances. But if the motion presents a complicated question about which the authority is split or tangential, or if the judge is otherwise involved in a complex proceeding, or if the judge gets sick, two months might not be unreasonable. Given the presumption that the judge is impartial, it must be assumed that there was good cause for the delay. If a party has reason to assume otherwise, they should file a new motion to disqualify saying so.

Mr. Jacoboni, the plaintiff, has every desire to have the case resolved as quickly as possible because it is he who is ultimately prejudiced by a delay. Defendants also undeniably took steps to obtain a hearing and prompt ruling on the motion. Still, although judges have responsibility to manage their dockets, -Escalona In re Certification of Need for Additional Judges, 780 So. 2d at 909.

II. COMMENTING ON THE UNDISPUTED EVIDENCE WAS NOT GROUNDS FOR DISQUALIFICATION OF THE TRIAL JUDGE.

> We increasingly encounter situations where the motive behind a motion to disqualify is obviously to gain a continuance or to get rid of a judge who evidences doubt or displeasure as to the efficacy of the movant's cause of action by oral comment or by entering adverse judicial rulings. A judge's remarks that he is not impressed with a lawyer's, or his

[7] Indeed, if the trial judge stated why her deliberations took as long as they did, that alone could constitute grounds for disqualification. Rule 2.160(f) clearly prohibits any explanation of the court's ruling: "No other reason for denial shall be stated, and an order of denial shall not take issue with the motion." Thus, Defendants expectation that the court explain her ruling or delay (Pet. Brief at 25) is misplaced.

> client's[,] behavior are not, without more, grounds for recusal. Nassetta v. Kaplan, 557 So. 2d 919, 921 (Fla. 4th DCA 1990).

As noted, Rule 2.160(d) requires disqualification when a party presents a properly supported, timely motion asserting that he has a well-grounded fear that he or she will not receive a fair trial from the presiding judge. Barwick v. State, 660 So. 2d 685, 691 (Fla. 1995). The motion "must be well-founded and contain facts germane to the judge's undue bias, prejudice or sympathy." Thompson v. State, 759 So. 2d 650, 659 (Fla. 2000). Where a party cannot make that showing, a motion for disqualification will be denied. E.g., Lee v. State, 772 So. 2d 606 (Fla. 4th DCA 2000).

Questions to the parties concerning their positions or comments regarding same do not constitute prejudging the issues or demonstrate bias or prejudice. Thompson, 759 So. 2d at 650. Mere characterizations and gratuitous comments, while perhaps offensive, may not provide a well-founded fear of bias or prejudice. See Oates v. State, 619 So. 2d 23 (Fla. 4th DCA), rev. denied, 629 So. 2d 134 (Fla. 1993).

In determining if a judge correctly denied a motion to disqualify, “it is necessary to consider the judge's statements in their entirety and in proper context.” Strasser v. Yalamanchi, 783 So. 2d 1087, 1090 (Fla. 4th DCA 2001). "A judge may form mental impressions and opinions during the course of the presentation of evidence, as long as she does not prejudge

the case." Brown v. Pate, 577 So. 2d 645, 647 (Fla. 1st DCA 1991), cert. denied, 516 U.S. 1097 (1966). See also Mobile v. Trask, 463 So. 2d 389 (Fla. 1st DCA 1985), rev. denied, 476 So. 2d 674 (Fla. 1985) (a judge is not required to abstain from forming mental impressions and opinions during the presentation of evidence).

Indeed, "allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that he judge discussed his opinion with others," are generally considered legally insufficient reasons to warrant the judge's disqualification. Rivera v. State, 717 So. 2d 477, 480-81 (Fla. 1998); Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992). Because the facts warranted it, a judge's remark to press that the defendant "was just being an obstinate jerk" was not reasonably sufficient to create in defendant legitimate fear of not receiving fair trial. Oates v. State, 619 So. 2d at 25.

The decision in Strasser v. Yalamanchi, 783 So. 2d 1087 (Fla. 4th DCA 2001), is instructive. In that case, after having heard the testimony of the defendant's employee who was accused of destroying a computer hard drive, the trial judge asked:

> How could ... the defendant in good conscience permit any data to be eliminated? ... Right now the court is wondering whether to decide to fire up all burners against the defendant on the court's own motion.
>
> Why wasn't it disclosed to the [plaintiff]...? Id. at 1091.

When the party’s attorney had no satisfactory explanation, the

court commented:

> Sounds to me like your client is going to have to suffer the consequences of non-disclosure. If the client were to come before me, if I was presiding over pre-trial, I possibly would have assessed Doctor Strasser for a significant six-figure fine for having failed to disclose the damage to and subsequent disposal of-a unilateral decision to dispose of something which was subject to a lot of controversy-a lot of attorney work. I wouldn't have batted an eye at a $100,000 fine in this case.
>
> * * *
>
> It's the responsibility of Doctor Strasser to have informed his attorneys of it accordingly. And I will be asking Doctor Strasser personally why he didn't disclose that information to his attorney. The consequences are great and directly impact on this case. Id.

When counsel attempted to shift the blame, indicating that the defendant may not have been aware of his employee's act, the court asked "Am I supposed to put [defendant's employee] in jail because he made a unilateral decision to dispose of something? ... Where I'm going, I'm very concerned, if not indeed frustrated." Id.

Finally, in response to the argument that there was no evidence of any intentional destruction, the court responded:

> Sure does cause the hackles on the back of my neck to rise in suspicion when I hear the only thing missing is what plaintiff wanted. That bothers me. It bothers me as a judge and it would certainly have bothered me as a trial attorney. Id.

The defendant moved to disqualify, which was denied. The defendant then sought a writ of prohibition and cited "the legion of Florida case law" in some of which judges were disqualified because they "made certain gratuitous and

unsolicited comments disparaging to a party or that party's legal position." Id. The court held that in each of the cases cited, "the trial judges' remarks and opinions not only expressed a strong personal dislike for the litigants, *but also were largely unrelated to the matter before the court and were given before little or any evidence was taken*." Id. at 1092 (emphasis added).

By contrast, the judge's comments in Yalamanchi "fail to rise to the level of personal attacks on Strasser, and they were made only after the trial judge familiarized himself with all of the prior pleadings and afforded each side an opportunity to present evidence on issues wholly relevant to the motion in limine." Id. "[T]he judge's comments were, in hindsight, not our words of choice." Id. Nevertheless, "when considered in context, they do not reach the threshold level required for recusal. They do, on the other hand, express the understandable frustration and concern that the trial judge must have experienced when confronted with the sudden and unexplained revelation concerning the missing hard drive." Id.

Here, the evidence showed that Tarrant lied to the parties involved in the sales transaction. He admitted he lied to Ms. Gideon. He admitted he lied to Lombard. He admitted he lied in the letters directed to RTG's client. He admitted that he inflated the sale price to increase his undisclosed commission. He claimed lying was a permissible and accepted practice in the art business. Finally, Tarrant inferred in his deposition that

he was in collusion with Plaintiff's agent.

Viewing Judge Donner's comments in the context in which they were made, a hearing to determine if Jacoboni had demonstrated sufficient grounds to state a claim for punitive damages, they were innocuous and proper. Plaintiff proffered evidence that the Defendant lied during the transaction. Lying is evidence of fraud. E.g., La Pesca Grande Charters v. Moran, 704 So. 2d 710 (Fla. 5th DCA 1998) ("If the seller knew the emerald had been filled but lied in order to trick you into agreeing to buy it, you have a cause of action for fraud with all its attendant remedies") A judge cannot be prohibited from acknowledging the facts when making a ruling. Yalamanchi.

Defendants complain that the judge's comments were not "antiseptic" enough, and that the judge already decided that Lombard was not aware of any factual inaccuracies. (Petitioner's Br. at 28). As to the former complaint, there was nothing wrong with stating that Tarrant lied when Tarrant admitted to making false statements, and there is nothing improper about saying lying is fraud, given that *lying is fraud*. Moran. Although a judge "must forego the pleasures of oral condemnations ... *which are unrelated to the cause at hand*," Oates v. State, 619 So. 2d at 25, nothing precludes a trial judge from commenting on evidence that is necessary to make a determination. Yalamanchi, 783 So. 2d at 1092. See also Oates, 619 So. 2d at 25 (judge's remark to press that the defendant "was just being an obstinate jerk" was not because the defendant was being a jerk).

The complaint concerning Judge Donner's purported disbelief of possible Tarrant-Lombard collusion is not accurate. Judge Donner specifically stated that she thought there may have been collusion between Tarrant and Lombard: "Now whether or not he had a deal with Ms. Gideon and Mr. Lombard to split that $300,000.00, which I suspect might be true, that's going to be a problem some place down the line." (App. 2 at 36)

Simply put, Judge Donner did nothing to cause the Defendants to have a well-founded fear they would not receive a fair trial. Judge Donner should not be disqualified.

CONCLUSION

Based on the foregoing, the Court should approve the decision of the Third District Court of Appeal in Tarrant v. Jacoboni, 780 So. 2d 344 (Fla. 3d DCA 2001), and disapprove the decision of the Fifth District Court of Appeal in Anderson v. Glass, 727 So. 2d 1147 (Fla. 5th DCA 1999). The Court should affirm the decision below.

Respectfully submitted,

CARLTON FIELDS, P.A.
4000 Bank of America Tower
100 S.E. Second Street
Miami, Florida 33131
Telephone: (305) 530-0050
Attorneys for Respondents

By:
GARY M. PAPPAS
Florida Bar No. 705853
JEFFREY A. COHEN
Florida Bar No. 057355

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail on this _____ day of July, 2001, to: **Perry M. Adair, Esq.**, Becker & Poliakoff, P.A., 5201 Blue Lagoon Drive, Suite 100, Miami, Florida 33126; and **The Honorable Amy Steele Donner**, Dade County Courthouse, 73 West Flagler Street, Room 243, Miami, Florida 33130.

CARLTON FIELDS, P.A.
4000 Bank of America Tower
100 S.E. Second Street
Miami, Florida 33131
Telephone: (305) 530-0050
Attorneys for Respondents

By:
GARY M. PAPPAS
Florida Bar No. 705853
JEFFREY A. COHEN
Florida Bar No. 057355

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Courier 12-point font.

By:

_____

JEFFREY A. COHEN

#2133845