

IN THE SUPREME COURT OF FLORIDA

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

CASE NO.: SC99-153

FLORIDA DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

ANGELO JULIANO,

Respondent.

**AMICUS BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS
ON BEHALF OF RESPONDENT**

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CERTIFICATE OF FONT SIZE

The Academy of Florida Trial Lawyers, Amicus Curiae herein, files this, its certificate that the size and style of type used in this brief is: 12 point Courier New, a font that is not proportionately spaced.

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PREFACE

In this brief, the Florida Department of Transportation will be referred to as “DOT”, or as “Petitioner”. Respondent, Angelo Juliano, will be referred to as such, or by name. Amicus Curiae, The Academy of Florida Trial Lawyers, will be referred to as “the Academy”. The Florida District Court of Appeal, Third District, will be referred to as “the DCA”. Unless otherwise noted, references to the Florida Statutes shall be to

the 1991 edition of those statutes. References to Petitioner's brief on the merits will be by the symbol "PB", followed by the page cited to. References to the Appendix which accompanies this brief will be by the symbol "A", followed by the page cited to.

STATEMENT OF THE CASE AND THE FACTS

The Academy adopts the statement of the case and of the facts in Respondent's brief on the merits. The Academy's argument will be confined to the issue involving the construction and application of the provisions of §440.11(1), Fla. Stat. The Academy will not address the law of the case issue raised by Petitioner.

SUMMARY OF ARGUMENT

Section 440.11(1), Fla. Stat. is the portion of the workers' compensation law which provides immunity from common law tort claims to employers and employees responsible for injury to another employee, when the injury occurs in the course and scope of the employment. There are three exceptions to the rule of immunity of employees: (1) when a fellow employee causes injury as a result of willful and wanton disregard, unprovoked physical aggression, or gross negligence; (2) when the negligent employee and the injured employee are assigned primarily to unrelated works in private or public employment; and, (3) when a manager causes injury to an employee as a result of conduct which is a violation of law.

DOT wishes for this court to blend these three exceptions to require that, in order to qualify to pursue a claim under the unrelated works exception, the injured employee must prove the responsible employee was guilty of more than simple negligence. DOT insists that the injured employee must prove the conduct required of a "fellow" employee in exception (1), or the culpable conduct of a manager in exception (3).

This position contorts the language of a statute which is clear on its face. The legislature's use of the disjunctive, "nor", is a clear indication that clause (2) of the exceptions was intended to be separate and distinct from the "fellow" employee and managerial exceptions. Were DOT's proposed construction accepted, then the unrelated works exception would be mere surplusage. That would nullify the legislative intent clearly expressed in the statute.

The Academy feels the statutory language is clear. However, should this court find ambiguity, other rules of construction dictate the same result. This provision is a limited restoration of the access to the courts of injured employees in this state. As such, there is a constitutional imperative to make that access as free as possible. As both a remedial statute and one in derogation of the common law, it must be strictly construed to provide the less restrictive and more favorable construction to the employee. Finally, a previous version of the language of what became the unrelated works exception demonstrates the legislature's intent to make this limited restoration of common law rights free of the strictures advocated by DOT.

DOT's "institutional negligence" argument is misplaced in a setting where the jury determined the negligence of five

named individuals caused Juliano's injury. In addition to the reasons set forth, above, since the DOT "supervisors" who were found to have negligently caused Juliano's injury did not supervise him, the culpable conduct standard of exception (3) would not apply to Juliano's claim. Because of the set off provisions of §768.76(1), Fla. Stat., the only way Juliano receives a "double recovery" is if DOT failed to raise and prove that affirmative defense at trial.

Nothing in DOT's brief makes a cogent case for construing the statute as DOT wishes it to be construed. The action of the DCA should be affirmed and the petition for review dismissed as improvidently granted on this issue.

ISSUE

DOT'S READING OF THE EXCEPTION PROVISIONS OF §440.11(1), FLA. STAT., IGNORES THE RULES OF GRAMMAR, USAGE AND STATUTORY CONSTRUCTION TO BLEND CONCEPTS WHICH HAVE SEPARATE AND DISTINCT EXISTENCES.

ARGUMENT

A. INTRODUCTION

DOT's mix and match approach to the exceptions to the immunity provisions of the workers' compensation law, if accepted by this court, would go a long way toward eviscerating the limited restoration of common law rights to the injured employees of this state, represented by the unrelated works provision of the statute. The construction which DOT espouses ignores the plain meaning of the statute based on correct grammatical usage which dictate discharge of the petition for review as improvidently granted on this issue.

B. THE FACTUAL BACKGROUND

DOT concedes this cause arose out of an injury to Respondent in 1991 as a result of a defect in the floor of a DOT weigh station. Juliano was employed by the Department of Corrections and was supervising a crew of prisoners cleaning the DOT facility when he tripped over defective flooring [PB2-3]. Lieutenant

Colonel McPherson, apparently a high official in the DOT administration, testified that every person from his (McPherson's) position in Tallahassee to the individual in contact with the local maintenance people, was responsible for the safety of persons on the premises of the weigh station [PB8]. DOT had actual notice the defect in the floor was an unsafe condition, since the attempts to correct the condition extended over a period of almost one year before Juliano's injury [PB9-10].¹

DOT complains that no individuals were named as persons responsible for Juliano's injury [PB3, 5, 6]. However, the jury's interrogatory verdict found negligence on the part of five individuals which proximately caused Juliano's injury [PB12]. The DCA approved these findings in *Dept. of Transportation v. Juliano*, 744 So.2d 477 (Fla. 3d DCA 1999).

C. THE STATUTORY BACKGROUND

This proceeding deals with the application of the unrelated works exception to the employer's immunity from tort claims provided by §440.11(1), Fla. Stat. Only a handful of cases have

¹ Of all of the affirmative defenses asserted by DOT at the various trial-level incarnations of this action, the question of planning versus operational functions sovereign immunity was never an issue on appeal.

considered this statutory provision, which has been described as unique to the State of Florida. See, *Turner v.*

PCR, Inc., 732 So.2d 342 (Fla. 1st DCA 1998). This court's only review dealt with a question involving the interplay of this provision and §768.28(9)(a), Fla. Stat., when the injured person was engaged in public employment. See, *Holmes County School Board v. Duffel*, 651 So.2d 1176 (Fla. 1995). Thus, the questions raised in this proceeding are issues of first impression in this court.

After providing that employers and fellow employees who cause injury to another employee on the job are immune from tort liability, §440.11(1), Fla. Stat., provides in pertinent part:

...Such fellow-employee immunities shall not be applicable to an employee who acts with respect to a fellow employee with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, *nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment.* The same immunity provisions enjoyed by an employer shall also apply to any sole proprietor, partner, corporate officer or director, supervisor,

or other person who in the course and scope of his duties acts in a managerial or policy making capacity and the conduct which caused the alleged injury arose within the course and scope of said managerial or policy making duties and was not a violation of a law, whether or not a violation was charged by which the maximum penalty which may be imposed exceeds 60 days imprisonment as set forth in s. 775.082 [e.s., A1].

This language provides three separate exceptions to the immunity provision, dealing with fellow employees: (1) where a fellow employee acts with willful and wanton disregard, unprovoked physical aggression, or gross negligence, to cause injury; (2) where the employee causing the injury is engaged in "works" unrelated to that of the injured employee; and, (3) where a manager acting in a managerial or supervisory capacity engages in conduct which is a violation of law and causes injury to a subordinate (or fellow manager).

The DOT wishes for this court to blend these distinct exceptions to require a finding of culpable or unlawful conduct by the fellow employee or manager as a predicate for recovery under the unrelated works exception. As the trial court and the DCA implied in rejecting this position, this goes too far.

The unrelated works exception language was included in §440.11(1), Fla. Stat., in Chapter 78-300, Laws of Florida [A2].² There is scant legislative history which deals with this language. Neither a memorandum of legislative intent [A5]; any of the staff analyses [A6, 10, 13]; nor an unsigned, undated "summary" [A17] discusses the reasons for the inclusion of this

²The managerial/supervisory culpability standard was incorporated into the statute by Ch. 88-284, §2, Laws of Fla.

exception into the statute. The Academy has located a copy of an earlier incarnation of the exception [A9], which will be discussed in detail in subsection E, below.

D. THE PLAIN MEANING OF THE STATUTE REQUIRES REJECTION OF

DOT'S POSITION

The intent of the legislature is of primary importance in the judicial construction of a statute. See, *Tyson v. Lanier*, 156 So.2d 833, 836 (Fla. 1963). This intent must be determined from the plain language of the statute. See, *SRG Corp. v. Dept. of Revenue*, 365 So.2d 687, 689 (Fla. 1978). When that language is so plain and unambiguous as to fix the legislative intent and admit of but one meaning, courts construing it may not depart from the plain and natural language employed by the legislature. See, *State v. State Racing Comm'n.*, 112 So.2d 825, 828 (Fla. 1959). In this regard, the legislature is conclusively presumed to have a working knowledge of the English language. See, *Florida State Racing Comm'n. v. McLaughlin*, 102 So.2d 574, 575 (Fla. 1958).

The crux of the problem with the construction which DOT advocates is the legislature's use of the word "nor" to separate the first exception clause which deals with willful or intentional conduct from the second clause, which deals with unrelated works. The managerial/supervisory standard of culpability is contained in a separate sentence in subsection

(1). The writer has been unable to locate any Florida decisions which construe the word "nor".

There are two out-of-state cases which deal with statutory construction of this word. In *McCoy v. Walker*, 876 S.W.2d 252 (Ark. 1994), the issue involved construction of the word "nor" used in a statute relating to homestead rights in a decedent's home. The court found "nor" to be a disjunctive, and it was "...clear the legislature intended to mark *separate categories* [e.s., 876 S.W.2d at 254]. In *Barasch v. Pennsylvania Public Utility Comm'n.*, 532 A.2d 325 (PA 1987), the phrase "...shall not be made a part of the rate base nor otherwise included in the rates charged..." [532 A.2d at 328] was construed. The court found this language to prohibit the utility from recovering costs of cancelled plants either by making the cost a part of the rate base, or as operating expenses, holding to do otherwise would require treating the clause beginning with "nor" as surplusage [532 A.2d at 332].

Webster's New Twentieth Century Dictionary (2d Ed. 1979) defines the term as:

...And not, and not either; usually as the second of the correlatives, *neither...nor*, implying negation of both parts of the statement... [emphasis in the original, at p. 1221; A18].

The Random House College Dictionary (Rev. Ed. 1982)

offers this definition:

1. (Used in negative phrases, esp. after *neither*, to introduce the second member in a series or any subsequent member)...2. (Used to continue the force of a negative, as *no*, *not*, *never*, etc., occurring in a preceding clause)...[emphasis in the original at p. 906; A19].

The use of this word by the legislature clearly delineates two separate and distinct exceptions to the immunity provision, not additive phrases of one exception as is maintained by DOT. Similarly, the separate sentence giving managerial immunity unless a violation of law is involved is separate and distinct from the two exception clauses that precede it. What the legislature clearly intended as disjunctive exceptions to the immunity provision (intentional conduct, unrelated works, and violation of law by a manager), DOT wants this court to combine and hold that the *only* exception to the immunity provision occurs where the employee has been injured by a "fellow" employee guilty of willful and wanton disregard, unprovoked physical aggression, or gross negligence *and* where the two employees are employed in unrelated works. If a manager is involved (as DOT incorrectly asserts to be the case here), then, in DOT's universe, the manager must have violated the law to cause injury to a fellow employee engaged in

unrelated works. This creative construction of the statutory language cannot be what the legislature intended.

In this case, the statutory language is clear. Both the judicial constructions of the word "nor" and the dictionary definitions reveal the legislative intent to have been that the unrelated works exception appearing after the word "nor" is a separate and distinct basis of avoiding the immunity provisions of the statute when the injury is caused by another employee of the same employer. If the legislature had intended to require the type of conduct necessary under the fellow employee and managerial exceptions, it would not have had to even include the unrelated works exception, since the other two provisions would have covered all possibilities. To adopt the construction which DOT advocates would merge separate categories (*McCoy*) and reduce the unrelated works exception to the mere surplusage condemned by the court in *Barasch*.

With reference to the DOT's argument concerning managerial employees, the unrelated works exception does not make distinctions between management and rank and file employees that are made in the preceding clause (fellow employees) and the succeeding sentence (managerial employees). This is perfectly logical because if a supervisor of the employer is guilty of negligence which causes injury to one employed in unrelated

works, by definition the tortfeasor could not have been the manager of the injured employee. DOT's strained construction of this statutory provision must be rejected.

To the same effect is the legislature's use of the qualifying adjective "fellow" in the first exception involving a non-managerial employee's willful and wanton disregard, unprovoked physical aggression or gross negligence. The legislature's omission of this adjective in the unrelated works clause is significant. This makes common sense, though. If two employees are engaged in unrelated works, they can't be "fellow" employees in the sense of employees who work side by side, day in and day out.

E. STATUTORY AMBIGUITY CONCERNS AND STATUTORY CONSTRUCTION

The Academy maintains that the clear language of the statute requires that DOT's construction be rejected. If, however, this court finds the statutory language to be ambiguous, then other rules of construction dictate the same result, upholding the lower court's determination of this issue. The legislature's action in creating limited exceptions to the blanket immunity provisions of §440.11(1), Fla. Stat., constitutes a partial restoration of this state's injured

employees' access to the courts. Article 1, §20 of the Florida Constitution's Declaration of Rights sets forth this right:

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Commenting on this provision contained in the pre-1968 form of the Florida Constitution, this court observed:

The dominant principals proclaimed in the (Declaration of Rights) are paramount insuperable commands to all governmental officers, tribunals, boards, commissions or other agencies or functionaries, who exercise delegated power or authority or duty, whether under the form of law or procedural, or not, and whether state, county, district, municipal or other nature or character, and whether legislative, executive, judicial, administrative, municipal, ministerial, or other nature or character. *State v. Woodruf*, 184 So. 81, 84 (Fla. 1938).

The principal of free access implies the right must be free of unreasonable burdens or restrictions. Any restrictions thus placed must be construed liberally in favor of the constitutional right. See, *G.B.B. Investments, Inc. v. Hinterkopf*, 343 So.2d 899 (Fla. 3d DCA 1977). In a setting where the legislature has deliberately provided for expansion of the constitutional right of free access to the courts in this area, to accept the DOT's tortured construction of the statutory language would ignore this constitutional imperative.

Since the workers' compensation law is remedial in nature, any doubt as to statutory construction must be resolved in favor of providing for injured workers. See, *Broward v. Jacksonville Med. Center*, 690 So.2d 589, 591 (Fla. 1997). Where a provision is susceptible of disparate interpretations, the court will adopt the construction which is more favorable to the employee. See, *Henderson v. Saul Walker & Co.*, 138 So.2d 323, 327 (Fla. 1962). If this court gives any credence to DOT's interpretation, clearly the more favorable reading is that advocated by the injured employee.

Since the workers' compensation law is an enactment in derogation of the common law, it must be construed strictly. See, *Weathers v. Cauthen*, 12 So.2d 294, 295 (Fla. 1943); *Grice v. Suwanee Lumber Mfg. Co.*, 113 So.2d 742, 745 (Fla. 1959). The court will presume that such a statute was not intended to alter common law other than by what is clearly and plainly specified in the statute. See, *Ady v. American Honda Finance Corp.*, 675 So.2d 577, 581 (Fla. 1996).

In the absence of a clear intent to derogate a common law right, it would ill become the judiciary to do so by a construction which could result in manifest injustice. *Trail Builders Supply Co. v. Reagan*, 235 So.2d 482, 485 (Fla. 1970).

Here, the legislature has reinstated common law rights which had previously been removed. This is certainly remedial legislation which must be liberally construed to effect the legislature's intent to allow injured employees access to the courts in limited circumstances. At the same time, since the workers' compensation law is in derogation of the common law, the court should adopt an interpretation which allows the widest possible access by injured employees consistent with the general immunity provisions of the statute. The construction urged by DOT contravenes both of these rules of construction.

The Academy maintains that the statutory meaning is clear and does not require resort to the legislative history of this section to resolve this issue. See, *Aetna Casualty & Surety Co. v. Huntington Nat'l Bank*, 609 So.2d 1315, 1317 (Fla. 1992). However, should this court determine the statute to be ambiguous, the legislative history of the enactment becomes an important means of resolving the ambiguity.

The language of an earlier version of CS/SB 636 varies from the language which ultimately became the unrelated works exception in significant ways. Instead of being a clause separated from the fellow employee exception by the word, "nor", the earlier form of the exception was contained in a sentence:

Provided, however, employees of the same employer may have a cause of action if each is operating in furtherance of the employer's business but they are not assigned to the same job site or are

assigned primarily to unrelated works within private or public employment [A9].

The first significant difference is the use of the "provided" language, instead of, "nor". "Provided" is defined as: "on the condition or understanding (that)..." Black's Law Dictionary, p. 1240 (7th Ed. 1999). This language is clearly not as disjunctive as the use of the word, "nor", to separate two clauses stating two different exceptions to immunity, as used in the final language. The use of "may have a cause of action" is a much less definite expansion of the right to a tort remedy than appears in the final version of the statute.

The predecessor language also places an additional qualification on the use of the exception which did not survive the passage of the ultimate form of the statute. The "not assigned to the same job site" language possibly could have been used to deny Juliano's claim on the facts of this case.³ The disappearance of this language from the final version of the statute is significant.

If the statute is ambiguous, there is still authority for construing the statute as the Academy proposes. The omission from the final enactment of a bill of a clause which

³From the facts set forth in the briefs, it is not clear to the Academy whether Juliano and his crew of prisoners worked on a daily basis at the weigh station where the injury occurred.

had originally been included is strong evidence that the legislature did not intend that the omitted material be effective. See, *Mayo v. American Agric. Chemical Co.*, 133 So. 885, 887 (Fla. 1931). The amendment which ultimately became the unrelated works exception in the 1978 statute was clearly tailored to remove indefinite language to allow this clause to stand alone as a separate and distinct exception to the immunity to claims in tort of employees of the same employer.

F. PETITIONER'S "INSTITUTIONAL NEGLIGENCE" ARGUMENT IS FLAWED

DOT argues it cannot be held responsible under the unrelated works exception for its "simple institutional negligence," alleging this injury was a "failure of the system to correct a potentially hazardous condition" [PB30]. The first observation which must be made about this is that institutions, whether public or private, can only act through the persons who make up those organizations.⁴ In this case, the jury assessed blame against five individual employees of DOT. Two courts

⁴Even in a setting of "institutional negligence", individual acts give rise to the claim. Because of considerations of respondeat superior and ability to pay a judgment, the institution rather than the individual is normally the defendant. Here, since the state is only a defendant because of the provisions of §768.28, Fla. Stat., the whole "institutional negligence" argument does not make much sense.

reviewing the jury's findings have found no factual basis to set those findings aside. Thus, this is not the case of an amorphous entity acting through anonymous individuals. We know the identity of the negligent individuals because the jury told us who they are.

Certainly a private institution may be found to be responsible because of the application of its policies and procedures has caused damage. This is not a case involving that question. Here, the cause of action was foundationed on a defect on the premises which the named employees in their individual capacities did nothing to correct. Since the jury advised who the negligent parties are, this is not a question of institutional negligence.

DOT's argument on this point also ignores the concept of concurrent cause. Under that doctrine, it is not necessary that the negligence of individual DOT employees be the only cause of the loss, only that it contributed substantially to producing the injury.⁵ DOT's statement of the case and the facts does not indicate this was ever an issue which was brought up in the trial court.

⁵ See, for example, Florida Standard Jury Instruction 5.1(b).

Under DOT's theory, the more people who are negligent, the less the chances of recovery, since this would mean the negligence was "institutional".⁶ DOT seems to be saying that the more individuals which a governmental agency can prove were negligent, the better their chance of showing "institutional negligence". This cannot be what the legislature intended. At any rate, the argument on this ground lacks any persuasiveness in light of the jury's determinations as to the individual responsibility for the injury.

G. THE NEGLIGENCE OF "A SUPERVISOR" DOES NOT HAVE TO BE
CULPABLE WHERE THE PERSON DOES NOT SUPERVISE THE INJURED
EMPLOYEE

DOT argues that, since some of the persons found to be negligent were managerial, they are immune from suit, absent culpable conduct [PB37]. This is another attempt by DOT to blend the unrelated works exception with the managerial immunity provided in a subsequent and separate sentence in §440.11(1), Fla. Stat.

Here, Juliano was a Department of Corrections employee with a completely different chain of command which probably did not merge with DOT chain of command until it reached cabinet level. No one at the DOT was his supervisor. If a supervisor is engaged in work unrelated to that of an employee whom he injures

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DOT maintains, "the very number of DOT employees found negligent demonstrated that this was really institutional negligence, not the negligence of particular individuals [PB13]."

but does not supervise, there is no basis to claim the injured employee must show culpable conduct of the supervisor as a predicate for recovery. As noted above, the unrelated works exception does not distinguish between managerial and non-managerial employees engaged in the unrelated works.

The absurdity of this argument can be illustrated by this example. In *Department of Corrections v. Koch*, 582 So.2d 5 (Fla. 1st DCA 1991), a DOT employee was struck and killed by a vehicle driven by an employee of the Department of Corrections. The case was on appeal on the issue whether the unrelated works exception was abolished by the sovereign immunity statute.⁷ However, in DOT's universe, if the driver of the Department of Corrections vehicle was a "supervisor", the Personal Representative of the deceased DOT employee would be required to show culpable conduct on the part of the negligent supervisor before he could recover. Such a bizarre result cannot be divined from the plain language in this statute.

H. RESPONDENT WILL MAKE NO DOUBLE RECOVERY IF HIS VERDICT IS
UPHELD

At every possible juncture in its brief, DOT has insinuated that, if the jury's verdict in this case is upheld, Juliano will achieve a "double recovery".⁸ Even though whether or not Juliano makes a double recovery is not relevant to the determination of any issue presently before this court, DOT throws the phrase out at every opportunity, seemingly to poison this proceeding with irrelevant material.

In the first place, the statement is semantically inaccurate, since the measure of damages Mr. Juliano receives

⁷The court determined the unrelated works exception was not abolished by the sovereign immunity statute.

DOT maintains that: "The end result of this case was that Juliano was permitted a double recovery for his injuries" [PB2]. See also references at PB15, 30, 33, 43.

under the workers' compensation law is significantly different from his damages in tort. It is to be devoutly hoped that, absent considerations of comparative negligence or inadequate insurance coverage, any plaintiff's tort recovery will significantly exceed his worker's compensation recovery by more than double.

In the second place, DOT is apparently unaware of the provisions of §768.76(1), Fla. Stat. which require that the trial court "...shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to him..." If the DOT did not have an affirmative defense invoking the set off provisions of the statute at trial, it should have. If it did, it is disingenuous to come before this court talking of "double recovery".

CONCLUSION

The plain language of this statute differentiates the unrelated works exception to the general workers' compensation immunity from the other exceptions relating to a fellow employee's aggressive conduct, and a manager's culpable conduct. Plain English requires that this court determine that the unrelated works exception does not require a showing of more than mere negligence on the other employee, or manager in order to lay a predicate for recovery of tort damages.

The Academy respectfully requests that this court determine that, since the DCA's actions were correct on this issue, that review was improvidently granted. This court should affirm the DCA's determinations concerning the application of the unrelated works exception to this controversy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished by U.S. Mail to: **L. BARRY KEYFETZ**, Esquire, Keyfetz, Asnis & Srebnick, P.A., 44 West Flagler Street, Suite 2400, Miami, Florida 33130; and **DIRK M. SMITS**, Esquire, Vernis & Bowling of the Florida Keys, P.A., Post Office Drawer 529, Islamorada, Florida 33036, this ____ day of July, 2000.

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