

In Re: M. P. A Child

O/A 3-6-85

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 65,596
DCA - 5 #83-584 and 83-779

STATE OF FLORIDA
DEPARTMENT OF HEALTH &
REHABILITATIVE SERVICES,

Petitioner,

vs.

LAKE COUNTY, a political
subdivision of the State of
Florida and STEPHEN G. BIRR,

Respondents.

FILED

JAN 16 1985

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

ANSWER BRIEF OF RESPONDENT, LAKE COUNTY

Submitted by:

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PRELIMINARY NOTE

The Petitioner, Department of Health and Rehabilitative Services, will be referred to as the Department. The Respondent, Lake County, Florida,, will be referred to herein as the County and the Respondent, Stephen G. Birr, will be referred to as the guardian ad litem.

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STATEMENT OF THE FACTS AND PROCEDURES

The Respondent concurs with the Statement of Facts and Procedures set forth by the Petitioner with the following additions.

The action was commenced in the Trial Court by the Department of Health and Rehabilitative Services were child abuse or neglect proceedings brought pursuant to Chapter 827, Florida Statutes (1981), Abuse of Children or Disabled or Aged Persons and Chapter 39, Part III, Florida Statutes, Proceedings Relating To Juveniles, Dependency Cases.

The District Court of Appeal affirmed the Trial Court's Order granting the Guardian Ad Litem's Motion for Attorneys' Fees and Costs to be paid by the Department of Health and Rehabilitative Services and remanded the case for a recalculation of the fees.

ISSUES PRESENTED

I. THE LOWER TRIBUNAL CORRECTLY REQUIRED THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES TO PAY FEES AND COSTS TO THE GUARDIAN AD LITEM REPRESENTING THE CHILDREN IN THESE ABUSE AND NEGLECT PROCEEDINGS.

II. THE LOWER TRIBUNAL ERRED IN AWARDING FEES TO THE GUARDIAN AD LITEM IN THESE CHILD ABUSE AND NEGLECT PROCEEDINGS.

III. WHETHER THE LOWER TRIBUNAL ERRED IN ORDERING THE DEPARTMENT TO PAY THE GUARDIAN AD LITEM'S FEES AND COSTS WITHIN THIRTY DAYS.

SUMMARY OF THE ARGUMENT

The lower tribunal correctly affirmed the Trial Court's order requiring the Department to pay fees and costs of the guardian ad litem in abuse and neglect proceedings. The intent of Section 827.07 is the protection of abused and neglected children. Section 827.07(1), Fla. Stat. (1981). The Department of Health and Rehabilitative Services is given the prime responsibility for that statutory goal. Section 827.07(11), Fla. Stat. (1981).

Children in dependency proceedings have no constitutional right to counsel. In The Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980). However, Section 827.07(16)(1979) makes the appointment of a guardian ad litem mandatory in child abuse or neglect proceedings such as those herein. The issues now before this Court are who, if anyone, should pay those guardian ad litem fees.

The County's position and that of the Trial Court and the lower appellate tribunal is that the Department of Health and Rehabilitative Services is obligated to assume that burden. The statute requiring the appointment of guardians ad litem was not made effective until after the Trial Court appointments in the case of D.B. and D.S. Therefore, even though this Court recognized the existence of that statute, it was not applied in the Court's determination of who, if anyone, should pay the guardian's fees.

The Second District Court has ruled In The Interest of R.W., 409 So.2d 1069 (Fla. 2d DCA 1981) Rev. denied 418 So.2d 127 (Fla. 1982), that the Department should pay the fees and costs of guardians ad litem appointed pursuant to Section 827.07(16). There have been no legislative amendments since that ruling.

The Department argues that the fees and costs of the guardian herein should be paid by the County because Section 43.28 requires the County to provide personnel necessary to operate the Circuit and County Courts. However, necessary personnel are to be provided by the County only in the event the State has not provided otherwise. In this instance, Chapter 827 establishes the provision of guardians ad litem through the Department. Although it would have been a simple matter for the Legislature to indicate its disapproval of the R.W. case, it has not done so even though it addressed the amount of fees due a guardian ad litem. Section 39.415, Fla. Stat. (1984)

The County agrees with the position of the Department as to the second issue presented -- the lower tribunal erred in awarding fees to the guardian ad litem in these proceedings. Lawyers have a professional obligation to provide legal services to the poor, including service as guardians ad litem when counsel is not constitutionally required. In The Interest of D.B. and D.S., supra at 92. Even if counsel is constitutionally required, lawyers are not totally relieved of their obligation and receive payment according to the formula established in State v. Rush, 45 N.J. 399, 217 A.2d 441, 1966 at 448. Additionally, Section

39.415, Florida Statutes (1984) provides that the fees of counsel appointed for representation pursuant to court appointment in dependency proceedings shall not exceed \$1,000.00 at the trial level and \$2,500.00 at the appellate level.

Therefore, the lower tribunal's decision affirming the entitlement of the guardian ad litem to fees is an unjustified departure from the precedent of this court and should be reversed. However, if the Court should decide that this guardian ad litem is due fees, the decision affirming the liability of the Department, rather than the County, for fees and costs of guardians ad litem should be affirmed. The decision remanding for recalculation of the fees, if any are awarded, should also be affirmed.

I. THE LOWER TRIBUNAL CORRECTLY REQUIRED THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES TO PAY FEES AND COSTS TO THE GUARDIAN AD LITEM REPRESENTING THE CHILDREN IN THESE ABUSE AND NEGLECT PROCEEDINGS.

The Trial Court's Order required the Department to pay the fees and costs of the attorney appointed as guardian ad litem in the child abuse proceedings before it. That Order was subsequently affirmed by the District Court. In Re: The Interest of M.P., 453 So.2d 85 (Fla. 5th DCA 1984). Since that opinion, the Third and the First District Courts of Appeal have followed with Per Curiam rulings placing the responsibility of reimbursements to guardians ad litem on the Department, rather than the County. Department of Health and Rehabilitative Services v. In The Interest of A.H., A.H. & R.H., Children, _____ So.2d _____ (Fla. 1st DCA 1984) (Case number AW-141 Opinion filed November 15, 1984), 9 FLW 1296 and State of Florida, Department of Health and Rehabilitative Services v. Metropolitan Dade County and The Interest of V.G., a child, _____ So.2d _____ (Fla. 3d DCA 1984) (Case No. 84-1364, Opinion filed December 11, 1984) 9 FLW 2584. All three District Courts of Appeal have cited an earlier opinion of the Second District Court, In The Interest of R.W., 409 So.2d 1069 (Fla. 2d DCA 1981), Rev. Denied, 418 So.2d 127 (Fla. 1982).

That portion of the lower tribunal's decision affirming the responsibility of the Department, rather than the County for the fees and costs of guardians ad litem in child abuse and neglect cases, should now be affirmed unless the Court determines that guardians in such instances are not entitled to fees.

Argument on that issue -- whether the guardian is to be paid any fees -- will be presented in the next section. However, no matter how the second issue is decided, the County agrees with the Department that the obligation to pay costs entailed by guardians ad litem in child abuse and neglect proceedings will be determined by resolution of this issue.

A. BASIS FOR THE DEPARTMENT'S RESPONSIBILITY.

This Court has held that children who are the subject of juvenile dependency proceedings have no constitutional right to counsel. In The Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980), at 91 and 93. However, children that are the subject of dependency proceedings have a right since 1979, by statute, to a guardian ad litem in any child abuse or neglect judicial proceeding. Section 827.07(16), Fla. Stat. (1981). This statutory entitlement to a guardian ad litem is only one prong of a comprehensive legislative scheme intended to provide protective services for abused or neglected children. Section 827.07(1-18), Fla. Stat. (1981). *1. Other sections of the statute require the reporting of child abuse or neglect to the Department. Sections

*1. Section 827.07 was transferred to Sections 415.502 - 415.513, Florida Statutes (1983). Further Amendments to these Statutes have been made by Chapters 83-75 and 84-226, Laws of Florida. For instance, a definition of guardian ad litem was added by the 1984 legislature. Section 415.503(5), Fla. Stat. (1984). However, the section concerning the appointment of a guardian ad litem, Section 827.07(16) has not been changed except to clarify its applicability in both civil and criminal proceedings. Section 39.415, Florida Statutes (1984), has set a ceiling on any fees awarded to counsel for dependency matters.

827.07(3), (4), and (9). Once the Department receives such reports, it then has the duty to investigate and notify the appropriate law enforcement agency whenever a criminal investigation is appropriate. Further, provisions for the Department to protect a child through utilization of Chapter 39's dependency proceedings are provided. Section 827.07(10)(e) and (g), Fla. Stat. (1981). Additionally, rules authorized by the Statute, have been promulgated by the Department to achieve the legislative intent of Chapter 827. Fla. Admin. Code Rule 10-9; Section 827.07(17).

Section 827.07(11) expressly delegates the responsibilities of public agencies to carry out the Legislature's intent.

1. Responsibilities Of Public Agencies:

(a) The Department shall:

(1) Have the prime responsibility for strengthening and improving child abuse and neglect prevention and treatment efforts.

(2) Seek and encourage the development of improved or additional programs and activities, the assumption of prevention and treatment responsibilities by additional agencies and organizations, and the coordination of existing programs and activities.

(3) To the fullest extent possible, cooperate with and seek cooperation of all appropriate public and health agencies, including health, education, social services and law enforcement agencies and courts, organizations or programs providing or concerned with human services related to the prevention, identification or treatment of child abuse or neglect.

(4) Provide on-going protective treatment and ameliorative services to, and on behalf of, children in need of protection to safeguard and insure their well being and whenever possible, to preserve and stabilize family life. (Emphasis Added).

(b) All state, county, and local agencies have a duty to give such cooperation, assistance and information to the Department as will enable it to fulfill its responsibilities under this section.

Thus, the Legislature assigned the prime responsibilities for carrying out the provisions of Chapter 827 to the Department. In Re: The Interest of M.P., 453 So.2d 85 (Fla. 5th DCA 1984) at 87, and In The Interest of R.W., 409 So.2d 1069 (Fla. 2d DCA 1981) at 1071. Consequently, the Department should pay the costs and fees incurred in carrying out that responsibility.

B. IN THE INTEREST OF D.B. AND D.S.

Appellant argues that this Court's opinion In The Interest of D.B. and D.S., supra. determines the outcome of the case before us. However, at the time that case was before the Trial Court, the applicable statutes and rules were different from those in effect at the time this Court's opinion was written by Justice Overton. This difference created a gap in this Court's opinion which at least two District Courts of Appeal have since determined allow for reconciliation of these cases. In The Interest of R.W., supra. and In Re: The Interest of M.P., supra.

The Trial Court entered its Order In The Interest of D.B. and D.S. on January 19, 1979. At the time, Section 827.07(16), Florida Statutes (1979) had not been enacted. Chapter 79-203,

Section 1, Laws of Florida created Section 827.07(16) effective on July 1, 1979. Therefore, the guardians ad litem appointed by the Dade County Trial Court for D.B. and D.S. were not appointed pursuant to Section 827.07(16) which provides:

A guardian ad litem shall be appointed by the Court to represent the child in any child abuse or neglect judicial proceeding. . . . In those cases in which the parents are financially able, the parent or parents of the child shall reimburse the Court, in part or in whole, for the cost of provision of guardian ad litem services. Reimbursement to the individual providing guardian ad litem services shall not be contingent upon successful collection by the Court from the parent or parents. (Emphasis supplied.)

The D.B. and D.S. opinion was rendered by this Court on May 16, 1980, after the effective date of Section 827.07(16), explaining this Court's allusion to the statute. D.B. and D.S., supra at 91.

The current applicable rule of juvenile procedure, adopted in 1982, also recognized the legislative mandate in Section 827.07(16). However, that procedural provision was before neither the Trial Court nor this Court when D.B. and D.S. was decided. At that time, the procedural rule concerned left the appointment of a guardian ad litem to the traditional discretion of the Trial Court. Fla. Juv. P. 8.300, prior to the 1982 amendment. The Florida Bar. In Re: Amendment to the Florida Rules of Juvenile Procedure, 418 So.2d 1004 (Fla. 1982).

With an understanding of the then effective rules and statutes, it is now helpful to review the factual circumstances then before this Court as set forth in its opinion. The Trial Court had appointed private counsel as guardian ad litem for D.B.

in proceedings by D.B.'s natural mother to set aside her previous surrender of five-year-old D.B. for permanent commitment and adoption. Representation by appointed counsel of the natural father, who had never been married to the natural mother, was also at issue.

D.S. was nine months old when a dependency action for temporary custody was commenced by the Department after the child's mother abandoned him at his grandmother's with threats to burn down the grandmother's home. The Trial Court's appointment of a guardian ad litem for D.S. and separate counsel for the mother were also before this Court.

The Trial Court's Order based on a decision of the United States District Court for the Southern District of Florida, Davis v. Page, 442 F.Supp. 258 (S.D. Fla. 1977), had held that the State must provide legal representation as a fundamental constitutional right to both indigent children and parents in all juvenile dependency proceedings. In The Interest of D.B. and D.S., supra at 87.

After reviewing the rights of parents and children to counsel in dependency matters, this Court rejected the determination of both the Trial Court and the United States District Court finding that, ". . . there is no constitutional right to counsel for the subject child in a judicial dependency proceeding." In The Interest of D.B. and D.S., supra at 91. This Court recognized, however, that by statute, counsel must be appointed for the child pursuant to Section 827.07(16). In all other cases, the

appointment of counsel as guardian ad litem was left to the traditional discretion of the Trial Court. Id.

The appointment of D.B.'s guardian ad litem was held to be an appropriate if discretionary one. On the other hand, the appointment of counsel as guardian ad litem for D.S. was determined both inappropriate and unnecessary. This Court then concluded that the relevant differences between the two appointments included the fact that D.S.'s proceedings were instituted by the Department to protect the child's interest. Therefore, further counsel was unnecessary. On the contrary, the Court found that D.B.'s guardian ad litem was appropriately appointed because the mother was contesting a prior surrender; the mother had a history of prostitution and heroin addiction; and the father was in prison seeking custody. In The Interest of D.B. and D.S., supra at 93.

There is no indication that this Court looked to Section 827.07(16) to determine whether the appointment of the guardians ad litem were necessary or appropriate. Arguably, that statute would have mandated guardians in both cases as the statute requires appointment in "...any child abuse or neglect judicial proceeding." Section 827.07(16). (Emphasis added). This Court has not, therefore, expressly considered the situation now before us -- the appointment of guardians ad litem pursuant to Chapter 827.

There is no doubt that after review of the constitutional requirements of legal representation for parents and children in dependency matters, this Court determined that the appointment of counsel to serve as guardian ad litem for a child is never constitutionally required. However, when legal representation is constitutionally required for parents in a dependency proceeding, this Court decided that government, not the legal profession, bears the obligation to provide those services. Section 43.28, Fla. Stat. (1979) provided authority to require the County to fund this governmental responsibility as constitutionally required counsel are "personnel necessary" to operate the Court. In The Interest of D.B. and D.S. supra at 93.

C. DIRECT RECONCILLIATION OF SECTION 43.28 AND CHAPTER 827.

It is the County's position that Section 43.28 is not authority for requiring the County to pay for the services of the guardian ad litem herein. That provision provides now as it has since 1977 that:

43.28 "Court Facilities" - The County shall provide appropriate courtrooms, facilities, equipment and unless provided by the State, personnel necessary to operate the Circuit and County courts. (Emphasis Supplied).

This Court ruled that constitutionally required counsel is "personnel necessary to operate the Circuit and County Courts". However, other language in that Statute = unless provided by the State -- was not expressly considered. Even constitutionally required counsel can be specifically funded elsewhere by the legislature avoiding the invocation of this section. For

instance, public defenders are constitutionally required counsel. However, they are not funded by the County under Section 43.28 but by the State. Section 27.5301, Fla. Stat. (1983) and Ch. 83-350, Section 3, Laws of Fla.

Indeed, the provisions of Chapter 827 establish a legislative scheme providing for these services (guardian ad litem costs and fees pursuant to Chapter 827) by the State. In The Interest of R.W. supra and In Re: The Interest of M.P. supra.

A review of Chapter 827.07(16) shows that:

(16) Guardian Ad Litem - A guardian ad litem shall be appointed by the court to represent the child in any child abuse or neglect judicial proceeding. Any person participating in a judicial proceeding resulting from such appointment shall be presumed prima facie to be acting in good faith and in so doing, shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed. In those cases in which the parents are financially able, the parent or parents of the child shall reimburse the Court, in part or in whole, for the cost of provision of guardian ad litem services. Reimbursement to the individual providing guardian ad litem services shall not be contingent upon successful collection by the Court from the parent or parents.

As the Department's initial brief explains, it is the Court, not the County that is to appoint the guardian. It is the Court, not the County that is to be reimbursed by a financially able parent. It is also the Court, not the County which the statute contemplates collecting for services. The Department seeks to substitute "the County" for "the Court" by a flat statement that the County is the fiscal agent for the Circuit Court. (The Department's initial brief, page 11). However, no authority, except Section 43.28 is offered for that incredible leap.

Indeed, a review of Chapter 125, County government; of Chapter 26, Circuit Court; and of Chapter 28, Clerks of the Circuit Court offers no substance for the Department's assertion. The County is not the Court. In fact, the Circuit Court Judges are paid by the State, not the County. Section 26.51, Fla. Stat. (1983).

The County does provide Court facilities pursuant to Section 43.28 just as the County provides public defenders within their circuit utilities, office space and custodial services. Section 27.54(3), Fla. Stat. (1983). However, public defenders and assistant public defenders are paid by the State, not the County, except that the County may contribute funds to pay the salary of one assistant public defender whose sole function will be to defend indigents charged with violations of special laws or ordinances of the County. Section 27.54(2), Fla. Stat. (1983).

The Department is correct, however, in its assertion that the Legislature has funded a guardian ad litem program through appropriation to the Florida Supreme Court. Line item 855, Ch. 81-201, Laws of Fla. and Line item 846A, Ch. 82-215, Laws of Fla. Yet another indication that the Legislature intended for the Department to bear the burden of the fees and costs for guardians ad litem is the fact that Chapter 827 has not been amended to indicate otherwise even though the Second District Court of Appeals ruled as early as 1981 that the Department was responsible for this obligation. An even stronger argument that

the Legislature has agreed with the Second District ruling is the fact that an amend next to Chapter 39 was made by the 1984 Legislature setting limits for compensation to be paid counsel in dependency proceedings.

D. CONCLUSION.

The lower tribunal correctly required the Department of Health and Rehabilitative Services to pay fees and costs of the guardian ad litem representing the children in these abuse and neglect proceedings. Chapter 827.07's provisions provide a legislative scheme for the protection of children. The appointment of a guardian ad litem pursuant to that statute is a legislative requirement, the burden of which has been placed on the Department. In Re: The Interest of M.P. supra at 87. The Department therefore, should pay the costs incurred in carrying out that responsibility. In Re: The Interest of M.P. supra at 87 and In The Interest of R.W. supra at 1071.

The factual circumstances, statutes and rules in D.B. and D.S. and those herein thus establish three prongs for the determination of compensation to guardians ad litem in dependency matters:

1. Constitutionally required counsel,
2. Legislatively mandated counsel,
3. Situations where counsel are neither constitutionally mandated nor legislatively required, but desirable.

The provisions of Chapter 827 clearly indicate a legislative plan of provision of guardians ad litem by the State through the Department. Section 43.28 only requires the County to provide personnel necessary to operate the Courts when they are not provided by the State. Since the Second District's ruling In The Interest of R.W., the Legislature has been aware of the Department's bearing the financial burden of this obligation. Had the Legislature wanted to remove the burden from the Department, it could have said so. It has not. Therefore, the opinion of the lower tribunal herein should be affirmed as to its ruling that the Department pay the fees and costs of the guardian ad litem.

II. THE LOWER TRIBUNAL ERRED IN AWARDING FEES TO THE GUARDIAN AD LITEM IN THESE CHILD ABUSE AND NEGLECT PROCEEDINGS.

The County did not specifically appeal the Trial Court's order awarding fees to the guardian ad litem since it was not ordered to pay them. The County, however, wishes to respond as follows to this issue raised by the Department.

Even when government is required by the constitution to provide legal representation to indigents, lawyers are not totally relieved of their professional obligation to provide legal services to the poor. In The Interest of D.B. and D.S., 385 So.2d 83, (Fla. 1980) at 92. This Court adopted the formula in State v. Rush, 46 N.J. 399, 217 A.2d 441, 1966 at 448 providing that appointed counsel would receive payment at sixty percent (60%) of the fee a client of ordinary means would pay an attorney of modest financial success for the circumstances in which counsel are appointed pursuant to constitutional requirements. It appears that there will now be another factor to be considered in addition to the Rush formula as the Legislature has determined that compensation for counsel for representation pursuant to Court appointment in a dependency proceeding shall not exceed \$1,000.00 at the trial level and \$2,500.00 at the appellate level. Section 39.415, Fla. Stat. (1984).

Notwithstanding, this Court has determined that the obligation to provide counsel, unless constitutionally required, is part of a lawyer's historical professional responsibility to represent the poor. When there are no available legal aid

services, an appointed attorney will receive no fees. In The Interest of D.B. and D.S., supra at 92. However, as the Department's initial brief concludes, no ruling has yet been made by this Court on the effect of Chapter 827's mandate as to the compensation to be received by counsel who serve pursuant to that statute. At this time, counsel are either constitutionally mandated and paid according to a formula or serving with no compensation as part of their professional responsibility. In this case, there was no constitutional requirement that counsel be appointed. Therefore, the appointment of the guardian ad litem herein falls into the category of that wherein no compensation is available and fees should not have been awarded.

The County also agrees with the Department's position that appointment of guardians ad litem in child abuse and neglect cases without providing fees will not cause any undue hardship upon the Florida Bar. Indeed, the guardian ad litem need not be an attorney. The current appropriate Florida Rule of Juvenile Procedure 8.300(2) specifically contemplates that the guardian so appointed may be a lay person. Additionally, a guardian ad litem program has been funded by the Legislature to provide services of lay guardians ad litem. Further, the Department is correct in the appointment of a guardian ad litem is mandated by the statute only in child abuse and neglect cases, not all dependency cases. The Department's contention that the child's interest may better be served by a spokesman whose training is more specifically relevant to a child's needs than an attorney's also has merit.

Since the opinion In The Interest of D.B. and D.S. was as published in 1980, it is reasonable to assume that attorneys appointed as guardians ad litem since then are aware that they would not be entitled to payment of fees. Since there should have been no expectation of payment, and since there is not statutory authority for payment, fees should not have been awarded in this case to the guardian ad litem. If, however, this court should find that this guardian ad litem is due payment of attorneys' fees, that portion of the decision of the lower tribunal which remanded to the Trial Court for recalculation of the amount of the fees due should be upheld.

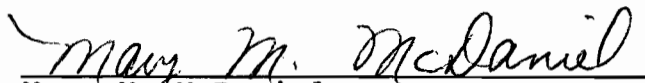
III. WHETHER THE LOWER TRIBUNAL ERRED IN ORDERING THE DEPARTMENT TO PAY THE GUARDIAN AD LITEM'S FEES AND COSTS WITHIN THIRTY DAYS.

The County takes no position as to whether the lower tribunal erred in ordering the Department to pay the guardian ad litem's fees and costs within thirty days except to suggest that the lower tribunal's reliance on Section 57.041, Fla. Stat. (1983) and Simpson v. Merrill, 234 So.2d 350, Fla. Stat. (1970) was an appropriate analogy to the payment of costs and fees pursuant to Chapter 827.07(16). Neither require a specific line item in the budget. The status of the party as a loser or a winner is not at issue in this case.

CONCLUSION

The lower tribunal's decision affirming the entitlement of the the guardian ad litem appointed pursuant to Section 827.07(16), Florida Statutes (1981), to the payment of fees is an unjustified departure from the precedent of this Court and should be reversed. Alternatively, if this Court should decide that this guardian ad litem is due fees, the decision of the lower tribunal decision affirming the liability of the Department of Health and Rehabilitative Services, rather than the County, for fees and costs of guardians ad litem in child abuse and neglect cases appointed pursuant to statute should be affirmed and remanded for recalculation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this document was furnished by mail this 14th day of January, 1988, to the parties set forth below:

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