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SID J. WHITE
MAY 26 1987
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF
THE STATE OF FLORIDA

ANNIE B. SMITH,

Petitioner,

vs.

DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Respondent.
_____/

CASE NO. 70,440

PROCEEDING ON QUESTION OF GREAT PUBLIC IMPORTANCE
CERTIFIED BY THE SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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May 22, 1987

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STATEMENT OF THE CASE

This is a proceeding on a question of great public importance certified to this Court by the Second District Court of Appeal for the State of Florida (hereinafter "Second DCA"). Petitioner ANNIE B. SMITH has taken an appeal to the Second DCA of an adverse administrative action following hearing. In an effort to complete the record on appeal, Petitioner moved to compel Respondent DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES to prepare a transcript and include it as part of the record on appeal without payment of costs, by authority of Florida Statutes §57.081 (1985). On April 1, 1987, in an order disposing of Petitioner's motion, the Second DCA certified the following question as being of great public importance:

> DOES SECTION 57.081 FLA. STAT. AUTHORIZE OR REQUIRE THAT INDIGENT APPELLANTS IN NON-CRIMINAL ADMINISTRATIVE APPEALS BE PROVIDED TRANSCRIPTS AT NO COST TO THEM?

Smith v. Department of Health and Rehabilitative Services, 504 So.2d 801 (Fla. 2d DCA 1987).

Petitioner filed her notice to invoke discretionary jurisdiction of this Court on April 17, 1987. This Court has jurisdiction pursuant to Article V, Section 3(b)(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v).

STATEMENT OF FACTS

Petitioner is a participant in the federal food stamp program administered in the State of Florida by Respondent. The federal regulations governing the administration of the program require that the State agency provide applicants for, and recipients of, food stamps an

appeal and evidentiary hearing on any adverse agency decision. See 45 C.F.R. §§205.10; 7 C.F.R. §§273.15-.18 (1986). Respondent has set up the Office of Public Assistance Appeal Hearings (hereinafter "OPAAH") in order to facilitate this federally mandated system of administrative hearings. In addition, OPAAH serves as the administrative tribunal to adjudicate claims by Respondent, against participants in the food stamp program alleged to have received food stamp benefits to which they are not entitled, due to an intentional act or omission. 7 C.F.R. §273.16 (1986). In these administrative fraud hearings OPAAH is authorized to sanction those food stamp recipients found to have committed an intentional program violation by disqualifying them from receiving food stamp benefits for various periods of time. Id.

Respondent alleged that Petitioner fraudulently received more food stamps than she was entitled to receive. Petitioner was found by the Hearing's Officer to have committed an intentional food stamp program violation and was disqualified from receiving food stamps for a period of three months.

Petitioner appealed the decision of the OPAAH Hearings Officer to the Second DCA. Petitioner requested and was issued a Certificate of Indigency by the Clerk of the administrative agency which allowed her to proceed in the District Court without payment of a filing fee. Petitioner also requested that Respondent's clerk provide a transcript of the agency hearing without charge. Respondent is required by law to record the testimony and evidence taken at the hearing, and to provide a copy of the official transcript to any requesting party. Fla. Admin. Code Rule 10-2.65. The request for a free transcript was denied by the Respondent, by and through its clerk.

Petitioner filed a motion with the Second DCA to compel Respondent to provide a transcript free of charge or in the alternative, to certify a question of great public importance. Respondent contested the motion. The court denied Petitioner's request to compel Respondent to provide a transcript and certified the question to this Court as being of great public importance. Petitioner now brings that question before this Court.

INTRODUCTORY STATEMENT

Two district courts of appeal have recently addressed whether §57.081 as amended in 1980 requires waiver of transcription fees in appeals of administrative agency action. The First DCA was the first to certify the question to this Court. Harris v. Department of Corrections, 486 So.2d 27 (Fla. 1st DCA 1986). See also Curran v. Florida Probation and Parole Commission, 498 So.2d 629 (Fla. 1st DCA 1986); Kelly v. Department of Health and Rehabilitative Services, 502 So.2d 42 (Fla. 1st DCA 1987). Two of those cases are now pending before this Court. Kelly v. Department of Health and Rehabilitative Services, Case No. 70,052 (Fla. 1987)(hereinafter "Kelly"); Harris v. Department of Corrections, Case No. 69,793 (Fla. 1987). Those cases present substantially the same issue as that presented in the question certified by the Second DCA in this case.

The initial brief in Kelly outlines a comprehensive legal and historical analysis of §57.081. Petitioners there raise four arguments in favor of the proposition that they are entitled to transcripts without cost from the administrative agencies that held their hearings: first that the plain meaning of §57.081 requires administrative agencies to provide free transcripts on appeal; second that the legislative history clearly contemplated such an obligation for agencies; third that prior case law to

the contrary can no longer be considered persuasive; and fourth that failure to provide free transcripts would constitute denial of the rights of due process and access to courts, guaranteed by the Florida Constitution. The arguments raised in the Kelly initial brief are equally applicable to this case.[1]

In the interests of judicial economy, Petitioner does not repeat the full arguments made in the Kelly brief but adopts them by reference. However, there is a slight difference between the way the two courts handled the issues before them. The First DCA did not address the history or policy of the legislative amendments and merely deferred to two cases decided prior to the 1980 amendments to §57.081. Bower v. Connecticut General Life Insurance Company, 347 So.2d 439 (Fla. 3d DCA 1977; Harrell v. Department of Health and Rehabilitative Services, 361 So.2d 715 (Fla. 4th DCA 1978). On the other hand, the Second DCA not only certified the question now before this Court, but attempted to explain why the Bower/Harrell reasoning survived the 1980 amendments to §57.081. Therefore, Petitioner submits this brief for the additional purpose of addressing points not previously raised in Kelly and of demonstrating that the opinion of the Second DCA is based on an erroroneous interpretation of the law.

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[1] The wording of the Kelly question differs in only one respect to the question certified in this case, where the Second DCA chose to narrow the question to include only "noncriminal administrative appeals." The Second DCA was correct in so limiting the certified question to the particular facts presented. However, despite the slight difference in the questions presented, the arguments in Kelly are equally applicable to this case. Here, Petitioner Smith has experienced exactly the same administrative process as five of the petitioners in Kelly, namely a disqualification from the food stamp program for an alleged intentional program violation. Thus, the arguments in Kelly can have no less force as applied to Petitioner Smith.

SUMMARY OF THE ARGUMENT

Petitioner is entitled to transcription of the tape of her administrative hearing under §57.081 and points out three 1980 statutory amendments that make this right clear; the addition to the statute of administrative agency proceedings, appeals, and inter-county services. It is an error of law to dismiss this argument solely because prior case law may have assumed that §57.081 covered appeals prior to amendment. Such an approach ignores the two other (and perhaps more significant) changes in the statute, is based on a dubious implication in the case law that conflicts with other clear holdings, and is, in any case, irrelevant to the proper question of what the legislature intended by the amendments. In addition, the approach ignores the fact that the legislature acted in the face of the only case law on the subject and so must be presumed to have wanted to change it.

Petitioner also points out that the agencies have the statutory duty under the Administrative Procedure Act (hereinafter "APA") to record administrative hearings and to transcribe them upon request. The agency clerk routinely prepares the transcripts and charges a fee that must be waived for indigents under §57.081. It is an error of law to dismiss this argument by stating that the APA does not explicitly give responsibility to the clerk of the agency. One reason is that the agency clearly does have the duty to transcribe and by statutory definition the agency includes its clerk. Furthermore, as the agency clerk has no explicit duties under the APA, that analysis would have the effect of making the statute meaningless as applied to administrative agencies, a result certainly inconsistent with legislative intent. It is also improper to fail to give effect to a statute merely because a court can find no compelling reason to do so.

ARGUMENT

I. THE COURT BELOW ERRED IN FAILING TO FIND ANY SIGNIFICANCE TO THE 1980 AMENDMENTS TO §57.081

In presenting her case to the Second DCA, Petitioner asserted that the 1980 statutory amendments to §57.081 should have laid to rest any doubt that the statute requires administrative agencies to provide transcripts on appeals from adverse action. Petitioner urged that there were three significant changes. First, the revised statute plainly applied to appeals. Chappell v. Department of Health and Rehabilitative Services, 419 So.2d 1051 (Fla. 1982). Compare Hillman v. Federal National Mortgage Association, 375 So.2d 336 (Fla. 4th DCA 1979); Lee v. City of Winter Haven, 386 So.2d 268 (Fla. 2d DCA 1980)(holding that former statute did not apply to appeals). Second, the revised statute obligated courts, sheriffs, and clerks to provide services to indigents throughout the state, not just to those indigents residing in the same county. Third, and perhaps most significant, the revised statute specifically, added administrative proceedings to the language of the statute. Petitioner concluded that the obvious impact of these changes is to require agencies to provide transcripts to indigent appellants.[2]

The Second DCA rejected this analysis, deferring to what the court found to be an implicit reasoning in Bower, the seminal case

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[2] As noted in the Kelly brief, this analysis is based on the plain meaning of §57.081, principles of law regarding construction of amended statutes, and legislative documents that clearly state that adding administrative agencies was designed to require agencies to furnish transcripts. See Kelley, supra p. 3, Initial Brief for Petitioner at 6-16.

denying indigent appellants transcripts under the former statute.[3] Although not clear from the facts, it appears that the lower court may have applied §57.081 to some costs associated with Bower's appeal and that the Third DCA implicitly affirmed that decision along with the refusal to order the Dade county clerk to pay the transcription fee. From this, the Second DCA assumed that the Bower court assumed that the former §57.081 applied to appeals. For that reason, the Second DCA summarily dismissed Petitioner's argument regarding the significance of the 1980 revision of the statute. There are several reasons why this analysis cannot be sustained.

Probably the biggest flaw in the court's reasoning is that it addresses only one of the three statutory changes noted by Petitioner, specifically the legislature's action to expand the statute to apply to appeals. Inexplicably, the court makes no mention of the legislature's action to include administrative proceedings or to obligate clerks to serve residents of other counties.[4] As argued in Kelly, see Initial Brief for Petitioners, at 10-16, the significance of all three changes leads to the

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[3] The Bower court cited two reasons for refusing to order the Dade county clerk to pay the court reporter's transcription fee; first that transcribing and preparing records on appeal in civil matters was not included in the statute, and second that transcription was not a function of the court or clerk.

[4] Petitioner has not argued that the addition of appeals alone required transcripts without charge to indigent appellants of administrative action. It is especially puzzling that the Second DCA made absolutely no mention of the legislature's action specifically to include administrative agencies in the statute. The question presented in Bower could not address that issue or the issue of county of residence as it was not an administrative proceeding and there is no indication that Bower resided in a county other than Dade County where the action was tried.

inescapable conclusion that the legislature intended to effect the change in the law that is outlined by Petitioner.

In addition, from the language of the Bower decision itself, it appears that the Third DCA would have held that appeals were not covered by §57.081. The court specifically stated that "the statute does not include the costs of transcribing and preparing records on appeal in civil matters." Bower, 347 So.2d at 440 (emphasis added). That language indicates just the opposite of what the Second DCA suggested.[5]

A second flaw in the court's reasoning is that it is irrelevant. Whatever assumptions were made by the Bower court regarding the applicability of §57.081 to appeals has no bearing on the intended effect of the changes. Instead, the courts must analyze the assumptions of the legislature regarding the statute and the effect of the 1980 amendments. It is very likely that the legislature assumed that the statute did not cover appeals. Prior to 1980, no district court of appeal held explicitly that the statute benefitted indigent appellants. By contrast, two courts indicated just the opposite. See Hillman v. Federal National Mortgage Association, 375 So.2d 336 (Fla. 4th DCA 1979); Lee v. City of Winter Haven, 386 So.2d 268 (Fla. 2d DCA 1980). Thus, the legislature may

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[5] Even if an implicit suggestion that appeals were included in the old §57.081 could be found in Bower, that is hardly enough to constitute a holding of the court. Certainly no responsible advocate would have cited Bower for the proposition that the former statute applied to appeals, especially in light of the confusing state of the law. In the days before the 1980 amendments, the case history of §57.081 produced many aberrant decisions. For example, the Fourth DCA implicitly held the former statute applicable to appeals, see Harrell, 361 So.2d at 716, but rejected the notion when called upon to make an explicit ruling, Hillman v. Federal National Mortgage Association, 375 So.2d 336 (Fla. 4th DCA 1979).

well have believed that extending the statute to apply to appeals would address at least part of the problem in applying Bower to administrative appeals.

In light of the Second DCA's analysis of Bower, it is curious that the court gave the case any weight at all. The Second DCA has never before adopted Bower nor adhered to its reasoning. In fact, the Second DCA specifically rejected the very notion the Second DCA found implicit in Bower. If Bower did assume the former statute's applicability to appeals, the case directly conflicts with the Second DCA's own Lee case. 386 So.2d 268. Furthermore, the Second DCA's conclusion that the 1980 statutory amendments did not affect Bower is directly contrary to a subsequent opinion of the Bower court. See Kleinschmidt v. Estate of Klienschmidt, 392 So.2d 66, 67 (Fla. 3d DCA 1981). Thus, as the Second DCA developed a different jurisprudence to the old §57.081, it would appear improvident for that court to adopt the Bower court's reasoning, especially after that reasoning's continued viability has been questioned even by the court that wrote it.

In addition, before the 1980 amendment, the only decision that discussed how §57.081 applied to administrative proceedings was the Harrell case, which applied the holding in Bower to administrative appeals. This is significant because in ascertaining the legislative intent behind legislative action, courts must consider "the history of the Act, the evil to be corrected, the purpose of the enactment, and the law then in existence bearing on the same subject." State Board of Accountancy v. Webb, 51 So.2d 296, 299 (Fla. 1951). As Harrell was the only law on the subject of §57.081 as applied to administrative agencies, the legislature must have wanted to change it by specifically adding

administrative agencies.[6] Therefore, any continuing reliance on the Bower reasoning as applied in Harrell cannot be supported.

In short, the Second DCA's reasoning with regard to Bower is faulty. Not only does the court seize upon only one of the statutory changes noted by Appellant, even the analysis of the effect of that change is flawed. In addition, the court has never analyzed Bower and its progeny in light of the court's own jurisprudence, which, as interpreted by the Second DCA, is at odds with the Third DCA on two key points (that is, whether the former statute applied to appeals and whether Bower was affected at all by the 1980 amendments). For these reasons, the Second DCA's analysis of Bower and the 1980 amendments to §57.081 can be accorded no weight.

II. THE DECISION OF THE COURT BELOW IS BASED UPON A MISINTERPRETATION OF THE RESPONDENT'S LEGAL OBLIGATIONS UNDER THE FLORIDA ADMINISTRATIVE PROCEDURE ACT

In further analyzing the obligations imposed upon administrative agencies by §57.081, the Second DCA addressed the Respondent clerk's practice of preparing transcripts on appeal. In the traditional court setting, the functions of clerk and court reporter are entirely separate, both collecting their own fees. However, in an administrative setting, the agency has the obligation to preserve

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[6] Of course, any remaining doubt as to what was intended by that change should be dispelled by the committee reports, produced at the time the change was first proposed, that state that it was intended to allow indigents to proceed under §57.081 to secure transcripts. See Kelly initial brief, pp. 11-12.

testimony and to make transcripts available. §120.57(10)(b)7, Fla. Stat. (Supp. 1986). The clerk both accepts the fee and prepares the transcript. See Fla. Admin. Code Rules 10-2.071, 10-2.072, 10-2.074 (formerly 10.-2.71, 10-2.71, 10-2.74). Thus, in practice, transcription is clearly a service of the clerk and Petitioner asserts that such a service must be performed without charge for a person certified to be indigent under §57.081.

However, the Second DCA suggested two reasons why it would require no waiver of those costs. First, the Court stated that neither the Florida APA nor the administrative rules explicitly make transcription a function of the clerk. Second, the Court noted that it could see no compelling reason to allow more complete subsidizing of civil cases in administrative appeals than in appeals from trial courts. For the reasons noted below, neither reason is a proper basis for rejecting Petitioner's claim to entitlement of a transcript without payment.

A. The Lower Court's Analysis of §57.081 is Based on an Invalid Interpretation of the APA and Would Render the Statute Meaningless as Applied to Administrative Agencies

Lack of an explicit designation of a duty to a clerk has no bearing on rights under §57.081 and the first reason should be evident. It is true that §120.57(1)(b)7 does not mention the agency clerk but instead assigns the obligations to make transcripts to the "agency" itself. However, the APA includes the agency clerk in the definition of agency. §120.52(1)(b), Fla. Stat. (1985). Thus, the Second DCA's approach ignores the plain language of the APA.

A second reason why the point has no validity is that the reasoning is logically flawed. The clerks of the various courts are

assigned very few explicit obligations; for example, no statute assigns them the explicit duty to prepare a record for appeal. However, it would be absurd to conclude for that reason that clerks are not obligated to waive costs for such services under §57.081. It is even more absurd to apply the same analysis to agency clerks, none of whose duties are explicit but are entirely derived by their association with the agency.[7]

This reveals probably the most fundamental of the flaws in the Second DCA's reasoning, specifically, the effect of rendering §57.081 meaningless as applied to administrative agencies. The court asserted that, under the Florida APA, transcription is a service assigned to the agency, not explicitly to its clerk. For that reason, the court suggested that even if in actual practice the clerk performs the service of transcription, that would not be a "service" within the meaning of §57.081 because neither the APA nor the Florida Administrative Code assign such a duty to the agency clerk.

As noted above, the conclusion that the clerk is not by statute responsible for transcription is faulty in itself because the APA defines "agency" in such a way as to include the clerk. Yet even if that were not the case, the court's analysis raises a very distinct problem -- neither the APA nor the Administrative Code assign any duties explicitly

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[7] The Florida APA makes only a few references to agency clerks. §§120.52(10), 120.54(11)(b), 120.59(5), 120.60(3), Fla. Stat. (1985). The only explicit duty given to the clerks is the duty to indicate the date of filing of an administrative order, something that has never required a fee. Therefore, under the Second DCA's reasoning, there would be no obligation for a clerk of an administrative agency to perform any services without charge under §57.081. For the reasons stated below, such a construction of the statute is invalid.

to the agency clerk. Thus, it would appear under the Second DCA's analysis that Respondent's clerk is not required to perform any services without charge under §57.081. If an agency clerk is only required to perform services explicitly assigned by the APA and regulations, and no such explicit designation is made, the clerk would not be required to waive any fees and §57.081 would have no meaning as applied to agencies. Furthermore, if the revised §57.081 has no meaning as applied to administrative agencies, then the legislature must be said to have acted pointlessly in amending the statute to include such agencies and the statute would mean nothing more after the amendment than it had before.

Such an analysis goes against well-established precedents of law. The legislature cannot be presumed to have acted pointlessly by adopting a change to the statute that has no meaning. See City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218, 219-220 (Fla. 1985). In addition, when the legislature amends a statute, it is presumed to have intended a different meaning from that accorded before the amendment. Seddon v. Harpster, 403 So.2d 409, 411 (Fla. 1981).

The effect of the Second DCA's interpretation of the requirements of §57.081 is to render the statute and its history meaningless. Therefore, that interpretation cannot be sustained.

B. The Lower Court Erred in Applying an Improper Legal Standard to the Analysis of §57.081

The second point raised by the court, that it could find no compelling reason to require the waiver, is clearly an inapplicable legal standard. Section 57.081 does not require a compelling reason before costs are required to be waived. It is irrelevant whether the Second

DCA can understand the legislature's choices as long as the legislature has acted within the scope of its constitutional authority. See Askew v. Schuster, 331 So.2d 297, 300 (Fla. 1976). The proper standard is to ascertain the legislative will and to carry that intent to the fullest degree. See City of Tampa v. Thatcher Glass Corp., 445 So.2d 578, 579 (Fla. 1984). It is significant that nowhere in the Second DCA's opinion is legislative intent even mentioned. The Second DCA did not explain what the legislature intended by amending §57.081 in 1980, specifically adding administrative agencies. Nor did the court state the Petitioner was wrong in her interpretation of the intent behind the 1980 statutory amendments. The court merely found no compelling reason to give effect to the legislative intent.[8] Of course, that is an improper legal standard.

In the past, this Court has not hesitated to enforce the legislative intent behind §57.081, even in the face of imposition of additional requirements by a district court of appeal. In Chappell v. Department of Health and Rehabilitative Services, 391 So.2d 358 (Fla. 5th DCA 1980), the Fifth DCA ruled that a cost waiver could be

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[8] Although not relevant in light of this analysis, there are many reasons why the legislature may have required transcripts in administrative appeals while not requiring them in most court appeals. First, there is the possibility that a private court reporter may go uncompensated in the traditional court setting while that is not an issue with the staff of an administrative agency. Second, because the rules of evidence do not apply in administrative proceedings, §120.58, Fla. Stat. (1985), the legislature may therefore have concluded that, without such traditional safeguards, an appellate court would need a clear record for review. Finally, it should be noted that the costs waived by agencies ("no more than actual cost" - §120.57(1)(b)7) would have considerably less fiscal impact on state agencies than a similar cost waiver imposed on a private court reporter whose fees are not limited to actual cost.

conditioned upon an attorney certification that no funds were available to pay the fees sought to be waived. This Court reversed. 419 So.2d 1051 (Fla. 1982). The Court noted that the legislature had not made the attorney certification a requirement of the statute and that the district court had no power to impose the requirement. In Petitioner's case, the Second DCA has in effect imposed another requirement not found in the statute, that is, that Petitioner must show a compelling reason to require the fee waiver. Like the non-statutory requirement in Chappell, this Court cannot allow such a deviation from the standards set by the legislature.

The Second DCA's opinion is based on an erroneous and unnecessarily strict interpretation of the Florida APA and §57.081. In addition, it applies an improper legal standard in giving effect to §57.081. Thus, the analysis of the Second DCA is a clear error of law.

CONCLUSION

For the reasons outlined above and in the briefs in Kelly v. Department of Health and Rehabilitative Services, Case No. 70,052 (Fla. 1987), both the plain meaning of the statute and the legislative history indicate a clear legislative intent to require agencies to produce transcripts without charge under §57.081. That obligation is not obviated by the case law prior to the 1980 amendments and is the only result consistent with the due process and access to courts provisions of the Florida Constitution.

The opinion of the Second DCA is based on a faulty analysis of the Florida APA and on an improper legal standard. The court did not properly address the issues raised by Petitioner. Thus, the court clearly erred in its reasoning about the requirements of §57.081.

Neither Respondent nor any district court of appeal has suggested how the revised statute differs in meaning to the former statute. Nobody has explained what the legislature thought it was doing by adding administrative agencies to §57.081. Petitioner submits that the obvious intent of the legislature was to "overrule" Harrell, the only case applying the §57.081 to administrative action. Petitioner's explanation is the only one that makes sense and it is backed up by the plain meaning of §57.081 and the legislative history behind the 1980 amendment.

For all these reasons, this Court should answer the certified question in the affirmative and should require Respondent to meet its obligations to provide transcripts of agency proceedings under §57.081.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF PETITIONER has been sent by regular U.S. mail, postage prepaid, to REGINA MORANTE, District VI Legal Counsel, W. T. Edwards Facility, 4000 West Buffalo Avenue, Fifth Floor, Room 520, Tampa, Florida 33606 on this 22nd day of May, 1987. I FURTHER CERTIFY that opposing counsel has previously received a true and correct copy of the Initial and Reply Briefs in the case of Kelly v. Department of Health and Rehabilitative Services, Case No. 70,052 (Fla. 1987) on the dates indicated on the certificates of service attached to each respective brief.

FRANCIS A. SOLORZANO

FAS/cjc