IN THE SUPREME COURT OF FLORIDA

HONORABLE MARY ANN MacKENZIE,
Judge of the Circuit Court of
Florida, Eleventh Judicial Circuit,

Petitioner,

vs.

SUPER KIDS BARGAIN STORE, INC.,

Respondent.

Case No. 74,798
Florida Bar No. 0105599

HONORABLE MARY ANN MacKENZIE,
Judge of the Circuit Court of
Florida, Eleventh Judicial Circuit,

Petitioner,

vs.

ARTHUR BREAKSTONE, et al.,

Respondent.

Case No. 74-800

BRIEF OF AMICUS CURIAE THE FLORIDA BAR

BARRY RICHARD
ROBERTS, BAGGETT, LaFACE & RICHARD
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32301
(904) 222-6891

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SUMMARY OF ARGUMENT

The rules establishing procedures for disqualification of judges are designed to strike a balance between the desirability of avoiding judge shopping and the necessity of maintaining judicial objectivity. The prophylactic rule announced by the District Court destroys this balance and effectively grants lawyers an absolute veto over judges by making contributions in excess of $500.

The District Court rule would likely result in substantial reduction or complete cessation of contributions to judicial candidates from lawyers. It is likely that many lawyers would avoid any participation for fear that the judges might be required to disqualify themselves. The result would be the removal of attorneys' guidance from the judicial selection process and an increase in the influence of independent wealth upon the process.

The Legislature has determined that contributions of $1,000 ($2,000 for District Court and $3,000 for Supreme Court candidates) is low enough so that there is a presumption of no undue influence. An affirmance of the District Court opinion would suggest that this Court has less faith in the integrity of Florida's judges than does the Legislature. The statutory limits set by the Legislature on contributions establish a reasonable criterion for disqualification.

Consideration of a prophylactic rule such as that announced by the District Court should be considered through the rule-making process. The decision is basically a policy decision and the rule-making process would give a greater number of lawyers and members of the public the opportunity for input. It would also give the Court an opportunity to gather important facts relevant to the decision.

Any decision requiring disqualification based solely upon a political contribution should be prospective and should apply only to campaigns after the 1990 elections. Retrospective application would be seriously disruptive for both lawyers and courts and would create an unfair advantage for those candidates who have already received contributions over those who have no yet opened accounts.

ARGUMENT

I.

THE PROPHYLACTIC RULE ANNOUNCED BY THE DISTRICT COURT DEPARTS FROM THE CAREFUL BALANCE STRUCK BY THIS COURT AND CREATES MORE PROBLEMS THAN IT RESOLVES.

In an ideal world, judges would be totally insulated from the trappings of politics. Judges would neither solicit nor receive political endorsements, support or contributions. In the real world, however, Florida continues to choose its trial judges in contested elections and from this reality flow two inescapable facts:

1. In order to run a meaningful judicial race, candidates must and do solicit financial contributions.

2. The great bulk of financial contributions to judicial candidates comes from the only source sufficiently affected by and interested in the outcome of a campaign to make such contributions: lawyers.

The District Court's attempt to impose upon this less-than-ideal world a prophylactic rule that presumes bias from nominal contributions to judicial candidates has severely undesirable ramifications.

The rule invites blatant judge shopping.

The procedural rules relating to disqualification of judges were designed to balance the desirability of avoiding such judge-shopping against the necessity of maintaining judicial objectivity:

> The requirements set forth in Section 38.10, Florida Statutes (1981), Florida Rule of Criminal Procedure 3.230, and Florida Rule of Civil Procedure 1.432 were established to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purpose of judge-shopping, delay or some other reason not related to providing for the fairness and impartiality of the proceeding.

Fischer v. Knuck, 497 So.2d 240 (Fla. 1986); **Livingston v. State**, 441 So.2d 1083 (Fla. 1983).

The rule announced by the District Court destroys the balance thus achieved. Lawyers would now effectively have an absolute veto over judges. By the simple device of contributing $500 each, a lawyer can remove all judges considered by the lawyer to be undesireable from sitting on cases in which the lawyer (or presumably another member of the firm) is involved. Conversely, a lawyer would be able to veto any judge who received a contribution of **$500** or more from the opposing counsel (or presumably the opposing counsel's law firm.)

If the District Court rule is upheld, a large number of lawyers can be expected to begin keeping lists of judicial contributions as a matter of course in order to be able to exercise

their veto option in appropriate cases. In fact, if the rule prevails, several troubling questions arise. Would lawyers be obligated to maintain lists of judicial contributions by other lawyers in order to provide their clients with the most effective representation? Would lawyers have an obligation to publish for their clients lists of those judges to whom they have contributed so that the clients know which judges have been eliminated as potential arbiters of their cases? Would a judge be subject to disqualification because a law firm which is before the judge includes a lawyer who contributed to the judge's campaign before joining the firm?

The District Court's rule enhances the worst elements of the elective process.

Statistically, the greatest proportion of contributions to judicial candidates comes from lawyers. The statistic is understandable. Lawyers have the most compelling interest in maintaining a qualified judiciary and, with few exceptions, lawyers comprise that segment of the population with the greatest knowledge of the relative qualifications of judicial aspirants. It is inevitable that the District Court's rule, if upheld, will result in an immediate, substantial reduction, if not complete cessation, of judicial campaign contributions from lawyers. Any lawyer contributing to a judicial candidate risks the possibility that the candidate, if elected, would be unable to sit in a case in which the lawyer or a member of the lawyer's firm is counsel of record. Contributing lawyers would risk barring from their cases the very judges they consider most qualified. In an effort

to avoid such consequences, it is probable that most lawyers would simply cease to make contributions to judicial candidates.

The impact of the District Court's rule is likely to extend beyond financial contributions. Having determined that a $500 contribution to a judicial candidate (or even a judicial candidate's spouse) creates a sufficient appearance of impropriety to require disqualification, can the Court then allow a judge to preside over a case in which one of the attorneys has merely endorsed the judge (often more important than a financial contribution) or actively worked on the judge's campaign? It is entirely probable that, in order to avoid the risk of disqualifying competent judges from sitting on their cases, many lawyers will simply avoid any participation whatsoever in judicial campaigns.

In short, the likely consequence of the District Court's rule is that the segment of the population best equipped to assist the public in electing the most deserving judges will be largely eliminated from the process, and candidates without independent sources of financial support will find it extremely difficult to finance a campaign. Rather than reducing the negative influence of money on judicial races, the District Court's rule will inevitably increase it.

The District Court's rule overlooks the real "appearance of impropriety".

The District Court did not suggest that a $500 contribution could truly be expected to compromise the integrity of a judge, and it is improbable that most lawyers seriously fear that judges could be so easily corrupted. Rather, justification for a prophylactic rule is premised upon avoidance of "the appearance of impropriety". However, the appearance of impropriety arises only out of the rule itself.

The criterion for judicial disqualification is not the appearance of impropriety to any party, regardless of how cynical or ill informed. The facts upon which the fear of bias are alleged "must be reasonably sufficient to create a well-founded fear in the mind of a party that he or she would not receive a fair trial." [emphasis supplied] **Fischer v. Knuck**, supra at 242; **Livingston v. State**, supra; **State v. Dewell**, 179 So. 695 (Fla. 1938). Implicit in the District Court's rule is the conclusion that a party's fear is "well-founded" if the party believes that the integrity and objectivity of a trial judge in Florida will be compromised upon receipt of a $500 contribution. In Section 106.08, Florida Statutes, the Florida Legislature has determined that a contribution of $1,000 or less is nominal enough that one can presume that it does not result in undue influence over an elected public servant, including a judge. For this Court to require disqualification of a judge receiving a contribution of $500 would be to suggest that the Court has

considerably less faith in the integrity of Florida's judges than does the Legislature.' Such a suggestion by the highest court of this state, rather than reassuring the public, can be expected to unjustifiably undermine the public's faith in its judiciary.

Undoubtedly, there comes a point where a political contribution is substantial enough that it would create a well-founded fear of partiality. It is not necessary, however, for this Court to determine where that point is. The Florida Legislature has declared that a contribution of $1,000 or less to a candidate for circuit or county judge or any other county-wide office is not so high as to create a fear of undue influence. The $1,000 cap establishes a reasonable limit[2] and has an additional significant advantage in the context of judicial races. Since the statute prohibits contributions in excess of $1,000, it avoids the problem of excess contributions for the purpose of judge-shopping.

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[1] Judges would also be placed in a position of lesser confidence than the other elected officials fulfilling quasi-judicial functions.

[2] The limits of $2,000 for District Court and $3,000 for Supreme Court are equally reasonable. The higher amounts undoubtedly reflect legislative recognition of the fact that the impact of a contribution is relative to the cost of the campaign which increases with the size of the district.

II.

A PROPHYLACTIC RULE SUCH AS THAT ANNOUNCED BY THE DISTRICT COURT SHOULD BE CONSIDERED THROUGH THE RULE-MAKING PROCESS.

The issue before this Court is one of procedural policy. As noted in the briefs filed on behalf of Judge McKenzie, there is no judicial precedent to support the absolute rule announced by the District Court. Nor is there any legal or factual "truth" to be discerned by this Court which suggests an appropriate level of acceptable financial contribution. Given the information available to the Court, any level other than the legislatively established $1,000 threshold would be essentially arbitrary. If this Court is to set an absolute limit, the rule-making process would be a more desirable method of determining such limit than any limited appellate proceeding such as the instant case.

The decision involved in this case is one which will have a broad and continuing impact upon the entire trial bar as well as the judiciary. The rule-making process allows members of the bar, and the judiciary, as well as the public at large, to have input which is otherwise limited to the few parties and amicus curiae involved in the cases before the Court. In addition, the rule-making process allows this Court to gather useful information not otherwise available to it regarding the number of cases which might be affected by the proposed rule, the extent of disruption that can be anticipated from the adoption of a parti-

cular campaign contribution limit, and the real perceptions of the bench, the bar and the public as to the influence which financial contributions at different levels have upon the objectivity of judges.

III

IF THIS COURT AFFIRMS THE DISTRICT COURT OR OTHERWISE ADOPTS *AN* ABSOLUTE RULE, THE DECISION SHOULD BE PROSPECTIVE AS TO OTHER PENDING CASES.

Any decision requiring disqualification based solely upon a political contribution would create serious problems if applied retrospectively. It is likely that numerous cases would have to be transferred to new judges, some matters late in the proceedings, resulting in significant disruption and delay. It is entirely possible that some judges would be rendered disqualified from sitting on most cases currently before them. Some lawyers and firms, particularly large firms, might well find themselves without any local judges qualified to hear cases in which they are counsel of record.

If the Court elects to impose a mandatory rule prospectively, the rule should apply to campaigns beginning after the 1990 election. If the rule were made prospective, but applied to future contributions to 1990 campaigns, it would create an unfair advantage for those judicial candidates who have already received contributions over opponents who have not yet opened campaign accounts.

CONCLUSION

The Bar takes no position as to whether or not this Court should reverse either of the lower court cases. However, the Bar strongly urges the Court to overrule the holding of the District Court to the effect that a judicial campaign contribution of $500 or more to the spouse of a judge requires disqualification. The Court is further urged to clarify that such a contribution directly to the judge presiding over the case would not, in itself, mandate disqualification.

In the alternative, if this Court is not prepared to reach such a holding, it is urged that the issue be referred to appropriate committees to be considered through the normal process for amending the rules of procedure and/or the Code of Judicial Conduct.

Finally, if the Court decides to affirm the District Court's ruling, it is urged to make such decision prospectively applicable to contributions made after the 1990 judicial election campaigns.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Amicus Curiae The Florida Bar has been served by U.S. Mail upon **Birgitta K. Siegel, Esquire, 701** Brickell Avenue, Suit 1900, Miami, Florida 33131; **Allan Rubin, Esquire,** 2404 Hollywood Blvd., Hollywood, Florida 33020; **Robert Black, Esquire,** 420 South Dixie Highway, Suite #2-L, Coral Gables, Florida 33146; **William** J. **Berger, Esquire,** 2150 **S.W.** 13 Avenue, Miami, Florida 33145; **Frank** M. Marks, **Esquire,** 4500 Biscayne Blvd., Suite 300, Miami, Florida 33137; **Joseph** P. **Klapholz, Esquire,** 2206 Hollywood Blvd., Hollywood, Florida 33020;, and **Robert A. Ginsburg, Esquire,** Dade County Attorney, Metro-Dade Center, Suite 2810, 111 N.W. 1st Street, Miami, Florida 33128-1993 on this 1ST day of December, 1989.

ROBERTS, BAGGETT, LaFACE & RICHARD
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32301
(904) 222-6891

BARRY RICHARD

BSR/FLBAR/cjm(MAM-A)