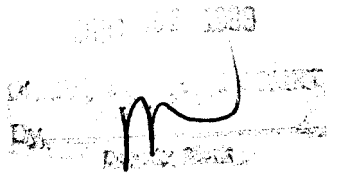
accepted

IN THE *SUPREME* COURT OF FLORIDA

MARY ANN MACKENZIE, JUDGE, ETC. PETITIONER, vs. SUPER KIDS BARGAIN STORE, INC., RESPONDENT.	CASE NO. 74,798
MARY ANN MACKENZIE, JUDGE, ETC. PETITIONER, vs. ARTHUR BREAKSTONE, ET AL., RESPONDENTS.	CASE NO. 74,800



BRIEF OF RESPONDENTS ARTHUR BREAKSTONE AND BEACH ENTERPRISES, LTD.

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STATEMENT OF THE CASE AND FACTS

Respondents, Arthur Breakstone and Beach Enterprises, Ltd., accept this portion of petitioner's brief.

SUMMARY OF ARGUMENT

A fear of prejudice from an adversary's attorney's $500 contribution to the presiding judge's spouse is not an unreasonable fear. The legislature did not restrict the grounds which may give rise to a reasonable fear of prejudice. The campaign finance law is in harmony with the disqualification statute as applied by the en banc decision, and it did not repeal by implication political contributions as a grounds for reasonable fear of prejudice. The state has a compelling interest that justice be administered fairly and that it appears to be fairly administered. That interest is not outweighed by the consequences of the en banc decision.

ARGUMENT

THE MOTION TO DISQUALIFY THE TRIAL JUDGE WAS LEGALLY SUFFICIENT AND THAT DETERMINATION DOES NOT CONTRAVENE FLORIDA LAW

Far from being a lawyer's "obligation," or a praise-worthy "tradition," the practice of direct lawyer contributions to judicial campaigns has long been publicly debated, criticized and recognized by authorities as a source of serious ethical problems for, and a challenge to, the administration of justice. See, Richman v. Shevin, 354 So.2d 1200 (Fla. 1977); Richman, "The need for Judicial Election Reform," 58 The Florida Bar Journal 489 (October, 1984); Richman, "A New Solution to an Old Problem: The Dade Judicial Trust Fund," 50 The Florida Bar Journal 478 (October, 1976).

The practice so eroded public confidence in the integrity of the judiciary that in 1972-77 it was the target of extraordinary efforts by the Dade County Bar Association, led by former Florida Bar President Gerald Richman, and other local bar associations to replace it by a voluntary blind judicial trust fund. Id. This Court praised "the laudable purpose" of these efforts

> "to insulate lawyers, judges and judicial candidates from problems associated with direct campaign contributions." Richman v. Shevin, supra at 1204.

This Court acknowledged

> "the peculiar problems wrought by a judicial candidate seeking campaign financing," Id at 1201.

The judicial trust fund no longer exists but there is no reason to think these problems have now disappeared.

If the general practice of direct lawyer contributions can be so criticized by a leading bar figure, identified by this Court as the source of "peculiar problems," and result in extraordinary steps by local bar associations to eliminate it to restore public confidence in the judiciary, which efforts were complimented by this Court, then a specific instance of a substantial contribution by an adversary's attorney to an ongoing judicial campaign of the presiding judge's spouse and acceptance of the contribution by the candidate while the parties await an impending non-jury trial can surely give rise in a non-lawyer litigant to a fear of prejudice which is "predicated on a modicum of reason," Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932), and is not frivolous or fanciful. Buckley v. Valeo, 424 U.S. 1, 22 (1976); see, Ferre v. State ex rel. Reno, 478 So.2d 1077 (Fla. 3 DCA 1985), approved 494 So.2d 214, certiori denied 107 S.Ct. 1973.

As stated in the en banc decision:

> "A $500 contribution is a substantial one by any standard. Certainly the ordinary litigant does not make, or have the financial capacity to make, a $500 contribution. Where the opposing litigant or opposing attorney counsel has made such a contribution, a reasonable person in the position of [respondents] would fear that the would not receive a fair trial. The concern, from the standpoint of a reasonable person, is neither frivolous nor fanciful."

Breakstone v. Mackenzie, 14, FLW 2223, 2224 (September 29, 1989).

Amicus and the Third District dissent argue that the $1000 limitation on contributions under F.S. §106.07 is a legislative pronouncement that any contribution up to that amount cannot give rise to a reasonable fear of prejudice. Such argument is wrong and misconceives both the campaign finance law and its purpose.

The campaign finance law, after all, outlawed what was once legal, namely, making unlimited campaign contributions, and, instead, imposed a relatively low legal limit of $1000. The $1000 cap must be seen in its true light: a relatively low amount compared to the unlimited ceiling before. The campaign finance law is, thus, a radical act which, by its relatively low limit on contributions, unequivocally demonstrates the serious ethical problems which contributions create. The law is a clear pronouncement that campaign contributions are a source of abuse and conflict of interest. Moreover, the law requires more extensive disclosure for contributions over $100. F.S. §106.07(4)(a)(1). See Breakstone v. Mackenzie, supra at 2227, n.11.

Thus, a contribution which is one half the legal maximum, which legal maximum itself is a relatively low amount, is properly a matter of reasonable concern.

The dissent and amicus argue that the more recent campaign finance law limits the scope of F.S. section 38.10 with the result that any legal contribution cannot, as a matter of law, give rise to a reasonable fear of prejudice.

An older statute, however, is not repealed by a later statute merely because the later statute relates to matters

covered in whole or in part by a prior statute. State v. Collier County, 171 So.2d 890 (Fla. 1965).

A construction is favored that gives each statute a field of operation, as opposed to a construction that considers a former statute as repealed by implication by the latter statute. Carawan v. State, 515 So.2d 161 (Fla. 1987). Repeal of a statute by implication from a more recent statute is disfavored. Tamiami Tours v. City of Tampa, 31 So.2d 468, 159 Fla. 287 (1947). There must be a positive repugnancy between the two statutes for the more recent to be construed as repealing the earlier by implication. Id.

There is no "positive repugnancy" between the campaign finance law and the disqualification statute. There is only a strained and highly cynical argument that the system will collapse as a result of the en banc decision. Under this argument, lawyers, who, the argument goes, are moved only by pure motives of supporting truly good candidates, will refuse to contribute because they cannot take advantage of appearing before judges whom they have supported! The only "positive repugnancy" is in the moral weight of such an argument.

Indeed, the campaign finance law contains no clear indication that less drastic measures cannot exist to deal with the inherent evils of political contributions, i.e. through case-by-case application of the disqualification statute. There is no conflict between the law which outlaws contributions over $1000 and the disqualification statute applied in the instant case. The disqualification statute is, thus, a less drastic

means, i.e. without criminal prohibition, for dealing on a case by case basis with a problem inherent in our system, namely, political contributions. Thus, the two statutes work together to a common goal: less conflicts of interest and the appearance of such conflicts,

Indeed, petitioner does not seem to challenge the implicit holding of the en banc decision that respondents had a well-grounded fear of prejudice. Rather, petitioner's primary argument is against the wisdom of result of the decision on the ground that a litigant's absolute right to "the cold neutrality of an impartial judge," Pistorino v. Ferguson, 386 So.2d 65, 67 (Fla. 3 DCA 1980), is less important than the "chilling effect" the Court's decision may have on direct lawyer contributions to judicial campaigns.

From a constitutional standpoint, this argument fails. The right which petitioner would sacrifice on the altar or so oft criticized and lamented a "tradition" is fundamental and invioable.

> "The courts of this state are firmly committed to the proposition that the due process guarantee of a fair trial contains in its core the principle that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. State ex rel. David v. Parks, 141 Fla. 516, 194 So. 613 (1939); State v. Steele. 348 So.2d 398 (Fla. 3 DCA 1977)." Pistorino v. Ferguson, Id.

An impartial decision maker is a basic constituent of minimum due process. Megill v. Board of Regents of State of Florida, 541 F.2d 1073 (5 Cir. 1976). To deprive one of this minimum constituent would render due process a nullity which the state

may not do. See, Hahn v. Carson, 462 F.Supp. 854 (S.D.Fla. 1978).

Not articulated but implicit in petitioner's argument is a challenge to the constitutionality of F.S. section 38.10 based on the contention that the en banc decision infringes on the First Amendment rights of lawyers to make campaign contributions. Of course, even it so, it would not make respondent's fear of prejudice any less reasonable. In any case, a similar argument was considered and rejected by the United States Supreme Court in Buckley v. Valeo, supra, and the Third District in Ferre v. State ex rel. Reno, supra, which upheld limitations on campaign contributions to candidates.

In upholding these limitations, these cases held that the government's interest in preventing the appearance or reality of corruption stemming from the real or imagined pressure imposed on political candidates by those who contribute substantially to their campaigns was sufficiently weighty and compelling to sustain the limitations. Thus, the limitations on campaign contributions were justified by the need to dispel the appearance of improper influence on candidates.

Buckley and Ferre recognize that, even when no actual influence is exerted, the appearance of influence on political candidates arising from substantial contributions is unavoidable and therefore provides a compelling basis for action to limit the harm arising from such appearance. In Buckley and Ferre the remedy was a dollar limit on contributions; under F.S. section 38.10, it is a motion for disqualification.

Certainly, the state has a compelling interest that justice be administered fairly and that it appear to be fairly administered. Dickenson, supra. That interest is not outweighed by the consequences of the en banc decision's application of F.S. section **38.10**. The decision has a de minimus affect on lawyers. No counsel or litigant is entitled to have a particular judge hear a case. See, Dickenson, supra. The decision does not prohibit or limit direct lawyer contributions or other forms of support, such as endorsements. The holding is limited to campaigns which are "recent" and contributions which are "substantial," The statute provides for reassignment to another judge.

> ". . . It is a matter of no concern what judge presides in a particular cause, but it is a matter of grave concern that justice be administered with dispatch, without fear or favor or the suspicion of such attributes. The outstanding big factor in every lawsuit is the truth of the controversy. Judges, counsel, and rules of procedure are secondary factors designed by the law as instrumentalities to work out and arrive at the truth of the controversy.
>
> "The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised.
>
> ". . . .The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice.' [citations omitted]." See, Dickenson, supra at **462**. (Emphasis added.)

Thus, the statute and the en banc decision are unassailable on First Amendment grounds.

From a statutory standpoint, also, the argument fails. Section **38.10**, a statute largely unchanged since **1919**,

> "was crafted to insure confidence in the integrity of our system of justice. The availability of its remedy is an indispensable right of all litigants." Hayship v. Douglas, 400 So.2d 553, 556 (Fla. 4 DCA 1981).

In giving to litigants the substantive right to seek judicial disqualification based on fear of prejudice, Livingston v. State, 441 So.2d 1083, 1087 (Fla. 1983), the legislature did not restrict from whence that fear may arise, and in this regard a court has no power to do what the legislature has not done. Dickenson, supra. Once the statutory ground is met -- an allegation of fear of prejudice "predicated on a modicum of reason," Dickenson, supra at 462 -- a court has no power or discretion other than to order disqualification. Rule 1.432(a) and (d); Crosby v. State, 97 So.2d 181 (Fla. 1957).

Arguments against literal enforcement of F.S. section 38.10 based on policy or by questioning the wisdom of result of enforcing the act are irrelevant.

> "But it is contended that such an interpretation [focusing on the litigant's mind and not the judge's] would open the way for widespread abuse of the statute in the matter of the disqualification of judges. The answer to this contention is that the Legislature must have been cognizant of such anticipated abuses, but approved the act on the theory that it was fraught with countervailing benefits. At any rate, the courts can deal with it only as enacted and enforce it according to the intent of the Legislature." Dickenson, supra at.

Consequently, the court has no power to carve out an exception to F.S. section 38.10 to protect the "peculiar institution" of direct lawyer contributions to judicial campaigns.

CONCLUSION

The certified questions should be answered "yes".

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the addresses on the attached list this 20th day of December, 1989.

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