OA 11-6-95

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 86,213

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION, and STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION.

Appellants/Cross-Appellees,

VS.

ASSOCIATED INDUSTRIES OF FLORIDA, INC., PUBLIX SUPERMARKETS, INC., NATIONAL ASSOCIATION OF CONVENIENCE STORES, INC., and PHILIP MORRIS, INC.,

Appellees/Cross-Appellants.

AMICUS CURIAE BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND FLORIDA RETAIL FEDERATION, INC. IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

On Direct Review of a Final
Order of the Second Judicial Circuit,
Certified for Immediate Resolution

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INTEREST OF *AMICUS CURIAE*

Florida Retail Federation is a trade association whose primary purpose is representing the interests of its members, who are persons and entities in the business of retail sales, before the Florida Legislature, various regulatory agencies, and in the judicial system as needed. The National Federation of Independent Business is a trade association specializing in the representation of its small business members before the Florida Legislature, various regulatory agencies, and in the judicial system as needed. As representatives of these persons and entities, the Florida Retail Federation and the National Federation of Independent Business assert on their behalf an interest in declaring unconstitutional the 1994 Amendments to the Florida Medicaid Third-Party Liability Act, section 4 of Chapter 94-251, Laws of Florida in that the 1994 Amendments abolish all affirmative defenses normally available to a defendant and thereby directly contravene Article I, section 21 of the Florida Constitution which guarantees every person an access to courts for redress of any injury.

We agree with the Wine and Spirits Distributors of Florida, Inc. When they note that while the State of Florida has assumed the responsibility and obligation to allocate funds under the medical program, and to attempt to recover from those who in fact are liable as third parties, the National Federation of Independent Business and the Florida Retail Federation, Inc. respectfully submit that any party subject to such liability must be insured

that their rights under the Constitutions of Florida and the United States are jealously guarded.

This Brief is filed with the consent of all parties.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae Associated Industries of Florida adopt the Statement of the Case and Facts contained in the Brief for the Appellees/Cross-Appellants.

STATEMENT OF THE ISSUE

DOES § 409.910, FLORIDA STATUTES, UNCONSTITUTIONALLY INTERFERE WITH THE CONSTITUTIONAL RIGHT OF EVERY CITIZEN TO ACCESS TO THE COURTS OF THE STATE OF FLORIDA?

SUMMARY OF THE ARGUMENT

Preface

Amicus Curiae National Federation of Independent Business and Florida Retail Federation, Inc. adopts by reference the arguments presented by the Amicus Curiae, Wine and Spirits Distribution of Florida, but adds its voice to that of the court below wherein that court expressed, though in a different manner, its concern with the rights of all to access to courts. See Final Order at p.2.

A

Level of Judicial Review

Courts carefully scrutinize actions taken by the legislature which may place impermissible burdens on a complainant's access to the courts. The actions of the legislature are subjected to strict scrutiny because of the potential for misuse. This court in Psychiatric Associates v. Siegel, 610 So. 2d 419 (Fla. 1992), stated that "[t]he *right to go to court to resolve our disputes* is one of our most fundamental rights." The history of Article I § 21 of the Florida Constitution demonstrates this courts' intention to construe the constitutional provision liberally in order to ensure accessibility to the courts for the resolution of disputes. A constituional democracy can demand no less. Furthermore, judicial oversight is necessary because due process considerations are raised when the statute does not bear a reasonable relation to a permissible legislative

purpose or is discriminatory, arbitrary, or oppressive.

B

Legislature's Limited Ability to Limit Access to Courts

The State of Florida has unquestionably changed the common law cause of action against manufacturers and merchants but, in doing so, the State has abrogated a defendants' rights in the action and thereby eliminated their ability to resolve disputes in the courts. In Kluger v. White, 281 So.2d 1 (Fla. 1973), this Court examined whether or not the state legislature is empowered to abolish a common law or statutory right of action without providing an adequate alternative. The Court acknowledged that the legislature has the right to implement change but stated that the "Legislature [cannot] destroy a traditional and long-standing cause of action upon mere legislative whim or when an alternative approach is available." This Court held that where the right to access to courts for redress is part of the common law of the state, the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the guaranteed rights of the people to redress for injuries unless the Legislature can: 1) show an overpowering public necessity for the abolishment of such right and; 2) no alternative method of meeting such public necessity can be shown.

The Kluger Court concerned itself with the rights of

plaintiffs to pursue actions in court. In our system of adversarial jurisprudence, it is unthinkable to believe that only the plaintiffs have the right to resolve disputes. The defendant in an action is equally concerned with the resolution of disputes. Each party, in advancing facts supporting generally accepted theories of liability or non-liability, desires to prove that their position is the correct position. By the abrogating of affirmative defenses, eliminating essential elements of proximate cause, and directing courts to liberally construe theories of recovery and the evidence code, the Legislature has not only singled out a discrete and insular minority for special unfavorable treatment, but also has denied that minority the ability to defend itself by presenting facts in support of generally accepted theories of non-liability. As a result, the Legislature allows the identifiable class to walk into the courtroom, but does not allow them to advance facts or legal theories essential to the resolution of disputes. This is a dangerous path for any legislature to take. Cf, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) and United States Trust Co. v. New Jersey, 432 U.S. 1 (1977).

It must be stressed that while Kluger recognized that the abolition of the common law rights of parties to litigation may occur, such abolition could only be accomplished if the public necessity was overpowering and no

alternative means of meeting that necessity could be shown. Therefore, in order to abrogate a defendant's use of affirmative defenses, the Legislature must show: 1) that the need to reimburse Medicaid is overpowering and; 2) that there is no alternative means of meeting that overpowering need.

Assuming *arguendo* that the State can satisfy the first prong of the Kluger test, the State cannot demonstrate the lack of an alternative means to accomplish its legislative intent. In this instance, the State has decided to abrogate common law theories of affirmative defense and severely undercut the judiciary's role in interpreting and applying the legal standards of causation, recovery, and evidence. This is hardly necessary given the alternativet of the health care. By imposing the tax instead of rewriting the principles of tort litigation, the Legislature would not impinge on the rights guaranteed by Art. I § 21 of the Florida Constitution.

It is the constitutional duty of this Court to adopt the rules and regulations governing the practice and procedure in all the courts of the state. Article V, § 2, Fla. Constitution. Section 409.910, Florida Statutes, unconstitutionally interferes with not only that duty but also the right of access to courts.

ARGUMENT

FLORIDA STATUTE 409.910 AS AMENDED (THE ACT) VIOLATES ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION BECAUSE THE ACT ABROGATES THE FUNDAMENTAL RIGHT OF A MANUFACTURER TO ASSERT DEFENSES IN A FLORIDA COURT WITHOUT A SHOWING OF ALTERNATIVE REMEDY OR OVERPOWERING PUBLIC NECESSITY.

INTRODUCTION

The State of Florida has attempted to implement legislation in the form of an amendment to Chapter 409.910 Fla.Stat.(1994) that will enable state agencies to recover the cost of Medicaid treatment for tobacco-related diseases. The concept of making Medicaid the payor of last resort for injuries or diseases caused by a third party is in and of itself, not unique. What is unique is the legislature's creation of a statutory cause of action styled along the lines of strict product liability. The resulting impact of this cause of action and the statutory directives on the rules of evidence and procedure on the potential class of defendants violates their right to meaningful access to courts guaranteed by Art. I, § 21 of the Florida Constitution as interpreted by this Court. The affirmative defenses that are otherwise available in common law or equity are not options for the defendants. This is not unlike what the states of Minnesota, New York and New Jersey (among others) attempted when due to fiscal difficulties those states pursued by legislation the "deep pockets" of

industry to insure that the states commitment to their citizens would be met. In those instances, though decided upon different constitutional grounds, the United States Supreme Court saw through the states' action and concluded that a discrete and insular minority cannot be made to bear the full burden of government alone, costs must be shared by all who benefit. See, Cf., Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) and United States Trust Co. v. New Jersey, 432 U.S. 1 (1977).

Chapter 409.910, as amended, allows the Florida Department of Legal Affairs to pursue actions against third parties because of their manufacture, sale, or distribution of a product thought to be the cause of the Medicaid recipient's disease. The evidence code shall be liberally construed regarding the issues of causation and of aggregate damages. The issues of causation and damages in any such actions may be proven by the use of statistical analysis.

C

Departure from Common-Law Tort Theory

The direction taken by the legislature of Florida in amending Florida Statute 409.910 is disquieting.

A cause of action in strict product liability exists when a defectively dangerous product is used and causes an injury to the consumer. Section 402A of the Restatement of

Torts recognizes that a product is "defectively" dangerous if it is dangerous to the extent beyond that which would be contemplated by the ordinary consumer that purchased it with the ordinary knowledge and common to the community as to the product's characteristics. An injury caused by a product that is inherently dangerous may be the result of the users' knowledge of the danger and the assumption of risk in the use of the product. Therefore, the difference in the rationale between the two causes of action involving "inherently" and "defectively" dangerous products is user's knowledge of the products danger. If the dangerous propensities of a correctly used product are the result of a defect, the manufacturer, distributor and merchant are strictly liable. If the dangerous propensities are inherent in the correctly used product the threshold question is whether or not the injured party reasonably knew of the danger and still used the product. In other words, critical questions necessary to attribute fault are whether or not the injured party assumed the risk and if she did, did she use the product correctly to minimize the potential for injury. By abolishing the affirmative defenses of assumption of risk and comparative negligence, these critical questions are not presented.

Affirmative defenses, such as assumption of risk and comparative negligence, are essential to a resolution of a dispute in the context of a tort action because these

questions go directly to the element of causation. Virtually all the courts have seemingly agreed that the conduct or misconduct of another, including the claimant, may be of such a nature to constitute a superseding cause and sever the proximate causation between seller and the claimant's injury. The breach of a legal duty must be proven to have caused the injury, otherwise the defendant would be held liable for a injury that the trier of fact has not ascertained was caused by the defendant.

The consequences of holding a party liable without establishing proximate cause are ludicrous. For example, under the statute, a merchant may be liable for a disease caused by a person's consumption of raw oysters even though there is a conspicuous notice that raw oysters may cause health problems and the injured person read the notice and appreciated the danger. Likewise, liquor manufacturer may be liable under the statute if an expectant mother drinks alcohol, pregnancy complications arise, and the mother needs medical treatment. As long as the treatment in these examples is paid for by Medicaid, the State will be successful against the defendants simply because the State does not have to prove that oyster-seller or liquor manufacturer, as opposed to the consumer, was the cause of the actual injury. Evidently, the State intends to make manufacturers and merchants responsible for the consumer's irresponsibility regardless of any affirmative steps (short

of not selling products) that the manufacturer or merchant takes to prevent injury.

These hypotheticals enforce the conclusion that this Court should reverse the lower court's holding that the Act does not violate Article I, Section 21 of the Florida Constitution because the Act denies the fundamental right of access to courts. Article I, Section 21 of the Florida Constitution affirmatively states that Florida courts "shall be open to every person for redress of any injury." "The history of the provision shows the courts' intention to construe the right liberally in order to guarantee broad accessibility to the courts for resolving disputes." Psychiatric Assocs. v. Siegel, 610 So.2d at 424.

In sum, while the fundamental right of access to courts is traditionally thought of as the right to bring a claim, access to courts extends to the right to assert a defense as well. Psychiatric Assocs. v. Siegel, 610 So. 2d at 424. Because the Act abrogates a potential defendant's right to assert an affirmative defense, this Court should find that the Act is unconstitutional. Three arguments clearly prove the point:

1. The Act is unconstitutional because the Act abrogates the right to assert common law defenses, thereby depriving a defendant a fundamental right of access to the courts of Florida.

This Court should find that the Act unconstitutionally abrogates the right to assert common law defenses in the courts of Florida. The Act is a deprivation of a

fundamental right granted by the Florida Constitution. This Court stated in 1973 that a party has the right of access to courts to assert any "right [that] has become part of the common law of the State pursuant to Fla. Stat. § 2.01." Kluger v. White, 282 So. 2d at 4. More recently, this Court established that the right of access to courts protects all rights established in the common law on the date that the 1968 Florida Constitution was adopted. See, Eller v. Shova, 630 So.2d 537, 534 n.4 (Fla. 1993).

The issue before this Court in Eller was whether a statutory amendment, which raised the degree of negligence required to maintain a civil tort action against a co-employee, effectively abolished the right of access to the courts. Eller v. Shova, 630 So.2d at 542. This Court held that the amendment "merely raise[d] the degree of negligence" without abolishing a civil cause of action in negligence. Id. As a result, the amendment was held to be constitutional under Article I, Section 21 of the Florida Constitution. Id. at 543.

The Act is challenged on the same premise as the amendment in Eller. However, there is a striking difference between the amendment challenged in Eller and the Act in the instant case. In Eller, the level of negligence was raised, not abolished. While a plaintiff could no longer maintain a claim for gross negligence, the claim of culpable negligence remained an available avenue to redress an injury.

Yet, in the present case, the Act deprives the manufacturer the right to assert all common law defenses to claims under the statute. The Act itself states that the defenses which the Act abolishes are those which are "normally available to a liable third party." Section 409.910(1), Florida Statutes (West Supp. 1995). In pertinent part, the Act states:

> Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of the risk, and all other affirmative defenses normally available to a liable third party are to be abrogated to the extent necessary to ensure full recovery. . .

Section 409.910(1) (West Supp. 1995) (emphasis added to reflect amendment). The reasoning of this Court in Eller applies to the present case in that, if the Act merely elevated the level or standard of a defense, the Act would be constitutional as the defense would still exist. However, the Act does not merely elevate the standard in the instant case as the plain language of the statute clearly provides no avenue for a manufacturer to redress an injury.

Additionally, the injury caused by the Act is unlike the traditional injury in a case involving the denial of access to courts. The injury does not result from the denial of the right to institute an action, but rather from the deprivation of the opportunity to defend against an action. This Court explored the denial of the right to assert a defense in State ex rel. Pittman v. Stanjeski, 562 So.2d 673 (Fla. 1990) in which the Court reviewed the

constitutionality of a statute which mandated the automatic entry of judgment for delinquent support monies.

The Stanjeski Court had for its consideration two cases in which both the 2d DCA and the 4th DCA had held that Section 61.14(5), Florida Statutes (1987), impermissibly denied a defendant access to Florida courts. Id. at 676. The statute provided that, under specific conditions, a delinquent support payment would become a final judgment by operation of law. Section 61.14(5), Florida Statutes (1987). The statute failed to expressly provide the obligor with "an opportunity to present defenses to a judicial officer" prior to the entry of final judgment. Id. at 674.

Respondents successfully argued before the lower courts that this deprivation of the right to be heard before the entry of judgment was a denial of access to courts, as the statute further provided that the court would not have the power to set aside or, in any way, alter the order. Id. (quoting Section 61.14(5)(d), Florida Statutes (1987)). However, this Court interpreted the statute as providing the right to assert any defenses because it offered the obligor the opportunity to file a response with the court. Id. More importantly for purposes of the present case, this Court "agree[d] that the statute as interpreted by the district courts would be unconstitutional." Id. at 673.

The Court in Stanjeski recognized that the deprivation of the right to assert a defense before the

entry of final judgment was an unconstitutional deprivation of the right of access to courts. Id. The Stanjeski Court correctly interpreted the statute at issue to provide for such an opportunity to assert defenses. Id. at 676. Yet, in the present case, there can be no such interpretation, as the plain language of the statute clearly states that the normal defenses available to the third party (manufacturer) are to be abrogated. Section 409.910(1), Florida Statutes, (West Supp. 1995).

With the abolishment of the right to assert normally available defenses, the manufacturer is placed in the same position as the obligor in the statute in Stanjeski. This Court agreed that placing a party in such a position would be a denial of the right of access to courts as guaranteed by Article 1, Section 21 of the Florida Constitution. Id. at 673. Such is the case now before this Court. Therefore, this Court should, consistent with Stanjeski, reverse the trial court's opinion as to Count I and hold that the Act is an unconstitutional denial of access to courts.

2. The Act unconstitutionally deprives a manufacturer of access to courts because the Act prevents the manufacturer from obtaining information necessary to asserting available defenses.

Additionally, this Court should find that the Act is unconstitutional because it erects substantial barriers to a manufacturer's ability to assert a defense. This Court has held that the imposition of barriers to a defense is as much a denial of access to courts as the complete abrogation of

the right to assert such a defense. Psychiatric Assocs. v. Siegel, 610 So. 2d at 424; see also State Farm Mut. Auto. Ins. Co. v. Hassen, 650 So. 2d 128, 141 (Fla. 2d DCA 1995).

In Psychiatric Assocs., this Court reviewed two cases in which the 1st DCA had invalidated sections of Florida Statutes which required a potential plaintiff bringing an action against a person who participated in a medical review board process to first post a bond sufficient to cover the defendant's costs and attorneys' fees. Psychiatric Assocs., 610 So. 2d at 421. The issue before the Court was whether this bond requirement violated the plaintiff's constitutional right of access to courts. Id.

The Court held that, while the right to bring a claim had not been completely abolished, the requirement that a potential plaintiff must post a bond prior to bringing a claim impermissibly restricted the plaintiff's access. "The constitutional right of access to the courts sharply restricts the imposition of financial barriers to asserting claims or defenses in court." Id. (citing G.B.B. Investments Inc. v. Hinterkopf, 343 So. 2d 899, 901 (Fla. 3d DCA 1977).

Application of Psychiatric Assocs. to the present case can produce but one conclusion, the unconstitutionality of the Act. While the Act imposes no financial barriers to asserting a defense, it erects substantive barriers which deny a manufacturer access to information relevant to establishing that its products did not cause the particular

Medicaid recipient's injury. Section 409.910(9)(a) denies a manufacturer information regarding the identity and medical records of the individual Medicaid recipients whose health care costs the State seeks to recoup. Section 409.901(9)(a), Florida Statutes, (West Supp. 1995).

It cannot be countenanced that a party has the right to dispute causation before liability is assessed. In the instant case, prior to the enactment of the Act, a manufacturer had the right to dispute (1) whether any particular Medicaid recipient was correctly diagnosed with the disease; (2) whether any other risk factor attributed or caused any particular recipient's disease; (3) whether another product brand caused the disease; or (4) whether the medical costs incurred by the Medicaid recipient were reasonable. Yet, under the Act, a manufacturer would be denied the opportunity to argue these issues with any specificity, because the Act denies the manufacturer the most important piece of information necessary to assert these defenses, the name of the recipient.

Additionally, the Act impermissibly denies a manufacturer the right to be liable for only the damage caused by its products because the Act imposes on each manufacturer joint and several liability. In the instant case the result of such a theory is arbitrary and excessive because each manufacturer will be held liable for the damages caused by the entire industry. This theory does not

offer any one manufacturer the opportunity to limit its liability to its portion of the market share.

Consequently, under the Act, a manufacturer is faced with insurmountable obstacles to overcome the presumption of liability. The Act denies the manufacturer access to critical information regarding the identity of the individual Medicaid recipients. As a result, the manufacturer cannot dispute any aspect of the individual claim. In addition, the manufacturer is prohibited from asserting that it should be liable on a market share theory of liability as opposed to a joint and several theory. The practical result of these barriers is the denial of access to courts for the manufacturer to rightfully assert defenses. Therefore, this Court should reverse the decision of the lower court on Count I and hold that the Act is an unconstitutional denial of access to courts.

3. The Act is unconstitutional and should not be applied because it fails the test set out by this Court in Kluger v. White.

This Court should reverse those portions of the lower court decision which upheld the constitutionality of the Act because the Act fails to meet the test established by this Court in Kluger v. White, 282 So. 2d at 4. In Kluger, this Court held that a law which impermissibly restricts or abrogates the fundamental right of access to courts is presumptively unconstitutional. Id.

The State may overcome that presumption by a showing

that either (1) the laws provide an alternative remedy to protect the rights of the party whose access has been restricted or abrogated or (2) the existence of an "overpowering public necessity" requiring the abolition of this fundamental right coupled with the absence of any less restrictive means to meet that necessity. Id. Because the legislature has not meet either test in the instant case, this Court should find that the Act is unconstitutional on its face.

Under the first test, the State has the burden of showing that, although the Act abolishes a manufacturer's access to courts, the legislature provides a reasonable alternative which would protect the rights of the manufacturer or provide a commensurate benefit. The State has, in no way, met this burden. The Act provides no alternative for a manufacturer to assert common law defenses or defend on the issue of causation. Additionally, the Act provides no identifiable commensurate benefit to the manufacturer. As a result, the Act fails the first test under Kluger.

Furthermore, the Act fails the second test that this Court established in Kluger. "The legislature has not demonstrated an overpowering public necessity for imposing such a [financial] restriction with a concomitant showing that no alternative method of addressing public necessity exists." State Farm Mut. Auto. Ins., 650 So. 2d at 141

(citing Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987)). This Court must look to the legislative record and history of this Act to determine overpowering necessity.

"Unlike other statutes in which the legislature has taken great care to delineate why an overpowering public necessity requires it to act by imposing restrictions on access to the courts," State Farm Mut. Auto. Ins., 650 So. 2d at 141, the Act is supported by no such legislative findings either in the plain language of the statute or in legislative record. While any such statement would be merely persuasive rather than controlling, the absence of such a statement of overpowering public necessity should lead to the determination of an absence of such necessity.

It is telling that, at this writing, no other state in the country has enacted a statute similar to the Florida Act. Additionally, federal law does not require the creation of any remedy to recoup Medicaid expenditures, with the exception of the traditional remedies of subrogation and assignment. Finally, any argument that federal law mandated the passage of the Act can be refuted upon examination of the Governor's Executive Order 95-105 and the proposed stipulation seeking to limit the reach of the Act to tobacco-related defendants.

In addition, assuming *arguendo* the presence of overpowering public necessity for such restrictions, the

legislature has not shown that the Act is the only possible method to address that necessity. In fact, there are alternative methods to dealing with the Medicaid problems. There are numerous other measures by which the State may obtain additional revenue to combat the high cost of Medicaid. At the time of the Act's passage, the State operated several programs to aid in the payment for injuries caused by products.

For example, the existing Act gives the State other remedies, such as subrogation rights against "third-party" tortfeasors. Yet, the State has made no overt showing that this, or any other measure, is not a reasonable alternative to the measures which restrict the access to courts.

Absent an affirmative showing by the State that no reasonable alternative exists, this Court must come to the conclusion that the State has not examined the alternatives. As a result, the State has failed to carry the burden ascribed to it by Kluger. Consequently, this Court should find that the Act which restricts or removes a manufacturer's access to Florida courts fails the Kluger test and is, therefore, unconstitutional.

CONCLUSION

The State of Florida is attempting, through amendment of 409.910, to first, tax manufacturers and merchants on a *selective* basis. Whereas a tax is usually applied to all organizations engaging in a particular field, this statute allows the State to specify which manufacturers or merchants must pay the costs perceived to be associated with the entire industry. The applicability of joint and several liability to the statutory cause of action enables the State to choose at will which who or what may be taxed. Second, equally compelling is the State's denial of access to the courts of Florida through the vehicle of limiting access to the courts of the state.

Since the foundation of this nation, access to the judicial system to resolve disputes has been of paramount importance. U.S. Const. Art. III. Our system nationwide is an adversial one and to abrogate affirmative defenses destroys that foundational principle. This position may buy votes but in the long run it discredits the common law and constitutions enacted in its wake.

It is therefore respectfully submitted that this court should reject appellants/cross appellees' analysis to the contrary and find for appellees/cross-appellants. In doing so this court will bring the state back to the reality of constitutional government. As the Court below stated: the statute in question "impermissibly infringes on the exclusive power of the judiciary to establish practice and procedure in Florida courts." Final Order at p. 2.

Respectfully Submitted

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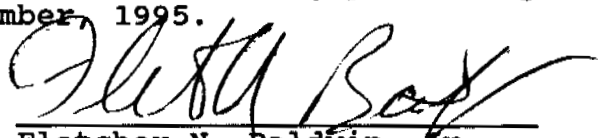
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Amicus Curiae* Brief in Support of Appellees/Cross-Appellants has been furnished to the following persons by Fed Ex this 26th day of September, 1995.



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