13
6 88

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF
ENVIRONMENTAL REGULATION,

Petitioner,

vs.

CASE NO. 65,769

E. PETER GOLDRING,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY
REVIEW OF A DECISION OF
THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

John G. Fletcher
Attorney for Respondent
Suite 222
7600 Red Road
South Miami,
Florida 33143

(305) 665-7521

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT ON CONFLICT JURISDICTION

1.
The ostensible conflict with State of Florida, Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla., 1st DCA, 1983).

The decision of the Third District Court of Appeal here sought to be reviewed* involved property which is dominated by sawgrass, a plant species on the list which is utilized by the Petitioner in determining its jurisdiction pursuant to Section 403.817, F.S. The Petitioner, using this dominance as a part of its determination of jurisdiction, issued a statement that the subject property is a portion of Florida Bay. However, as Florida Bay is a saltwater body and sawgrass is a fresh water plant that will not survive in saline water, an obvious anomaly existed: how can this property, which is wet only ten per cent of the year and then only from rainfall, be part of saltwater Florida Bay? The answer that it could not be such was obvious, but the statutes and rules relating to the subject were not being enforced by the Petitioner as clearly written, but rather in some other fashion as the present occupants of the Department of Environmental Regulation (DER) would have them read.**

---

* Goldring v. State, Department of Environmental Regulation, 452 So.2d 968 (Fla., 3rd DCA, 1984).

** The DOAH Hearing Officer who heard the Chapter 120 evidentiary matters recommended in favor of Goldring. The Department ruled in favor of itself. The Third District Court agreed with the Hearing Officer.

As to the above the Third District Court summarized (page 970):

> "Applying these principles to the facts of the present case, we readily conclude that Mr. Goldring's property is not within the landward extent of Florida Bay. The site in question lies four and one-half miles north of the recognizable edge of Florida Bay. Were we to utilize the vegetation index as the determinative factor then the presence of sawgrass would clearly place the property within the landward extent of Florida Bay. However, the anomaly is that Florida Bay is salt water, while sawgrass is a fresh water species. Clearly, the dynamic action of the Bay does not have an effect on Mr. Goldring's property. The fact that the land is incidentally wet enough from rainfall to support sawgrass does not supplant the requirement that the land be subject to inundation by the water of the state. Accordingly, we find that the area in question is not within the landward extent of Florida Bay and thus, the DER does not have jurisdiction."

The Third District Court thus determined that the dominant presence of a plant on the indicator species list (sawgrass here) while necessary to DER jurisdiction, is not conclusive of DER jurisdiction.

The Petitioner contends* that this determination of the Third District Court is in express and direct conflict with the First District Court's decision of State, Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla., 1st DCA, 1983). The Petitioner contends that in Falls Chase it was determined that the mere dominant presence of a vegetation species on the indicator list conclusively establishes jurisdiction in the DER. As will be seen Falls Chase does not expressly

---

* As Falls Chase was not cited below to the Third District Court of Appeal by the DER (in its brief there or otherwise) one wonders how serious the DER is in its contention.

and directly conflict with Goldring, but is completely consistent therewith.

Falls Chase involved land which at times in the past had been subject to inundation, but because of a sinkhole became totally dry. No vegetation species on the indicator list were present. Notwithstanding the absence of the indicator species the DER attempted to exert jurisdiction (on the basis of an "ordinary high water line").

The issue in Falls Chase, then, was whether the DER can claim jurisdiction in the absence of a dominant species. The issue in Goldring was whether the dominant presence of an indicator species alone confers jurisdiction. The decisions do not conflict with one another in any fashion.

The Petitioner attempts in its jurisdictional brief to create a conflict by lifting quotations from Falls Chase and reassembling them out of context. In fact the First District Court was only discussing the correctness of the DER's use of the "ordinary high water mark" in lieu of the vegetation index. It never could have reached the issue of whether the dominant present of a vegetation species on the list was sufficient by itself as such a species was not present but totally absent. Thus the quotations in the Petitioner's brief when reassembled in context refer to the DER's improper use of the "ordinary high water mark"; witness, please, from Falls Chase, page 792-793:

> "The claim of jurisdiction by DER is devoid of merit for a number of reasons, including, but by no means limited to: (1) Section

> 403.817, Florida Statutes, specifies the method by which dredge and fill regulatory jurisdiction is to be determined. The ordinary high water mark is not one of the methods prescribed. (2) At common law, the ordinary high water mark was used to establish the line of ownership between publicly owned bodies of water and privately owned land and would have no application here, since ownership is not at issue in this case. (3) It is not permissible under the terms of Section 403.817 for DER to modify its jurisdiction by substituting ordinary high water mark for the methods specified by statute, but, even if permissible, such a change would require adoption of a rule subject to to legislative approval. Section 403.817, Florida Statutes."

~~In summary, then~~, Falls Chase stands for the proposition that the dominant presence of a listed vegetation species is necessary for DER jurisdiction, and in its absence one looks no further. Goldring stands for the proposition that the dominant presence of a listed vegetation is necessary for DER jurisdiction, but its presence alone is not conclusive of DER jurisdiction. There is no conflict between these two propositions, thus there is no ~~discretionary~~ conflict jurisdiction in this ~~Honorable~~ Court.

2.
The ostensible conflict with Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College, 425 So.2d 133 (Fla., 1st DCA, 1983).

The Petitioner contends that Palm Beach Junior College expressly and directly conflicts with Goldring as to the standard to be applied in giving deference to an administrator's interpretation of a statute. At page 136, Palm Beach Junior College, the First District Court set forth that measurement. Goldring contains no express statement as to that standard of deference. The Petitioner contends, however, that in applying the standard announced by the First District Court in Palm Beach Junior College, the Third District Court in Goldring went afoul of the standard as (Petitioner's jurisdictional brief, page 8), it "acknowledged that treating jurisdictional vegetation as a conclusive indication of the landward extent of a water body is a possible construction of the statute" (Emphasis supplied).

This statement in Petitioner's brief contains several errors: The standard announced in Palm Beach Junior College is not whether the administrative interpretation is possible but whether it is permissible. Palm Beach Junior College, at page 136:

> "Permissible interpretations of a statute must and will be sustained . . . ".

Further, in Goldring the Third District Court found the DER's statutory interpretation not to be permissible, as

not being within the intent of the statute. At page 970, Goldring, the Third District Court stated:

> "While upon quick perusal it might appear that the presence of an index species is a conclusive indication of the landward extent of a water body, a closer reading of the statute indicates that such was not the intent."

As it was not the statutory intent to permit the administrators (DER) to use the index species as a conclusive presumption, the administrator's utilization thereof contrary to that legislative intent was impermissible. The intent of a statute, as this Court and the District Courts have stated numerous times, is the polestar by which we must be guided. E.g., Scarborough v. Newsome, 150 Fla. 220, 7 So.2d 321 (1942).

Search though one may he will not find a statement anywhere in Goldring that the DER's conclusive presumption is a permissible (or even "possible") one. Nor will one find any express and direct, or even implied and indirect, conflict with Palm Beach Junior College. This Honorable Court thus lacks discretionary conflict jurisdiction.

3.

The ostensible conflict with Jess Parrish Memorial Hospital v. Florida Public Employees Relations Commission, 364 So.2d 777 (Fla., 1st DCA, 1978)

The Petitioner states in its jurisdictional brief, pages 9 and 10, that the Jess Parrish decision of the First District Court of Appeal "established guidelines regarding the grant of attorney's fees" and that Goldring conflicts with Jess Parrish. Both portions of this conjunctive statement are in error.

First, the First District Court in Jess Parrish determined at page 784 that the applicant therein for attorney's fees was not so entitled because it (a hospital) was not the prevailing party, thus not entitled to seek attorney's fees against the state agency. Then having so determined as above, starting at page 784 the First District Court launched into an entirely unnecessary (to the case) discussion, obiter dicta, concerning the award of attorney's fees to prevailing parties to reversed agency action.

Thus, there were no "guidelines established". At page 784, Jess Parrish, the First District Court stated:

> ". . . The hospital is therefore not entitled fees and costs since it is clearly not the prevailing party.
>
> "Having so concluded, however, we think it appropriate to comment upon some general principles which may be of aid to a determination, once an agency order is reversed, whether to impose fees and costs against an agency when it is acting within the scope of its adjudicatory responsibilities."

After a lengthy discussion the First District Court then stated (page 785):

> "The above principles are of course not all inclusive . . . 'It is impossible to state

> with precision a general rule locating the outer perimeters of appropriate agency discretion. This may only be done on a case-by case basis'."

In other words the District Courts in determining attorney's fees awards to prevailing parties on appeal should examine each case individually in exercising the discretion they have been granted. This is hardly the establishment of guidelines.

Further, the decision of the Third District Court in Goldring as to the grant of attorney's fees consisted of one sentence in an order separate from its opinion. That one sentence was (Respondent's Appendix to this Brief, first page):

> "Upon consideration, the motion for attorney's fees filed by counsel for appellant is granted, and John G. Fletcher is allowed $5,000.00 as compensation for the services of said attorney in this Court."

Goldring contained no express and direct conflict with the "guidelines set" by Jess Parrish. It contained no effort to "establish guidelines" or even to discuss "some general principles". The Petitioner apparently contends that the conflict is implied as, the Petitioner contends, the Goldring decision did not correctly apply the "guidelines set" by Jess Parrish. As has been seen, however, Jess Parrish set no guidelines by its unnecessary discussion, obiter dicta, but concluded that the principles it discussed were not all inclusive and decisions must be made on a case-by-case basis, just as Goldring does.

However, assuming arguendo that Jess Parrish did set firm and all encompassing guidelines, Goldring would not conflict with them. At page 785 Jess Parrish states several principles that lead to the award of attorney's fees which are consistent with the Goldring award:

a) The agency may be liable where its employees fail to conform to pre-existing statutory and regulatory requirements.

The Third District Court in Goldring found that the agency did not conform to pre-existing statutory and regulatory requirements, witness its opinion.

b) The agency did not conform to and act consistently with the authority delegated to it.

At page 971 of Goldring the Court found that the DER abused its powers and procedures in an attempt to circumvent a decision rendered by the Court.

c) The Jess Parrish principles are not all conclusive; each case must be determined individually.

The Third District Court in Goldring concluded that the word "exchange" was clearly misinterpreted by the agency in order to obtain jurisdiction. Goldring, page 970. This clear error led to years of administrative and appellate proceedings (and expense) that should readily have been avoided. On a case-by-case basis this also may have been considered by the Third District Court to be one of those "additional principles" allowed by Jess Parrish.

There is no express and direct conflict between Goldring and Jess Parrish. As a consequence this Honorable Court has no discretionary conflict jurisdiction.

CONCLUSION

There being no conflict between the instant decision of the Third District Court of Appeal and any of the cases put forth by the Petitioner, this Honorable Court has no jurisdiction. The Petitioner's request that this Honorable Court review the Goldring decision should be denied.

I HEREBY CERTIFY that a copy of the foregoing has been mailed to E. Gary Early, Assistant General Counsel, State of Florida, Department of Environmental Regulation, Twin Towers Office Bldg., 2600 Blair Stone Rd., Tallahassee, Fl., 32301, this 12th day of September, 1984.

John G. Fletcher
Attorney for Respondent
Suite 222
7600 Red Road
South Miami,
Florida 33143

(305) 665-7521