D/a 4-1-88

IN THE SUPREME COURT
STATE OF FLORIDA

ENVIROGENICS SYSTEMS COMPANY,
a Delaware corporation,

Appellant,

v.

CITY OF CAPE CORAL, FLORIDA,
a municipal corporation,

Appellee.

WATER SERVICES OF AMERICA, INC.,

Appellant,

v.

CITY OF CAPE CORAL, FLORIDA,

Appellee.

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Supreme Court
Case No. 71,096

REPLY BRIEF OF APPELLANTS

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AND

WATER SERVICES OF AMERICA, INC.

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PREFACE

Envirogenics Systems Company and Water Services of America, Inc., are the appellants and the City of Cape Coral is the appellee. The appellants shall be referred to as "Envirogenics" and "Water Services," respectively, and collectively as the "utility contractors." The appellee shall be referred to as "Cape Coral." Chapter 489, Florida Statutes (1983) shall be referred to as "Chapter 489," Section 489.103(1), Florida Statutes (1983) shall be referred to as "Section 489.103(1)." Section 489.103(5), Florida Statutes (1983) shall be referred to as "Section 489.103(5)." Chapter 468, Florida Statutes (1976) shall be referred to as "Chapter 468." Section 468.114(1), Florida Statutes (1976) shall be referred to as "Section 468.114(1)."

The following symbols will be used:

R. - Record

A. - Appendix

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL'S DECISION SHOULD BE REVERSED IN THAT IT MISCONSTRUED THE EXEMPTION FOR CONTRACTORS IN WORK ON UTILITIES SET FORTH IN SECTION 489.103(1), FLORIDA STATUTES (1983).

As was noted by the Second District Court of Appeal in _Envirogenics Systems Company, et al. v. City of Cape Coral, Florida_, 510 So.2d 934 (Fla. 2d DCA 1987), this appeal raises a question of statutory construction; namely, whether Section 489.103(1) expressly exempts contractors in work on utilities from the licensing requirements of Chapter 489. This issue of statutory construction was determinative in both the trial court and the Second District Court of Appeal. Even if the trial court had considered facts relating to the housing facility, the record reveals that it was undisputed that the housing facility constituted an integral part of the reverse osmosis plant. (R. 144-115). The trial court's decision, however, was not based on these facts but rather was founded solely on its determination as a matter of law that the appellants, being contractors in work on a utility, were not exempted from the requirements of Chapter 489 by virtue of Section 489.103. This issue and this issue alone was addressed by the trial court, discussed by the Second District Court of Appeal and is the issue presently before this court.

II. ENVIROGENICS AND WATER SERVICES CLEARLY FALL WITHIN THE EXEMPTION SET FORTH IN SECTION 489.103(1), FLORIDA STATUTES (1983).

A. Section 489.103(1) exempts contractors in work on utilities.

Cape Coral's contention that Section 489.103(1) does not

exempt contractors in work on utilities is without merit. According to Cape Coral, the use of a comma before the word "or" indicates that the exemptions set forth in Section 489.103(1) refer solely to contractors who work on bridges, roads, streets, highways or railroads. Cape Coral's reliance on a single comma to construe the meaning of Section 489.103(1) is misplaced. Under the rules of statutory construction, punctuation is considered the the most fallible and least reliable indication of legislative intent in construing a statute. Wagner v. Botts, 88 So.2d 611 (Fla. 1956). (A.1.iii). This is especially true in light of the fundamental rule of grammar that the use of a comma between the last two items in a series is optional.

Likewise, Cape Coral's reliance on the additional exemption contained in 489.103(5) to support its construction is misplaced. According to Cape Coral, the interpretation of Section 489.103(1) urged by Envirogenics and Water Services would render the exemption set forth in subparagraph 5 of that same section meaningless. Cape Coral's contention fails to consider the other sections contained in Chapter 489. It is a cardinal rule of statutory construction that legislative intent should be gathered from consideration of a statute as a whole rather than from any one part thereof. Florida Jai Alai, Inc. v. Lake Howell Water and Reclamation Dist., 274 So.2d 522 (Fla. 1973). (A.1.vii). In the present case, the definition of "contractor" as set forth in Section 489.105(3) harmonizes the purported inconsistency existing between the exemptions contained in subparagraphs 1 and 5 of Section 489.103. Contractor is defined in that section as meaning:

> . . . The person who is qualified for and responsible for the entire project contracted for and means, except as exempted in this act, the person who, for compensation undertakes to, submits a bid to, or does himself or by other construct, repair, alter, remodel, add to, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others . . .
>
> Section 489.105(3).

In light of this definition, the exemption provided in Section 489.103(1) clearly refers to outside contractors who work on utilities. Relatedly, the exemption provided in Section 489.103(5) only applies to incidental construction, maintenance and development work performed on public utilities by in-house personnel. See R. Leiby, Florida Construction Law Manual, Section 16.03 (1981). (A.xiii). As such, the construction urged by Envirogenics and Water Services does not render subparagraphs 1 and 5 of Section 489.103 inconsistent.

B. All existing authority supports the construction urged by Envirogenics and Water Services.

Not only does a plain reading of Chapter 489 support the construction urged by Envirogenics and Water Services, but all existing authority buttresses this construction.

Cape Coral attempts to down play the persuasive authority of Wood-Hopkins Contracting Co. v. Roger Au and Son, Inc., 354 So.2d 446 (Fla. 1st DCA 1978) by alluding to the fact that the Wood Hopkins court merely discussed the licensing issue in a footnote. A close examination of the Wood-Hopkins decision reveals that this is not the case. Rather, the First District Court, in reaching its decision, stated in the body of its opinion.

> The trial court ruled that the JEA's prequalification of Au, plus the express exemption of Florida Statute

§468.114, made registration requirements inapplicable.

> The record clearly supports the holding of the able trial court that Au is the lowest responsible bidder on the project and that JEA could not reasonably reject Au's bid. 354 So. at 449.

Thus, the First District Court of Appeal has clearly held that contractors who work on utilities are expressly exempted from the registration requirements of Chapter 489.

Cape Coral further attempts to distinguish the Wood-Hopkins decision based on the nature of the construction project involved in that case. While Cape Coral contends that the project in Wood-Hopkins involved only pipe work, a close examination of the court's decision and the record in the present case does not establish this fact. Rather, a perusal of the case reveals that the project in question involved the construction of a thermal discharge unit. The decision is silent as to what the components of this unit consisted of. As such, Cape Coral's contention that it consisted solely of piping is pure speculation. What is revealed by the Wood-Hopkins decision is that it, like the present case, involved work on a utility.

Finally, Cape Coral attempts to distinguish the Wood-Hopkins decision based on the absence in the present case of a competitive bidding statute. Cape Coral fails to point out, however, that its own bid specifications provided:

> 1.07 AWARD OF CONTRACT
>
> All bids will be evaluated as given in 1.09 hereinafter. The award of the contract shall be made to the evaluated low, responsive and responsible bidder on the proposal submitted for the work. The contract shall be deemed as having been awarded when formal notice shall have been served upon the successful bidder by an officer or agent of the owner duly authorized to give such notice. (R.655A/IB-3).

As such, Cape Coral imposed on itself a competitive bidding requirement.

Likewise, Cape Coral's attempt to distinguish away the Attorney General's Opinion to the Florida Construction Industry Licensing Board does not bear scrutiny. Cape Coral argues that the opinion is ambiguous. To the contrary, an examination of the Attorney General's opinion clearly reveals that it was the opinion of the Attorney General that Section 468.114(1), Florida Statutes (current version at 489.103(1)) exempts contractors who work on utilities from the provisions of Chapter 468, Florida Statutes (current version at Chapter 489).

Finally, Cape Coral challenges the status of the opinion rendered by the Attorney General to the Construction Industry Licensing Board. Cape Coral contends that the Attorney General's opinion in question is not an "official" opinion of the Attorney General due to the fact that it was not published in the 1967-68 Biannual Report of the Attorney General. While research has failed to reveal any appellate decision addressing the issue of when an Attorney General's opinion constitutes an "official opinion" as opposed to an "unofficial opinion," the Attorney General has addressed that issue. In 1946 Op. Atty. Gen. 264, the Attorney General emphasized that an opinion not rendered to some state official, board, commission or agency, or upon some question affecting the interest of the state was to be considered an unofficial opinion. (A.1.xi). By negative implication, an opinion of the Attorney General rendered to some state official, board, commission or agency would be considered an official

opinion. In the present case, the opinion at issue was directed to the Executive Director of the Florida Construction Industry Licensing Board. The Florida Construction Industry Licensing Board is a state board. Section 468.103, Florida Statutes (1969). As such, Mr. Faircloth's December 6, 1968, opinion should be considered an official opinion of the Attorney General of the State of Florida.

As is revealed by the briefs filed by the parties herein, all available authority supports the construction urged by Envirogenics and Water Services; namely, that Section 489.103(1) exempts contractors in work on utilities from the licensing provisions of Chapter 489, Florida Statutes.

III. THE LICENSING EXEMPTION SET FORTH IN SECTION 489.103(1) FOR CONTRACTORS IN WORK ON UTILITIES PROMOTES THE STATED PURPOSE OF CHAPTER 489, FLORIDA STATUTES (1983) AND IS IN THE BEST INTEREST OF THE PUBLIC.

The technology and skill needed to construct modern utility systems, such as nuclear power plants, reverse osmosis water treatment facilities and resource recovery plants, can often only be obtained on a national or international basis. (R. 45-49). The specialized nature of the technology associated with such systems and the limited number of contractors capable of performing such utility work insures competency. Needless to say, impeding the flow of specialized utility technology and contractors into the state of Florida by eliminating the exemption set forth in Section 489.103(1) would be completely contrary to the stated legislative purpose of Chapter 489; to wit: to protect the public from incompetent contractors.

Furthermore, preserving utility exemptions contained in

Section 489.103(1) promotes public health, safety and welfare. The advent of Florida's phenomenal growth has taxed the state's existing infrastructure to its limits. The existence of the utility exemption set forth in Section 489.103(1) assists in alleviating this burden by encouraging the utilization of state of the art utility systems. The elimination of this exemption would only add to the already overburdened state infrastructure.

Finally, Cape Coral's contention that Envirogenics and Water Services' construction of Section 489.103(1) would open the door for unlimited construction by unlicensed utility contractors is baseless. In enacting the utility exemption set forth in Section 489.103, the legislature specifically limited the exemption to "services incidental" to work on utilities. As such, the exemption would not permit a utility contractor to undertake any work which was not incidental to work on a utility. Thus, the legislature has already provided a safeguard to protect against an unlicensed utility contractor undertaking work which is not incidental to work on a utility.

CONCLUSION

The sole issue framed by the present appeal is whether Section 489.103(1) exempts contractors in work on utilities from the licensing requirements of Chapter 489. All available authority supports the construction urged by the appellants or that contractors in work on utilities are exempt from the provisions of Chapter 489. Accordingly, the decision of the Second District Court of Appeal should be reversed, and the case remanded to the trial court for consideration of the issue of damages.

Respectfully submitted,

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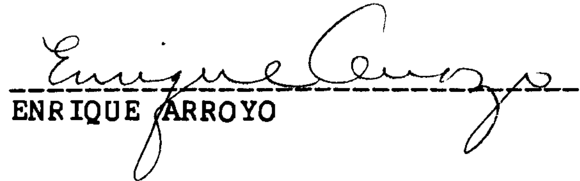
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 16 day of February, 1988, to William M. Powell, City Attorney, P. O. Box 150027, Cape Coral, Florida 33915-0027.



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