

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,516

FILED
SID J. WHITE

STATE OF FLORIDA, by and through **APR 18 1988**
GERALD LEWIS as Comptroller and
Head of the Department of Banking and Finance **COURT**
By _____

Deputy Clerk

Petitioner,

v.

BYRON D. BEELER, BEELER DEVELOPMENT COMPANY,
PARKVIEW NURSING HOME, INC., and
INVESTORS MORTGAGE and LOAN COMPANY,

Respondents.

DISCRETIONARY REVIEW OF A DECISION OF THE FIRST
DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE
DEPARTMENT OF LEGAL AFFAIRS,
STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopts the Statement of the Case and Statement of the Facts presented by Petitioner.

INTEREST OF AMICUS CURIAE

Pursuant to Florida's Deceptive and Unfair Trade Practices Act, Chapter 501, Part II, Florida Statutes (1987), and Section 812.035, Florida Statutes (1987), the Department of Legal Affairs is specifically granted the authority to seek injunctive relief to aid in its efforts to protect consumers. In many instances, it is essential that the injunctive relief be granted without notice to the adverse party. The complaints filed by the Department involve consumer fraud and egregious business practices where, quite often, notice to the adverse party will result in the destruction of evidence and the dissipation of assets. Such action is prejudicial to the prosecution of the case and to the rights of the consumers. Therefore, the Department frequently avails itself of Rule 1.610(a), Fla.R.Civ.P., which provides for the discretionary issuance of a temporary injunction without notice to the adverse party under certain circumstances.

One of the issues presented this Court by the decision below is what is the proper standard to be employed in determining whether a party has met the requirements of Rule 1.610(a). The decision below sets forth a standard which, for all practical purposes, emasculates Rule 1.610(a) and eliminates one of the most effective and protective enforcement tools employed by this Department. The Department of Legal Affairs submits this brief, with the knowledge and approval of Petitioner, because the opinion below detrimentally affects the enforcing authority of this Department, and, as a result, the consumers of the State of Florida.

SUMMARY OF ARGUMENT

The decision below sets forth an improper standard in determining whether a party has met the requirements of Rule 1.610(a), Fla. R. Civ. P. Initially, the decision ignores the presumption of irreparable injury where the legislature has granted the authority to seek an injunction against one who violates a statute enacted to protect the public interest. Secondly, the decision erroneously requires allegations of certainty concerning irreparable injury. The rule and decisions of this Court make clear that the allegations and affidavits of a party seeking an injunction without notice need only make it appear that irreparable injury will result. As such, this Court should reverse the decision below and reiterate the proper standard in determining whether a party has met the requirements of Rule 1.610.

ARGUMENT

RULE 1.610(a), DOES NOT REQUIRE
THAT A PARTY ESTABLISH WITH
CERTAINTY THAT IRREPARABLE INJURY
WILL BE SUSTAINED IF NOTICE IS
GIVEN TO THE ADVERSE PARTY PRIOR TO
THE ISSUANCE OF AN INJUNCTION.

Rule 1.610(a) provides that an injunction may be granted without written or oral notice to the adverse party only if, inter alia, "it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss or damage will result to the movant before the adverse party can be heard in opposition." The decision below contrues the above provision and improperly requires that the party seeking injunctive relief without notice establish, with certainty, that immediate and irreparable injury loss or damage would result if notice were given. As will be demonstrated, the standard set forth by the First District Court of Appeal is erroneous and should be rejected by this Court.

Initially, when a motion for injunctive relief without notice is filed pursuant to statutorily granted authority and the purpose of the statute is the protection of the public health, safety, and welfare, irreparable harm is presumed.

Harvey v. Wittenberg, 384 So.2d 940 (Fla. 3d DCA 1980);
Times Publishing Company v. Williams, 222 So.2d 470 (Fla. 2d
DCA 1969). As recognized in the above cases, legislatively
granted authority to seek an injunction against one who
violates a statute enacted to protect the public interest,
"is the equivalent of a legislative declaration that a
violation of the statutory mandate constitutes an
irreparable public injury." Times Publishing Company v.
Williams, supra at 476. As such, a mere showing that the
statute has been or is about to be violated satisfies the
requirement of demonstrating irreparable injury. Times
Publishing Company v. Williams, supra.

Both the statute under which Petitioner filed the
complaint which is the basis of the instant appeal, and the
statute under which the Department of Legal Affairs files
complaints, are statutes enacted to protect the public
welfare. In addition, both statutes grant authority to seek
an injunction against one who violates the provisions of the
statutes. Section 517.191, Florida Statutes (1987); Section
501.207(b), Florida Statutes (1987). As such, Petitioner
was not even required to introduce evidence of imminent
irreparable harm to the public prior to the issuance of an
injunction without notice, as that harm was presumed.

Harvey v. Willenberg, supra.

Accordingly, the decision below, which ignores the presumption of irreparable harm, erroneously required proof of same.

Moreover, even if Petitioner were required to prove irreparable harm, it is clear that it did so. Rule 1.610(a) provides that if it appears from the facts shown that immediate and irreparable injury will result if notice is given, an injunction without notice may be issued. Indeed, this Court has specifically held that to justify issuance of an injunction without notice, "it must appear that the time required to give notice of a hearing would actually permit the threatened injury to occur." (emphasis added). Lieberman v. Marshall, 236 So.2d 120 (Fla. 1970). See Dixie Music Company v. Pike, 135 Fla. 671, 185 So. 441 (Fla. 1938); Godwin v. Phifer, 51 Fla. 441, 41 So. 597 (Fla. 1906). Clearly, the complaint of Petitioner, which alleged specific facts; contained affidavits; and set forth the injury that would occur if notice was given,¹ support the trial court's determination that issuance of an injunction without notice was necessary.

¹ The specifics of the complaint are set forth more fully in Petitioner's brief.

In finding to the contrary, the court below determined that the allegations in the complaint were insufficient because they did not state with certainty that the injury would result. The higher standard employed by the court below not only runs afoul of the clear language in the Rule, but also places a nearly insurmountable burden upon parties seeking an injunction without notice. In order to meet the burden would likely require use of a source such as a confidential informant to establish with certainty the future actions of an adverse party. The standard employed, in all practical purposes, eliminates injunctions without notice.

The Department of Legal Affairs would urge that an injunction without notice is properly issued when, as in the instant case, the allegations in the complaint and the supporting affidavits make it manifest to the judge that the injury apprehended will be done. Godwin v. Phifer, supra. The decision of the lower court would impair the Department of Legal Affairs' ability to enforce Chapter 501, Part II of the Florida Statutes and its ability to protect the consumers of the State of Florida. As such, it turns to this Court for relief.

CONCLUSION

Based upon the foregoing reasons and citations of authority, this Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE was furnished by mail to SHARON L. BARNETT, Office of Comptroller, 1313 Tampa Street, Suite 615, Tampa, Florida 33602-3394, MATTHEW W. BURNS, ESQ., P.O. Box 1226, Destin, Florida 32541, JAMES W. MIDDLETON, ESQ., 216 Hospital Drive, Ft. Walton Beach, Florida 32548, and JOHN G. PIERCE, ESQ., 800 N. Ferncreek Avenue, Orlando, Florida 32803, on this 14 day of April, 1988.



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/bf