047

IN THE SUPREME COURT OF FLORIDA

MARTIN COUNTY, etc.,

Petitioners,

vs. Case No. 78,768

WILLIE EDENFIELD, SR.,

Respondent. Fourth District court of
_____/ Appeal Case No. 90-0398

BRIEF OF AMICUS CURIAE
BROWARD COUNTY

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PRELIMINARY STATEMENT

Broward County is filing this brief as amicus curiae in support of Petitioners, Martin County, etc. Broward County adopts the Statement of the Case and Facts presented in Martin County's initial brief.

ARGUMENT

FLORIDA STATUTES SECTION 112.3187, THE "WHISTLE-BLOWER'S ACT," IS NOT APPLICABLE TO THOSE EMPLOYEES WHO REPORT A WRONGDOING IN WHICH THEY PARTICIPATED.

Broward County is alarmed at the potential ramifications for local governments of the decision of the Fourth District Court of Appeal that is being reviewed in this case. In holding that the Whistle-blower's Act is applicable to employees who report a wrongdoing in which they participated, the Fourth District Court of Appeal's opinion will greatly impact local governmental operations and employment, and will have a direct impact on those employers' ability to discipline their employees.

The Fourth District Court of Appeal's interpretation of the statute is contrary to the clear language of the Whistle-blower's Act. The Act reads, in pertinent part:

> It shall be a defense to any action brought pursuant to this section that the adverse action was predicated upon grounds other than the employee's or person's exercise of rights protected by this section.

§ 112.3187(10), Fla. Stat. (1989).

Clearly, under the Whistle-blower's Act, the illegal activity itself and the reporting of the illegal activity are treated as separate elements. The Whistle-blower's Act affords protection only to the reporting element. (See R. 43). Therefore, the involvement in illegal activity remains unprotected, and the employer retains the right to discipline an employee for involvement in the illegal activity. To allow a co-conspirator or a participant in the illegal activity to obtain refuge under the

Whistle-blower's Act and avoid discipline by reporting the activity is beyond comprehension.

Under the Fourth District Court of Appeal's interpretation, however, an employee is able to engage in any type of illegal activity and escape discipline by simply reporting the illegal activity whenever he or she feels that the threat of discovery is imminent. In other words, if a county employee lies, cheats or steals from the county, until he or she is about to be caught and then reports the illegal activity, he or she is suddenly beyond reach under the Whistle-blower's Act. This situation places employers, such as Broward County and Martin County, in the untenable position of being powerless to stop employees who repeatedly engage in illegal activities and report the activity merely to evade discovery and discipline.

While no other Florida court has addressed this situation, case law in other jurisdictions supports Martin County's position that the Whistle-blower's Act is inapplicable to employees who report a wrongdoing in which they participated. Under a similar statute, a federal court in Michigan held that protection of a wrongdoer is clearly not the intent of a whistleblower-type act. See Wolcott v. Champion Intern. Corp., 691 F.Supp. 1052 (W.D. Mich. 1987). In Wolcott, the court held that the plaintiff failed to establish a prima facie case of retaliation under the act. Id. at 1058. Of particular importance to the court was the fact that "[t]he Whistleblower Act was not intended to serve as a tool for extortion." Id. at 1059. As the Wolcott court noted, those

availing themselves of the statute's protection should be motivated, at least in part, by a desire to inform the public about violations of laws and statutes, as a service to the public. Id. The Wolcott plaintiff, like the plaintiff in the instant case, clearly failed to meet these criteria. Id. In fact, as the Wolcott court stated:

> [P]laintiff's subsequent attempt to legitimize his extortive actions via this lawsuit is scandalous and borders on abuse of process.

Id.

Moreover, another Michigan federal court has held that only those acting in goad faith are protected by Michigan's Whistleblowers Act. See Melchi v. Burns Intern. Sec. Services Inc., 597 F.Supp. 575, 583 (E.D. Mich. 1984). The Michigan statute, like Section 112.3187, Florida Statutes, expressly excludes from its coverage reports that the employee knows are false. See id.; § 112.3187 (4)(c), Fla. Stat. Thus, as the Melchi court noted, the legislature recognized that employees must not be permitted to use the statute in a purely offensive manner by reporting violations known to be false. Melchi, 597 F.Supp. at 583. By precluding protection to those acting in bad faith, the legislature clearly implied that only those acting in good faith are entitled to protection. Id.

The legislative history behind Section 112.3187, Florida Statutes, clearly supports the opinion of the Melchi court:

> [The] suggestion that Whistleblower might unwittingly create a statutory immunity loophole for wrongdoers is of some concern. It is to be noted however, that while one

> cannot be fired or disciplined for "blowing the whistle" one could be fired or disciplined for participation in an act warranting whistleblowing.

(R. 43).

Thus, the Whistle-blower's Act was in no way intended to provide immunity for an employee who engaged in wrongful conduct and, fearing discovery, decided to report that conduct. The opinion of the Fourth District Court of Appeal is clearly erroneous, will have tremendous negative impact on local governments statewide, and must be reversed.

CONCLUSION

For all of the above and foregoing reasons, the opinion of the Fourth District Court of Appeal should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail to J. David Richeson, Esq., and Joseph J. Mancini, Esq., Richeson & Brown, P.A., P.O. Box 4048, Fort Pierce, Florida 34949; Noreen S. Dreyer, County Attorney, Martin County, 2401 S.E. Monterey Road, Stuart, Florida 34996; and to Philip Burlington, Esq., 1615 Forum Place, suite 4-B, West Palm Beach, Florida 33401, this 8th day of November, 1991.

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11/7/91