O.A. 6-3-92 a

FILED
SID J. WHITE
SEP 24 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

MARTIN COUNTY, FLORIDA, ETC.,

Petitioner

v. CASE NO. 78,768

WILLIE EDENFIELD, SR.,

Respondent

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

PETITIONER'S INITIAL SUPPLEMENTAL BRIEF

On Review from the District Court of Appeal, Fourth District, State of Florida

RICHESON & BROWN, P.A.
J. DAVID RICHESON, ESQ.
Florida Bar No. 175657
JOSEPH J. MANCINI, ESQ.
Florida Bar No. 384526
Post Office Box 4048
Fort Pierce, Fl. 34948
(407) 465-5111
Attorneys for Petitioner

TABLE OF CONTENTS

Table of Citations — Page

Other

ISSUES FOR SUPPLEMENTAL BRIEFING

I. THE LEGISLATURE'S RECENT AMENDMENT OF F.S. §§112.3187 et seq. CONSTITUTES A REAFFIRMATION AND A CLARIFICATION OF THE WHISTLEBLOWER ACT OF 1986 AND MAKES IT CLEAR THAT AN ADMITTED WRONGDOER, SUCH AS THE RESPONDENT, CANNOT INVOKE THE PROTECTION OF THE ACT.

II. EVEN IF THE AMENDMENT TO THE ACT IS CONSIDERED A SUBSTANTIVE CHANGE TO THE ACT, IT IS APPLICABLE TO, AND DISPOSITIVE OF, THE INSTANT CASE UNDER THE AUTHORITY OF GRIFFITH v. FLORIDA PAROLE PROBATION COM'N

PREFACE

The petitioner, Martin County, Florida, (Martin County) was the defendant in the trial court and the appellee in the Court of Appeal.

The Respondent, Willie Edenfield, Sr., (Mr. Edenfield) was the plaintiff in the trial court and the appellant in the Court of Appeal.

Reference to a document in the Record will be designated [R:] followed by a page (p.) paragraph (para.) and/or if appropriate a line (1.) designation.

STATEMENT OF THE CASE AND FACTS

The petitioner is filing the Initial Supplemental Brief pursuant to the Court's August 25, 1992 Order. A key issue in this litigation is whether or not an admitted governmental wrongdoer, such as the respondent, can invoke the protection of Florida's Whistleblower Act of 1986, F.S. SS112.3187 et seq. (hereinafter "the Act"). Subsequent to the filing of briefs and oral argument in this case, an amendment to the Act was signed into law on or about July 7, 1992. In pertinent part the amendment added language that the protection of the Act was not available to any individual who committed or intentionally participated in wrongdoing. 1./

Because of the obvious relevance of the amendment, petitioner filed a Notice of Supplemental Authority and a subsequent Motion For Leave To File Supplemental Memorandum. Attached as exhibits to Martin County's Motion were HB 371-H, which was signed into law on or about July 7, 1992, as well as Senate Committee Substitute for Senate Bill 666. The Senate bill was a predecessor bill to HB 371-H. This predecessor bill contained, inter alia, many of the same

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1./ HB 371-H also contained other amendments to the Act not pertinent to the instant case. These additional amendments established a host of state administrative procedures which did not previously exist for the processing and investigation of "whistleblower" complaints including a toll-free hotline for reporting violations to the Chief Inspector General.

provisions of the House bill including the exclusion for governmental wrongdoers. The Senate bill also contained a provision that the Act did not apply to any judicial or administrative action filed prior to the effective date of the Act. However, this provision was not included in the bill which was ultimately enacted.

SUMMARY OF ARGUMENT

I. THE LEGISLATURE'S RECENT AMENDMENT OF F.S. §§112.3187 et seq. CONSTITUTES A REAFFIRMATION AND A CLARIFICATION OF THE WHISTLEBLOWER ACT OF 1986 AND MAKES IT CLEAR THAT AN ADMITTED WRONGDOER, SUCH AS THE RESPONDENT, CANNOT INVOKE THE PROTECTION OF THE ACT.

It is a well-established principle of statutory construction that an appellate court has both a right and a duty to consider subsequent amendments to a statute when the court is attempting to discern the scope and meaning of the prior legislation. An application of that principle to the instant case shows that the recent amendment to the Act constitutes a reaffirmation and clarification of the original intent that admitted wrongdoers do not have a cause of action under the Act.

II EVEN IF THE AMENDMENT TO THE ACT IS CONSIDERED A SUBSTANTIVE CHANGE TO THE ACT, IT IS APPLICABLE TO, AND DISPOSITIVE OF, THE INSTANT CASE UNDER THE AUTHORITY OF GRIFFITH v. FLORIDA PROBATION COM'N.

If the amendment in question is in some fashion construed as a substantive change in the Act, it is still dispositive of the instant case. This Court has previously held that if, during the pendency of an appeal, the Legislature amends a statute to preclude certain specified individuals from pursuing a statutorily created cause of action, such an amendment is applied to pending appeals. In the instant case the amendment to the Act clearly provides that individuals who have committed the underlying wrongdoing cannot pursue a cause of action under the Act. Because Mr. Edenfield has already admitted his involvement

in the wrongdoing, he is precluded from invoking the protection of the Act.

I. THE LEGISLATURE'S RECENT AMENDMENT OF F.S. §§112.3187 et seq. CONSTITUTES A REAFFIRMATION AND A CLARIFICATION OF THE WHISTLEBLOWER ACT OF 1986 AND MAKES IT CLEAR THAT AN ADMITTED WRONGDOER, SUCH AS THE RESPONDENT, CANNOT INVOKE THE PROTECTION OF THE ACT.

Martin County, has argued throughout the proceedings in this case that Mr. Edenfield was not entitled to invoke the protection of F.S. §§112.3187 et seq., the Whistleblower Act of 1986, (hereinafter "the Act") because of his own involvement in the wrongdoing which he allegedly "reported" some four months after the fact. Martin County's argument was based, in part, on the legislative history of the Act which indicated that the Act was not intended to apply to wrongdoers who "confessed" their misfeasance once the "cat was out of the bag". See e.g. Petitioner's Initial Brief On The Merits, pp. 8-9. As Martin County previously informed the Court, the Florida Legislature, on or about June 30, 1992 amended the Act. Petitioner's Notice of Supplemental Authority; Petitioner's Motion for Leave To File Supplemental Memorandum. In relevant part the amendment, which was signed into law on or about July 7, 1992, added the following language to F.S. §§112.3187(7) [employees and persons protected],

> No remedy or other protection under SS112.3187 - 112.31895 applies to any person who has committed or intentionally participated in committing the violation or suspected violation for which protection under SS112.3187 - 112.31895 is being sought.

Martin County submits that its prior arguments to the Court clearly established that Mr. Edenfield's claim under the Act was precluded because of his own misfeasance. The recent

amendment to the Act is a further message from the Legislature, if one was needed, that the County's position is well-taken. As detailed below, under several well-established principles of statutory construction, the foregoing amendment is dispositive of the instant case and mandates reversal of the Fourth District Court of Appeal's opinion.

This honorable Court has long recognized the principle that it,

> ... has the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation.
> Gay v. Canada Dry-Bottling Co., 59 So. 2d 788, 790 (Fla. 1952) (emphasis added)

See, also, Lowry v. Parole and Probation Commission, 473 So. 2d 1248 (Fla. 1985); Palma Del Mar v. Commercial Laundries, 586 So.2d 315 (Fla. 1991). In each of the three preceding cases the posture was identical to the instant case, i.e. there had been a subsequent amendment to the controlling statute. In each case the Court examined the subsequent legislation to determine the intended result of the previously enacted statute. In these cases the Court did not specifically engage in an analysis of whether or not the amendment in question was to be applied retroactively, but rather used the amendment to shed light on the original legislation.

For example, Palma Del Mar involved the interpretation of F.S. S718.3025 (1985) which placed certain restrictions on vendor contracts with condominium associations. As

initially enacted the statute contained no specific exclusions for particular types of vendor contracts but rather simply noted that it applied to contracts for "maintenance or management services". The Second District Court of Appeal held that, in its view, the Legislature did not intend to include in the statutory coverage the laundry machine contracts which were at issue. This opinion was in direct conflict with a Third District Court of Appeal opinion, Wash-Bowl Vending Co. v. No. 3 Condominium Association, 485 So.2d 1307 (Fla. 3d DCA 1986) which held that such contracts came within the purview of the statute. Following the Wash-Bowl decision, the Legislature clarified the statute by adding language which specifically exempted, inter alia, laundry machine contracts.

In its opinion in Palma Del Mar this honorable Court focused on the subsequent amendment to the statute and noted that the,

> ... legislature has the authority to explain its original intent, and did so in this instance, without modifying the original wording of section 718.3025 ... Consequently, it is appropriate for this Court to consider [the subsequent amendment] particularly since there had been a judicial interpretation after the original enactment of section 718.3025 which the legislature believed was contrary to its original intent.
> Palma Del Mar, at 317.

Martin County submits that the Palma Del Mar analysis is dispositive of the instant case. In this case, as in Palma Del Mar, the statute in question arguably did not initially contain a specifically worded exemption from

coverage for wrongdoers such as Mr. Edenfield. However, as petitioner has previously demonstrated, the legislative history indicates a clear: intent that such wrongdoers were not to be accorded protection under the Act. In the instant case, as in Palma Del Mar, there has been a judicial interpretation of the original Act which is contrary to the legislative intent, namely the Fourth District's opinion in this case. Finally in this case also, the Legislature has subsequently added language to the Act explaining and clarifying its original intent that wrongdoers cannot seek protection under the Act.

This approach, i.e. examining recent statutory amendments, has been repeatedly utilized by the courts in their efforts to properly interpret statutory language. In Cay, supra, a dispute arose regarding the scope of a tax exemption contained in the Florida Revenue Act of 1949. During the pendency of the litigation the Legislature amended the act to clarify the scope of the exemption in question. In its decision in the case this honorable Court specifically considered and relied on the subsequent amendment in determining the scope of the exemption contained in the original statute. See, also, New Smyrna Beach v. Internal Imp. Tr. F., 543 So.2d 824 (Fla. 5th DCA 1989) (subsequent amendment specifying in more detail the purposes for which certain funds could be used highly indicative of prior legislative intent); Keyes Investors Series 20 v. Dept. of State, 487 So.2d 59 (Fla. 1st DCA

1986) (subsequent amendment specifying certain filing fees in greater detail clarified prior statute).

Moreover the courts have rejected the argument that a subsequent clarifying statutory amendment is evidence that the prior version of the statute did not authorize the activity in question. Keyes Investors Series 20, supra, illustrates the point. The case involved whether or not the Florida Department of State was empowered to impose a filing fee on the appellant's amendment to its certificate of limited partnership. At the time the dispute arose the operative statute, F.S. §620.02(2), merely provided that fees were to be paid for filing several different categories of documents, but did not specifically reference certificates of amendment. The statute was subsequently amended to specifically include such certificates. The appellant therefore argued that this subsequent legislative action was evidence that the Department of State did not have authority under the prior statute to impose the fee. The Keyes court rejected the argument, noting that a change in statutory language does not always indicate an intent to change the law but rather can evidence an intent simply to clarify the law. See also, State Ex rel Szabo Food Serv. v. Dickinson, 286 So.2d 529 (Fla. 1973); Ocala Breeder Sales Co. v. Division of Pari-Mutuel Wagering, 464 So.2d 1272 (Fla. 1st DCA 1985).

The foregoing analysis is particularly applicable in

light of the timing of the Legislature's amendment to the Act. As this Court has previously noted, when an amendment to a statute is enacted soon after controversies as to the original act arise, a court may consider the amendment as a legislative interpretation of the original law and not as a substantive change in the law. Lowry, supra. In the instant case the Fourth District Court of Appeal's opinion under review was issued on July 31, 1991. To date, this opinion remains the only Florida appellate opinion addressing the coverage provisions of the Act. The amendment to the Act was drafted and signed into law less than one year after the Fourth District's opinion was issued. Such prompt legislative response to a judicial misapprehension of legislative intent has traditionally been held to constitute a clarification of, rather than a substantive change to, the existing statute. Lowry, supra; accord Gay, supra ("court could infer a legislative intent to clarify rather than change the existing law"); Williams v. Hartford Acc. & Indem. Co., 382 So.2d 1216 (Fla. 1980) (timing of the amendment indicates purpose was to clarify existing law).

As further evidence that the amendment to the Act constitutes a reaffirmation and a clarification of the original intent, rather than a substantive change, the petitioner requests the Court's attention to a predecessor bill to the bill which was finally signed into law. Senate Committee Substitute for Senate Bill 666, exhibit 2 to

Petitioner's Motion For Leave To File Supplemental Memorandum, contains the identical language regarding non-coverage of wrongdoers which was enacted into law. However, this latter bill also contained a Section 4 which read:

> Applicability to pending actions. -- This act does not apply to any judicial or administrative action filed prior to the effective date of this act.

This section was omitted from the final version of the bill which became law. Martin County submits that had the Legislature viewed the language regarding coverage of wrongdoers as effecting a substantive change in the statute then logic dictates that the Legislature would have included language addressing the applicability of the change to pending cases. Conversely, if the amendment is merely a clarification of the original intent, then such language is not necessary. It is not necessary because, under the Gay and Palma Del Mar rationale discussed above, a court will in fact consider such a subsequent amendment when deciding a pending case.

In short, the recent amendment to the Act clarifies and supports what the petitioner has been arguing throughout this case, namely that admitted wrongdoers cannot invoke the protection of the Act. Therefore the Fourth District Court of Appeal's opinion should be reversed.

11. EVEN IF THE AMENDMENT TO THE ACT IS CONSIDERED A SUBSTANTIVE CHANGE TO THE ACT, IT IS APPLICABLE TO, AND DISPOSITIVE OF, THE INSTANT CASE UNDER THE AUTHORITY OF GRIFFITH v. FLORIDA PAROLE PROBATION COM'N

As detailed above, the amendment to the Act operates merely as a reaffirmation of the initial legislative intent of the Whistleblower Act and effects no substantive change in the law. However, even assuming arguendo that the legislation is in some manner "substantive", it clearly is applicable to the instant case as shown in the discussion below. Further, Martin County respectfully submits that an application of the amendment to this case mandates a reversal of the Fourth District Court of Appeal's opinion.

In Griffith v. Florida Parole & Probation Com'n, 485 So.2d 818 (Fla. 1986) this honorable Court addressed an issue analogous to that presented in the instant case. Griffith involved a prisoner's judicial challenge, pursuant to F.S. S120.68 (1981), of an allegedly improper presumptive parole release date. At the time the prisoner filed his appeal, such a procedure was statutorily authorized. However, during the pendency of his appeal the legislature amended the relevant statutes to specifically preclude prisoners from appealing such decisions under F.S. §120.68. The amendment in question read,

> Prisoners shall not be considered parties in any other proceedings and may not seek judicial review under §120.68 of any other agency action.
>
> Griffith at 820.

The Griffith court held that the foregoing amendment deprived the court of jurisdiction to entertain any such

appeals. Further, and most importantly for purposes of the instant case, this honorable Court applied the amendment to the case before it and sustained the lower court's dismissal of the appeal.

The foregoing rationale applies with equal force to the instant case. The amendment to the Whistleblower Act is akin to the amendment in Griffith in that both amendments held that certain specified individuals could no longer pursue a particular statutorily created cause of action. In both situations, the amendments in question were passed while appeals were pending. Likewise, in both **cases** the plaintiffs had available to them other remedies. As noted in Griffith, prisoners could still pursue writs of mandamus or habeas corpus. In the instant case, Mr. Edenfield initially challenged the personnel action taken against him by filing an administrative grievance and proceeding to an administrative hearing. [R: 10]. Following the final adverse administrative action, Mr. Edenfield arguably could have contested the matter pursuant to Fl. R. **App.** P. 9.030, 9.110, governing appellate review of final administrative action or pursued a writ of certiorari action. Thus other possible remedies were available to him. In short, there is no principled distinction between Griffith and the instant **case.** Therefore Martin County respectfully submits that the Whistleblower amendment should be applied to this appeal just **as** the legislative amendment was applied in Griffith. Such an application would also be consistent with the

well-established principle that an appellate court will dispose of a case according to the law prevailing at the time of the appellate decision. Lowe v. Price, 436 So.2d 142 (Fla. 1983); Zobac v. Southeastern Hospital Dist., 382 So.2d 829 (Fla. 4th DCA 1986); Hapney v. Central Garage, Inc., 579 So.2d 127 (Fla. 2d DCA 1991, review denied 591 So.2d 180 (Fla. 1991); (1990 amendment to F.S. S542.33 regarding enforceability of covenants not to compete is applicable to pending action even though the contract in question was entered into in 1988).

An application of the amendment to the facts of this case, as established in the trial court below, shows that Martin County is entitled to judgment as a matter of law. As previously noted, the amendment states that the protections of the Act are not available to an individual who has "committed" the underlying wrongdoing. It is beyond dispute that Mr. Edenfield "committed" the wrongdoing at issue. See, e.g. Brief of Respondent On The Merits, pp. 5-7 (setting forth respondent's involvement in the misappropriation of sod). Therefore, under the specific language of the amendment he does not come within the protection of the Act and the Fourth District's Opinion should therefore be reversed.

CONCLUSION

The Legislature's recent clarifying amendment of the Act, coming as it did hortly after the Fourth District's opinion in this case, makes it clear that the legislative intent underlying the Act was, and continues to be, that wrongdoers such as the respondent cannot invoke the protection of the Act. This Court has long recognized that in the process of construing the meaning and coverage of a statute a court **has** both a right **and** a duty to consider subsequent amendments to the statute. An application of that principle to the instant case shows that Martin County's position is well-taken and the appellate decision herein should be reversed.

Even assuming that the recent amendment in some fashion effects a substantive change, the respondent cannot prevail. The amendment provides, in essence, that certain classes or groups of individuals do not have a cause of action under the Act, namely individuals who committed the wrongdoing they allegedly "reported". It is beyond dispute that Mr. Edenfield comes within the class of individuals who do not have a cause of action under the Act. Therefore the Fourth District Court of Appeal's opinion should be reversed and the litigation dismissed.

Respectfully submitted,
RICHESON & BROWN, P.A.

J. David Richeson
Florida Bar No. **175657**

Joseph J. Mancini
Florida Bar No. 384526
Post Office Box 4048
Fort Pierce, Fl. 34048
(407) 465-5111

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail , postage pre-paid, to Philip Burlington, Esq., 1615 Forum Place, Suite 4-B, West Palm Beach, Fl. 33401 and W. Trent Steele, Esq., Gardens Plaza, suite 300, 3300 PGA Boulevard, Palm Beach Gardens, Fl. 33410 and Andrea Karns Hoffman, Esq., Broward County Governmental Center, suite 423, 115 South Andrews Avenue, Fort Lauderdale, Fl. 33301, this 23 day of September, 1992.

Attorney-at-law