90,768 w/app

12-9

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 BRIEF ON THE MERITS

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

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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 (l.) designation.

STATEMENT OF THE CASE AND FACTS

Presented for this court's review is the Fourth District Court of Appeal's July 31, 1991, decision. The trial court had granted the petitioner, Martin County, summary judgment in this matter. In its July 31 decision, the Court of Appeal reversed the trial court's decision. On September 10, 1991, the Court of Appeal certified its opinion as one that passes upon a question of great public importance.

The opinion under review discussed and construed, inter alia, certain provisions of § 112.3187, Florida Statutes (1989), the "Whistleblower's Act of 1986 (hereinafter "the Act"), and specifically held that the Act is applicable, without exception, to individuals who previously participated in governmental wrongdoing.

A. Trial Court Proceedings

The underlying action was commenced on May 15, 1989, by Mr. Edenfield's filing of a one-count complaint alleging that his employer, Martin County, had taken adverse personnel action against him in violation of the Act when he was transferred to another job in another department at a lower rate of pay. [R: 3-41. Martin County subsequently filed a motion for summary judgment. [R: 8-13]. The motion was based solely on Mr. Edenfield's own deposition testimony and was in the nature of a statutory construction argument. [R: 8-13]. The gist of the argument was that Mr. Edenfield could not seek the protection of the Act because he was a

"wrongdoer" himself who took active steps to conceal his involvement in the improper activities, who never reported or discussed his involvement for over four months, and finally only discussed the improper activites when he was questioned about it by a county official who already knew of the incident.

In brief, the facts cited in the motion for summary judgment were as follows and are found at **pages** 8-10 of the Record. [R: 8-10]. Mr. Edenfield, who at the time was the Assistant Road Superintendent for Martin County, used a Martin County truck to deliver sod to a private residence owned by Mr. Edenfield's supervisor. The sod that Mr. Edenfield delivered was billed to and paid for by Martin County. Mr. Edenfield ordered one of his subordinate employees to assist him in delivering the sod. Mr. Edenfield knew at the time he did it that his actions in this regard were wrong and contrary to Martin County's rules **and** regulations. Subsequent to his delivery of the sod, he took active steps to conceal his involvement in the matter. Mr. Edenfield first discussed his involvement in the incident with a Martin County official, Commissioner John Holt, some four months after the incident. This discussion took place during a telephone conversation initiated by the Commissioner, not Mr. Edenfield. Mr. Edenfield admitted his involvement in the incident to Commissioner Holt only after Mr. Holt first raised the matter with him. During this conversation, Mr. Edenfield implicated both himself and his

supervisor.

At the hearing on the motion, Mr. Edenfield's recently retained substitute counsel submitted affidavits in opposition to the motion and requested an extension of time to respond to the motion. [R: 82-83]. A dispute arose regarding whether or not any of the materials in opposition to the motion had been timely served and the court ordered the parties to submit memoranda of law regarding the requested extension of time. [R: 1481. Following receipt of the memoranda, the trial court issued an order denying the request for extension of time and granting Martin County summary judgment. [R: 229-2341. Mr. Edenfield then took an appeal of that order to the Fourth District Court of Appeal. [R: 2351.

B. Appellate Proceedings

In its July 31, 1991 opinion, the Court of Appeals did not address the denial of Mr. Edenfield's motion for extension of time. See, Appendix A. The opinion did hold that the one affidavit which was timely served raised a factual dispute as to whether or not Mr. Edenfield suffered "adverse personnel action". The opinion focused primarily on the fact that Mr. Edenfield had disclosed information regarding his supervisor. In discussing the County's argument that Mr. Edenfield could not invoke the protection of the Act, the opinion merely notes that, in the court's view, the Act does not contain "...any exclusion for those 'in pari delicto'".

As noted above, the Court of Appeals subsequently certified its opinion as one which passed on a question of great public importance and pursuant to that certification Martin County filed with this honorable Court a Notice to Invoke Discretionary Jurisdiction. By order dated October 17, 1991, this Court postponed a decision on jurisdiction and set forth a briefing schedule.

SUMMARY OF ARGUMENT

I

FLORIDA'S WHISTLE-BLOWER'S ACT OF 1986 (§ 112.3187, FLORIDA STATUTES (1989)) DOES NOT PROVIDE PROTECTION FOR AN EMPLOYEE, SUCH AS THE RESPONDENT, WHO HAS PARTICIPATED IN GOVERNMENTAL WRONG-DOING, TAKEN ACTIVE STEPS TO CONCEAL HIS PARTICIPATION AND DISCLOSED HIS PARTICIPATION ONLY WHEN CONFRONTED BY SOMEONE WHO WAS ALREADY AWARE OF THE INCIDENT

The legislative history preceding the passage of the Act unequivocally shows that the Act was not intended to permit wrong-doers such as Mr. Edenfield, who have taken active steps to conceal their improper activities, to exculpate themselves from discipline by the simple expedient of "blowing the whistle" when they are finally confronted by someone with prior knowledge of the wrong-doing. To condone such a construction of the Act would be contrary not only to the legislative history but would be violative of fundamental principles of statutory construction.

II

THE COURT OF APPEAL OPINION UNDER REVIEW ARGUABLY IMPERMISSIBLY PRECLUDES A DEFENDANT FROM ASSERTING THE SPECIFIC DEFENSE, PROVIDED FOR IN THE ACT, THAT THE ADVERSE PERSONNEL ACTION WAS TAKEN FOR REASONS OTHER THAN "WHISTLE-BLOWING"

The Act specifically provides that "...it shall be a defense" (emphasis added) to an action under the Act that adverse personnel action was taken for reasons other than an employee's exercise of his protected rights. However, the Court of Appeal's cursory opinion does not address this issue at all and provides no guidance or analysis regarding the interplay of this statutory defense with the facts of

the case. Indeed, the opinion could be interpreted to read the defense completely out of the Act.

ARGUMENT

FLORIDA'S **WHISTLE-BLOWER'S** ACT OF **1986** (§ 112.3187 FLORIDA **STATUTES** (1989)) DOES NOT PROVIDE PROTECTION FOR *AN* EMPLOYEE, SUCH **AS** THE RESPONDENT, WHO HAS **PARTICIPATED** IN GOVERNMENTAL **WRONG-DOING**, TAKEN **ACTIVE STEPS** TO **CONCEAL HIS PARTICIPATION AND DISCLOSED HIS PARTICIPATION** ONLY **WHEN** CONFRONTED BY SOMEONE **WHO** WAS ALREADY AWARE OF THE INCIDENT.

The petitioner respectfully submits that the Fourth District **Court** of Appeal's cursory treatment of the issue of the applicability of the Act to an individual such **as** the respondent who has engaged in an active campaign to conceal his misdeeds and then admits his involvement only after the misdeeds come to light, a matter of first impression in **Florida,**[1] is in error. The court's opinion fails to address, and is contrary to, the legislative history of the **Act**. Further, the **court's** construction of the Act provides virtually absolute immunity to wrong-doers. An employee **could** engage in all manner of illegal activity, do his best to conceal the illegal activity and when the individual felt it was in his best interests to do **so**, he could "blow the whistle" and then arguably assert the appellate court's decision as an absolute defense to any proposed discipline.

[1] As of this date the petitioner's research has uncovered no Florida appellate decisions which have addressed this issue. The Act has been mentioned in 4 reported decisions (Ujcic **v.** City of Apopka, 581 So.2d 218 **(Fla.** 5th DCA, **1991)**; Bezersa v. City of Hialeah, 571 So.2d. 123 (Fla. **3d** DCA 1990); City of Miami v. Coll, 546 **So.2d** 695 **(Fla. 3d** DCA **1988)**; Dept. of Corrections **v.** Croce, **520 So.2d. 695 (Fla.** 4th DCA 1988).) but these cases contain no relevant analysis.

This is so because the appellate opinion tersely notes, without explanation, analysis or guidance, that the Act does not contain any exclusion for those "in pari delicto" but rather includes "...even those who previously participated in the wrongdoing". [Appendix A, p.1]. There may indeed be situations in which a participant in the wrong-doing can invoke the protections of the Act. However, Martin County respectfully submits that the facts of the instant case do not constitute such a situation. Further, the Court of Appeal's failure to provide any guidance whatsoever in these uncharted waters, despite Martin County's request in its Motion For Clarification to do so, leaves unresolved a key issue under the court's interpretation of the Act; namely when is a wrong-doer not entitled, if ever, to invoke the protection of the Act.

The following analysis of the legislative history of the Act, coupled with the undisputed facts testified to by the respondent in his deposition and well-established principles of statutory construction, shows that the Court of Appeal was in error and the decision should be reversed.

A. Legislative History

In support of its motion for summary judgment, Martin County submitted the available record of legislative discussions and materials regarding the Act. The materials submitted included a legislative memorandum responding to various concerns which had been raised by the Attorney General's office regarding the proposed legislation [R: 421

and the transcript of an October 5, 1985 meeting of the Florida House Committee on Government Operations [R: 44-73].

One concern specifically raised by the Attorney General was that,

> 3.) The bill offers statutory immunity to wrongdoers who might otherwise be subject to prosecution. An employee engaged in fraud or malfeasance could "blow the whistle" himself when he felt the "cat was just about out [sic] the bag" and exculpate himself. [R: 421.

The response to the foregoing concern of the Attorney General was as follows,

> Mr. Minick's suggestion that Whistlebower 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]. (Emphasis added).

Statements made at the October 5, 1985, meeting of the Florida House Committee on Government Operations are consistent with the foregoing. The Committee specifically noted that,

> If there are other reasons to fire someone besides [sic] the person is whistle blowing, the whistle blowing wouldn't save him. [R: 58].

The Court of Appeal's holding that Mr. Edenfield is entitled to proceed under the Act is directly contrary to the foregoing unequivocal legislative intent and the opinion should therefore be reversed.

A brief review of the facts, as testified to by Mr. Edenfield himself, shows that his actions were even more

egregious than the factual setting anticipated in the legislative history materials and he was therefore not entitled to seek refuge in the Act.

At the time of the incident in question, Mr. Edenfield was the Assistant Road Superintendent for Martin County. [R: 8, para. 1]. He used a Martin County truck to deliver sod to a private residence owned by his supervisor. [R: 8, para. 1]. Mr. Edenfield ordered one of his subordinate employees to assist him in delivering the sod. [R: 9, para. 3]. The sod that he delivered was billed to and paid for by Martin County. [R: 9, para. 2]. Mr. Edenfield admitted that he knew his actions in using a Martin County owned truck to deliver sod, which was paid for by Martin County, to a private residence was wrong. [R: 9, para. 4]. After delivering the sod, Mr. Edenfield returned to his office with the invoice for the sod "...so nobody would know about it" except Mr. Edenfield, his supervisor and the secretary in the department. [R: 9, para. 5].

During the delivery of the sod, Mr. Edenfield damaged the tailgate of the Martin County truck he had used. He subsequently had the tailgate repaired by a Martin County department other than his own road department "...so nobody knew I was delivering sod for the road superintendent". [R: 9, para. 6]. Approximately two weeks after his participation in the incident, Mr. Edenfield returned to the sod company to obtain a copy of the invoice which he had signed when he took delivery of the sod. His admitted

motivation in doing so was to protect himself should the incident ever come to light. [R: 9, para. 6, 7]. Mr. Edenfield admitted his involvement in the incident only after he was questioned about it by a county commissioner approximately four months after the incident. [R: 9, para. 10]. During the four month period between the incident and his subsequent admission, Mr. Edenfield did not report either his, or anyone else's participation in the illegal activities or the fact that the incident had occurred to anyone. [R: 9, para. 12].

The petitioner submits that Mr. Edenfield's actions go beyond the scenario addressed in the legislative history above. By his own deposition admissions, Mr. Edenfield engaged in activity which he knew was wrong, he took active steps to conceal his activities, he did not report or discuss the incident with anyone for approximately four months and when he finally did confess to his involvement it was in response to a direct inquiry by someone who already knew of the incident. In contrast to the previously cited legislative history which addressed the issue of "whistle-blowing" when the "cat was just about out of the bag", Mr. Edenfield "blew the whistle", if at all, only when the cat was already out of the bag and scratching the furniture. Such conduct is not the type of activity which was intended to be protected under the Act and the Court of Appeal was in error in so holding.

As noted previously, this is a case of first impression

in Florida. However, courts in other jurisdictions have had occasion to interpret Whistleblower statutes. A particularly enlightening opinion is found in Wolcott v. Champion Intern. Corp., 691 F. Supp. 1052 (W.D. Mi. 1987)

In Wolcott, an employee threatened to report alleged wrongdoings by his employer to various agencies unless the employer changed its decision to scale down its operations. In granting the employer's Motion For Summary Judgment on the plaintiff's whistleblower claim, the court cited several factors which precluded coverage under the Michigan Whistle-blower's statute. Many of those same factors are present in the instant case. The Wolcott court noted that the plaintiff in the case had been involved in a portion of the illegal activity which the plaintiff later reported to the appropriate agencies. The Wolcott plaintiff was aware for quite some time of the problems he later reported to the authorities, yet "...failed to report it until it was in his best interest to do so" Wolcott, at 1064. In Wolcott, the plaintiff's attempt to shield himself through use of the Whistleblower's Act would put the plaintiff in a better position than he would have been in had he not reported the violations. Finally, the Wolcott court held that a plaintiff who seeks "whistleblower" protection must demonstrate that "...good faith or the interests of society as a whole" played a part in the plaintiff's decision to report the incident. Wolcott, at 1063.

Mr. Edenfield engaged in the illegal activity he now

claims to have "reported" to officials, as did the plaintiff in Wolcott. He was aware, as was the Wolcott plaintiff, of the improper activity for a considerable length of time yet did not "report" it until it was in his best interest to do so. Mr. Edenfield's attempt to shield himself through the Whistleblower's Act will put him in a better position than he would be without the Act. He cannot seriously contend that he could not have been disciplined by Martin County for his involvement in the illegal activity. However, by asserting a claim under F.S. § 112.3187, he seeks to be reinstated to his former position and recover all lost pay and benefits. Finally, there is no evidence that Mr. Edenfield acted in good faith or that he was motivated by a concern for the interests of society. Indeed, his own deposition testimony shows that the Plaintiff took active steps to conceal his involvement in the illegal activity and to "protect" himself should the incident ever come to light. See, also, Fiorillo v. U.S. Dept. of Justice, 795 F. 2d 1544, 1550 (Fed. Cir. 1986) (to be afforded protection under the federal whistleblower statute, "...the primary motivation of the employee must be the desire to inform the public on matters of public concern, and not personal vindictiveness [emphasis in original]).

As the Wolcott court noted, allowing whistleblower protection in circumstances similar to the instant case,

> ...would encourage other employees to hold off blowing the whistle until it becomes most advantageous for them to do so. Wolcott at 1066.

B. Statutory Construction

It is a fundamental tenet of statutory construction that a statute will not be interpreted so as to yield an absurd result. Williams v. State, 492 So.2d 1051 (Fla. 1986). The petitioner submits that the Court of Appeal's opinion in this case violates this fundamental principle in that it accords admitted wrongdoers a safe haven through the simple expedient of "blowing the whistle" on themselves and thereby insulating them from any disciplinary action by their employer.

The Williams case is particularly instructive in this regard. In the case, Williams was convicted of possession of a firearm by a convicted felon. One of Williams' arguments to this honorable Court was that F.S. § 790.23 allows a convicted felon to possess a firearm which is an antique or a replica thereof. Williams asserted that he had presented testimony of a firearms expert that the gun was an antique or replica. In rejecting Williams' argument, the Court noted that, while Williams may have met the literal requirements of the statute, such an argument exalted form over substance and yielded an absurd result. See, also, Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986) ("Legislative intent must be given effect even though it may contradict the strict letter of the statute.")

so too, in the instant case, the Court of Appeal's construction of the Act yields an absurd result. The

opinion holds that Mr. Edenfield was free to engage in improper conduct, take active steps to conceal his involvement and then, because he finally admitted his activities when confronted about it by an individual who already knew of the incident, he was free to invoke the **Act** to prevent his being disciplined for his improper activities. Further, the opinion as worded can arguably be invoked by all manner of governmental wrong-doers as an absolute bar to any proposed discipline for their misconduct. The Act **was** intended to reduce malfeasance in office, not encourage it. To allow a wrongdoer to hide behind the Act would encourage malfeasance and totally eviscerate the laudable goals of the Act.

Florida common law does not recognize a cause of action for retaliatory or wrongful discharge. Smith v. Piezo Technology & Prof. Adm'rs, 427 So.2d 182 (Fla. 1983). Therefore, the Whistleblower's Act, which provides such a cause of action in limited situations, is a statute in derogation of common law. It has been repeatedly held that such statutes are to be strictly construed and will not be interpreted to displace the common law further than is clearly necessary. See 49 Fla. Jur. 2d, Statutes, § 192 and numerous decisions cited therein.

Contrary to the foregoing principle, the Court of Appeal has accorded the Act the broadest of constructions with respect to both the facts of Mr. Edenfield's situation and to future wrong-doers. The opinion in question makes

absolutely no distinction between individuals who are, in essence, "co-conspirators" in the governmental malfeasance and individuals who are bona-fide whistleblowers, i.e. individuals who discover such malfeasance and promptly and forthrightly step forward to report the improper activity. The opinion sets forth no principles whatsoever that would enable either the trial court in this case or courts in subsequent cases to effectuate the clear legislative intent of the Act cited above when faced with a plaintiff/ wrongdoer. While the opinion is brief, its sweep is overly broad and should be reversed.

II

THE COURT OF APPEAL OPINION UNDER REVIEW ARGUABLY IMPERMISSIBLY PRECLUDES A DEFENDANT FROM ASSERTING THE SPECIFIC DEFENSE, PROVIDED FOR IN THE ACT, THAT THE ADVERSE PERSONNEL ACTION WAS TAKEN FOR REASONS OTHER THAN "WHISTLE-BLOWING".

The Act specifically provides that,

> 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).

However, the broad language of the Court of Appeal's opinion arguably precludes **Martin** County from even raising this defense should the matter be remanded to the trial court for further proceedings. The opinion does not discuss this section of the Act nor does it provide any guidance or direction **as** to how this provision is to be treated.

The Court of Appeal denied Martin County's Motion For Clarification which addressed, inter alia, the foregoing. The petitioner respectfully submits that the matter needs to be addressed and clarified by this honorable Court to provide guidance not only in this case but in future cases as well.

CONCLUSION

The Court of Appeal's opinion, as written, extends the protection of the Act to the very individuals the Act was designed to uncover and weed out of governmental service. The opinion makes no distinction between governmental wrongdoers like Mr. Edenfield who, when the "cat is out of the bag" despite their best efforts to hide their misconduct, blow the whistle on themselves and those governmental employees who courageously and forthrightly step forward to expose improprieties. The court's opinion does a grave disservice to the latter group and is clearly contrary to the intent and tenor of the legislation. The petitioner therefore respectfully submits that the decision should be reversed.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1991

WILLIE EDENFIELD, Sr.,

Appellant,

v.

MARTIN COUNTY, FLORIDA a political subdivision of the State of Florida,

Appellee.

CASE NO. 90-0398.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed July 31, 1991

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County, John E. Fennelly, Judge.

W. Trent **Steele**, Esq., West **Palm** Beach, for appellant.

Joseph J. Mancini, Esq., of Richeson & Brown, P.A., Ft. Pierce, for appellee.

FARMER, J.

We reverse the summary judgment in favor of the defendant County in this action for relief under section **112.3187**, Florida Statutes (1989), the "Whistle-blower's Act of 1986." In particular, we conclude that the affidavit of the witness Holt, which everyone agrees **was** timely served, showed a material factual dispute **as** to whether plaintiff suffered "adverse personnel action" after he had voluntarily disclosed what he believed to **be** wrongdoing **by** his supervisor.

We also do not believe that the Whistle-blowers **Act**, properly read, contains any exclusion for those "in pari delicto" **as** argued by the County. Quite the contrary, we construe the statute to include even those who previously participated in the **wrongdoing**, so **long as** they are employees or **persons**

> who disclose information on their own initiative in a sworn complaint; [or] who are requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal government entity; * * * .

§ 112.3187(7), Fla. Stat. (1989).

We certainly think that plaintiff's affidavits also showed the existence of evidence that a jury might accept as establishing that plaintiff himself had done nothing wrong and that he had voluntarily disclosed conduct of the supervisor which constituted malfeasance by an official of the county. It was not for the trial judge considering a motion for summary judgment to sort out the factual contentions and apply the law to them. We remand so that a jury can do so.

REVERSED.

DOWNEY, J., and WALDEN, JAMES H., Senior Judge, concur.