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SID J. WHITE
FEB 3 1992
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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, 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 REPLY BRIEF

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

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CITATIONS OF AUTHORITY

FACTUAL INACCURACIES IN THE ANSWER BRIEF

Martin County, would note several factual inaccuracies in the respondent's Brief on the Merits. Some of the inaccuracies pertain to arguably collateral matters that are unnecessary or irrelevant given the posture of this case. In its Suggestion For Certification, Martin County noted that the Fourth District's opinion addressed the issue of the applicability of the Act to individuals who previously participated in the wrongdoing, a matter of first impression in Florida. The opinion construed the Act to include such individuals without exception. However, much of the respondent's Brief is dedicated to arguing the weight of factual matters peculiar to this case which are more appropriately raised in front of a jury or argued before the trial court in opposition to a Motion For Summary Judgment e.g. the degree of culpability of the respondent, whether or not the respondent's supervisor suffered any detriment. The parties are before this Court for clarification and guidance on the broader issue of the applicability of the Act to governmental wrongdoers; an issue that the Fourth District has certified as being of great public importance. Detailed factual allegations and disputes regarding the respondent's particular situation are really of no import at this stage.

Therefore the County is of the view that it is neither necessary or appropriate to raise the types of collateral factual issues the respondent has set forth in his Brief. However, while the petitioner does not wish to unduly mire

the Court in these details, because the respondent has asserted them in his Brief the petitioner is compelled to point out the inaccuracies.

The Untimely Affidavits

The respondent makes several references to an affidavit of Roosevelt Jones. See, e.g. Respondent's Brief, pp. 8, 9, 16. While the County submits that this issue has no bearing on the question presented to this Court, the petitioner would point out the errors in the respondent's allegations. The respondent correctly notes that the Jones affidavit, as well as two other affidavits submitted by the respondent in opposition to the Motion for Summary Judgment, were ruled untimely by the trial court. Respondent's Brief, p. 8, fn. 2. However, the respondent incorrectly alleges that Martin County "... has not challenged the Fourth District's reliance on" the affidavit. Respondent's Brief, p. 8, fn. 2.

In its Motion for Rehearing and Motion for Rehearing En Banc the County specifically challenged the Court of Appeal's reliance on the untimely affidavits. See, Motion for Rehearing ... etc., pp. 4, 5. As noted in the Motion, petitioner's counsel did not receive the Jones affidavit, as well as two others, until a few minutes before the petitioner's Motion for Summary Judgment was to be heard. See, Stipulation To Correct The Record, para. 1 [R: 242].

A key issue before both the trial court and the Court

of Appeal was the respondent's Motion far Extension of Time to respond to the Motion for Summary Judgment. Barring an extension of time, the affidavits in question were untimely and could not be considered by either court. See, e.g. Stiles v. Evans, 206 So. 2d 65 (Fla. 4th DCA 1968). The trial court denied the request for additional time. This issue, among others, was presented to the Court of Appeal for decision. See, e.g. Appellant's Amended Initial Brief, p. v. However, the Fourth District never ruled on the trial court's denial of the extension of time. Because the Court of Appeal did not reverse the trial court's ruling on the issue, the three affidavits in question, including that of Mr. Jones, were untimely and therefore the affidavits are not properly part of the record in this case. With all due deference to the Court of Appeal, the petitioner submits that the opinion's reference to "affidavits" is, at most, a gratuitous remark and any such comment should not be considered by this Court.

Raulerson did not go unpunished

The respondent also raises the collateral issue of whether his supervisor, Mr. Raulerson, suffered any detriment for his involvement in the incident in question. The respondent repeatedly alleges that no action was taken against his supervisor, Mr. Raulerson, because of the incident in question. Respondent's Brief, pp. 7, 15, 18, 19, 23. The respondent also makes the unsupported, conclusory allegation that his supervisor, Raulerson, "...

was obviously extremely more culpable than" the respondent. Respondent's Brief, p. 18. Here again, because of the posture of this case, the County is of the view that it is not appropriate or necessary to address the matter. However, the County would note that the foregoing assertions are directly contrary to the respondent's deposition testimony. For example the respondent testified that Martin County had filed criminal charges against Mr. Raulerson because of the incident. (Depo., p. 86). Further, the respondent testified that as a result of the incident and the pending criminal charges, Mr. Raulerson submitted his resignation. (Depo., p. 108).

What in fact the record indicates in this case is that Mr. Raulerson, the head of the Road Department, resigned his position under the cloud of pending criminal charges. Also, it should be noted that the respondent had served as the assistant Road Sup rintendent for approximately 8 or 9 years. [Depo., p. 14]. In essence he was Raulerson's "right hand man". After the incident in question came to light the respondent subsequently admitted to additional prior acts of malfeasance and misuse of County property while he was second-in-command in the Road Department. See, e.g., Exhibit 3 to respondent's deposition, pp. 3, 6.

The petitioner submits that the question of "culpability" is, at least, an open one. Indeed, it could be argued that the respondent is more culpable because, had he not repeatedly carried out Mr. Raulerson's improper

requests, the malfeasance in the Road Department might never have occurred. In any event, the relevant inquiry here is not a weighing of the varying degrees of culpability of the respondent and his supervisor but rather what effect, if any, culpability has in deciding the issue certified to this court,

The "unverified" memo

The respondent makes several references to a memorandum from Kathryn Bradley to Jack Overstreet which was submitted to the trial court in support of the petitioner's Motion For Summary Judgment. The respondent characterizes this memorandum as "unverified" or "of uncertain origin". Brief, pp. 3, 12. As the respondent well knows, the memorandum in question was submitted to the trial court as part of the legislative history materials regarding the Whistleblower Act. These materials were obtained from the Florida State Archives and a certification to that effect is contained in the record [R: 150]. Further, at no time during the proceedings in the trial court or in the Court of Appeal has the respondent questioned the authenticity or veracity of the memorandum and he is therefore precluded from raising the matter for the first time here.

No oral argument

On page 3 of his Brief the respondent alleges that the Court of Appeal heard oral argument in this case. The

petitioner would simply note that no oral argument was heard and the Court of Appeal decided the case based solely on the parties' written submissions.

SUMMARY OF ARGUMENT

I

THE FOURTH DISTRICT'S OPINION DOES NOT SAY WHAT THE RESPONDENT ALLEGES IT DOES

While the respondent sets forth in his Brief a lengthy explanation of what the Fourth District allegedly meant by its opinion, he ignores the clear and unambiguous language of the opinion itself. The opinion under review states in pertinent part that the court does,

> ... not believe that the Whistle-blowers Act, properly read, contains any exclusion for those "in pari delicto" ... (emphasis added).

That opinion, lacking any further explanation or clarification, totally ignores subsection 10 of the Act, Fla. Stat. 112.3187(10) and the legislative intent. Arguably there is nothing in the opinion to prevent a governmental wrongdoer from asserting the opinion as a complete defense to any proposed discipline the employer may want to impose. Indeed, had the Fourth District said in its opinion what the respondent now reads into that opinion at least a portion of the instant proceedings would be unnecessary.

II

THE FOURTH DISTRICT'S CONSTRUCTION OF THE STATUTE IGNORES WELL-SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION

The statute is in fact ambiguous and the Court of Appeal was in error in not addressing the legislative history of the Act. Further, the opinion is contrary to other equally compelling principals of statutory construction.

III

PUBLIC DICTATES THAT NOT ALL WRONG-DOERS BE ACCORDED PROTECTION UNDER THE ACT

The laudable goal of Fla. Stat. 112.3187, i.e. to stop the misuse of tax dollars, is thwarted if every governmental wrong-doer is free, no matter how extensive or outrageous the malfeasance, to invoke the protection of the Act and put the governmental employer to the expense of a jury trial.

ARGUMENT

THE FOURTH DISTRICT'S OPINION DOES NOT SAY WHAT THE RESPONDENT ALLEGES IT DOES

It is interesting to note that in his Brief the respondent spends a good deal of time explaining what the Court of Appeal's opinion allegedly really says. The truth of the matter is that if the opinion actually said what the respondent alleges it says, the parties might not be before this honorable Court. The respondent asserts that "[n]othing in the Fourth District's decision eliminated or diminished" the defense that the respondent suffered adverse personnel action for reasons other than whistle-blowing. Respondent's Brief, pp. 14-15. However, the simple fact of the matter is that the opinion does not say that.

The opinion simply notes that the Whistle-blower's Act does not contain

> ... *any* exclusion for those in "pari-delicto" (emphasis added).

Unlike the respondent's Brief, the opinion contains no discussion of the alleged facts underlying the conclusion, no discussion of the interplay between subsection (7) and subsection (10) of the statute, and no discussion or balancing of the competing public policy interests involved. Because subsection (10) is an "exclusion" from the protection of the Act, the Fourth District's opinion, as worded, can be construed as reading that provision entirely out of the Act.

There is arguably nothing in the opinion as it is

written to prevent a governmental employee, such as the respondent, from engaging in all manner of official misfeasance and then, when called to task about the misconduct, take steps to comply with subsection (7) of the Act and finally assert the Fourth District's opinion as a complete defense to any proposed discipline. No amount of argument in the respondent's Brief can change the specific wording of the Court's opinion which can be read as supporting such a scenario. Only this honorable Court can do so and the petitioner respectfully submits that such action is necessary by this court. Indeed, the fact that the Fourth District certified its opinion rather than clarifying or rehearing the matter certainly implies that the Court of Appeal felt it needed this Court's guidance in these uncharted waters.

THE FOURTH DISTRICT'S CONSTRUCTION OF THE STATUTE IGNORES WELL-SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION

The respondent argues that the Fourth District's opinion is in accordance with the principle of statutory construction which holds that legislative history need not be consulted when the statute is clear and unambiguous. The petitioner submits however, that the foregoing principle is not applicable in the instant case because the statute is unclear and ambiguous with respect to the issue presented here.

Subsection (10) of the Act provided, at the time this

case arose, 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.

A fair reading of the foregoing section indicates that the Act contemplates the disciplining of wrong-doers even if they have "blown the whistle". However, the Act does not make it clear when and in what fashion this defense can be raised.[1./] The Act is likewise unclear as to the extent of the defense. Indeed, the County's argument is akin to a "subspecies" of this defense, i.e. the actions of an alleged wrongdoer may, in some instances, be so egregious as to constitute an absolute defense to a claim under the Act.

In light of the foregoing ambiguities it is entirely appropriate, indeed necessary, to examine the legislative history of the Act. That history supports the petitioner's contention that an admitted governmental wrong-doer cannot in every circumstance invoke the protection of the Act by the simple expedient of "blowing the whistle" when the improper activities are discovered.

Finally, the County would note also that if the language of the statute is as clear and unambiguous as the respondent asserts, the subsequent amendment of the Act

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1./ Out of an abundance of caution, the County did assert this matter as an affirmative defense in its Answer. [R:6]

would not have been necessary. Fla. Stat. §112.3187(10) now reads as follows:

> It shall be an affirmative defense to any action brought pursuant to this section that the adverse action was predicated upon grounds other than, and would have been taken absent, the employee's or person's exercise of rights protected by this section. (changes underlined)

Aside from the issue of "ambiguity", is the well-established principle that a statute will not be interpreted so as to yield an absurd result. The respondent repeatedly argues that he is entitled to the protection of the Act because he has allegedly met the literal requirements of subsection (7). As this Court so aptly noted, however,

> This literal requirement of the statute exalts form over substance to the detriment of public policy, and such a result is clearly absurd.
> Williams v. State 492 So. 2d 1051, 1054 (Fla. 1986)

See, also Byrd v. Richardson-Greenshields Securities, 552 So. 2d 1099, 1102 (Fla. 1989) (a court's obligation "... is to honor the obvious legislative intent and policy behind an enactment, even where that intent requires an interpretation that exceeds the literal language of the statute"). Curiously, even though the petitioner raised the foregoing statutory construction argument in its initial Brief, the respondent has not addressed it. Likewise, the respondent has not addressed the petitioner's argument that the Whistle-blower's Act is a statute in derogation of common law and therefore is to be strictly construed. Because

these arguments have not been addressed, it would appear that the respondent does not contest the arguments.

Finally, the respondent argues that the Fourth District's opinion did not need to address subsection (10) because that specific defense was not presented to the Court of Appeal. Respondent's Brief, p. 15. However, it is a black letter principle of statutory construction that a statute should be construed in its entirety. Wilensky v. Fields, 267 So. 2d 1 (Fla. 1972); 49 Fla. Jur. 2d, Statutes, §115. In light of that principle, the Fourth District had an obligation to at least reconcile its holding that the Act contains no exclusion with the explicit exclusion contained in subsection (10). Indeed, in its Motion For Clarification, the County specifically requested guidance regarding what issues remained for trial in the case after remand. As previously noted however, the Court of Appeal felt that clarification and guidance should more appropriately come from this Court, as evidenced by the court's certification of its opinion. The County therefore respectfully submits that the issue should be addressed and clarified by this honorable Court.

III

PUBLIC POLICY DICTATES THAT NOT ALL WRONG-DOERS BE ACCORDED PROTECTION UNDER THE ACT

The respondent argues that,

> ... eliminating all employees who had any involvement in the wrongdoing at

issue, Brief, p. 19.

would, as a practical matter unnecessarily preclude an "important source of information". Initially the County would note that it has not argued that "all" employees who had involvement in wrongdoing are precluded as a matter of law from invoking the protection of the Act. Rather, the issue presented is,

> ... when is a wrong-doer not entitled, if ever, to invoke the protection of the Act. Petitioner's Initial Brief, p. 8.

The respondent's argument is, in essence, that no matter how flagrant the malfeasance, no matter how duplicitous the actions, no matter how extensive the cover-up efforts, public policy dictates that a governmental wrong-doer is protected because he or she is an "important source of information". Under the respondent's reasoning such an individual can steal from the taxpayers not once, but twice. The first theft arises from his or her misconduct in office. The second, and perhaps more egregious, theft occurs when the individual institutes litigation under the Act and the taxpayers have to bear the expense of proceeding through a jury trial, with no possibility of summary judgment to cut short outrageous claims.

The County submits that the Whistle-blower's Act was never intended to increase the expenditure of tax dollars but rather to decrease such expenditures by encouraging employees to promptly come forward to report and thereby