Appeal
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SID J. WHITE
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IN THE SUPREME COURT
FOR THE STATE OF FLORIDA
CASE NO. 84,827

STATE OF FLORIDA
DEPARTMENT OF BANKING
AND FINANCE, DIVISION
OF SECURITIES AND
INVESTOR PROTECTION,

Petitioner,

vs.

OSBORNE STERN AND
COMPANY, INC., et al.,,

Respondents.
_____/

ON APPEAL FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT,
CASE NO. 91-488

INITIAL BRIEF OF THE PETITIONER
STATE OF FLORIDA DEPARTMENT OF BANKING AND FINANCE
DIVISION OF SECURITIES AND INVESTOR PROTECTION

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STATEMENT OF THE CASE AND FACTS

As used herein the Petitioner, the State of Florida Department of Banking and Finance, Division of Securities and Investor Protection, will be referred to as the Department. Osborne Stern and Company, Inc., and Douglas W. Osborne will be referred to as Respondents.

The Department adopts, with footnotes omitted, the recitation of the facts as stated by the First District Court of Appeal on pages 2-6 of the Revised Opinion as follows:

> [Respondents] applied for registration with the Department to deal in securities. By letter of December 5, 1989, the Department notified [respondents] of its intent to deny the registration applications under Section 517.161, Florida Statutes (1989), based upon [respondents'] having violated Sections 517.12(1), 517.07, 517.301(1)(a)2. and 517.301(1)(c), Florida Statutes (1989). [Respondents] filed a petition for formal hearing, and the matter was referred to the Division of Administrative Hearings and assigned case number 90-873. On May 3, 1990, the Department issued a notice of intent to issue a cease and desist order and impose administrative fines against [respondents] and others under section 517.221. As to [respondents], the notice was based upon the same facts and circumstances alleged in the prior notice of intent to deny the registration applications. [Respondents} petitioned for a formal hearing, and the matter was referred to DOAH, assigned case number 90-4584, and consolidated with case number 90-873.
>
> Prior to the hearing, the Department filed a motion in limine as to both cases to preclude [respondents] from introducing evidence of mitigating circumstances as to the alleged violations of Sections 517.12(1), 517.07, and 517.301(1)(a)2, Florida Statutes, on the ground that these sections impose strict liability. The Department did not seek to preclude such evidence as to the alleged violations of section 517.301(1)(c), Florida Statutes, which imposes liability based upon a "knowingly and willfully" standard. By written pro-se response, [respondents] argued that evidence of mitigating circumstances would be relevant, even under the strict liability statutes, to the exercise of the Department's discretion "to properly assess what damages, if any, [respondents] are responsible for." The hearing officer

granted the motion.

> The hearing officer ruled that [respondents] had the burden of proving their entitlement to registration by a preponderance of the evidence, . . . , and further ruled that the Department, in seeking to impose civil penalties upon [respondents], likewise had to prove the allegations in the cease and desist proceeding by a preponderance of the evidence, ... The Department's final order approved this ruling.
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> At the hearing, Douglas W. Osborne appeared pro se and on behalf of Osborne Stern. Although Osborne admitted generally to having violated unspecified security laws, he denied fraudulent intent. The hearing officer sustained the Department's objections to parts of Osborne's testimony on the ground that such testimony was irrelevant mitigating evidence. The Department's representative testified that she contacted [respondents] and told them they were not to trade in Florida until registered. The representative then offered as proof of [respondents'] misconduct a series of letters and affidavits from Florida investors with whom [respondents] had traded.
>
> In his recommended order of December 5, 1990, the hearing officer found that [respondents] had violated each of the four predicate statutes. The hearing officer recommended imposition of a $5,000 fine as to each violation, denial of [respondents'] applications for registration, and entry of a final cease and desist order. The Department denied the applications for registration, entered a final cease and desist order, and imposed a $5,000 fine for each of the four statutes [respondents] were found to have violated.

On April 19, 1994, the district court entered its initial opinion which is substantially the same as the Revised Opinion. However, the initial opinion contained one minor factual misstatement. On page 8 of the initial opinion, the court stated, "Even though appellants admitted the security transactions took place, they denied any fraudulent intent; thus the Department had the burden of proving that appellants engaged in those transactions with the requisite fraudulent intent."

On or about May 3, 1994, the Department filed with the

district court a Motion for Clarification, Motion for Rehearing, Motion for Rehearing En Banc and Motion for Certification. On or about July 1, 1994, Respondents filed pleadings in opposition to the Department's motions.

On November 18, 1994, the district court entered a Revised Opinion, which corrected the minor factual misstatement and deleted that above-quoted sentence.

In its Revised Opinion, the district court certified to this Court the following question as being of great public importance:

> IN DENYING AN APPLICATION FOR REGISTRATION TO SELL SECURITIES AND IMPOSING CIVIL FINES FOR ALLEGED VIOLATIONS OF PROVISIONS IN CHAPTER 517 REGULATING THE SALE OF SECURITIES, IS THE DEPARTMENT OF BANKING AND FINANCE REQUIRED TO PROVE SUCH ALLEGATIONS BY CLEAR AND CONVINCING EVIDENCE?

SUMMARY OF ARGUMENT

In recognizing the special importance of securities regulation, this Court has concluded that Chapter 517 should be liberally construed so that the state will not be unduly restricted in its enforcement thereof. However, the opinion of the First District Court of Appeal is inconsistent with this important principle. In addition, the district court has now impermissibly extended this Court's reasoning in Ferris v. Turlington, 510 So.2d 292, 294-95 (Fla. 1987), to the gain of a livelihood, which would vitiate the distinction between the privilege of possessing an existing license and the mere expectancy of acquiring a license in the future. Furthermore, the practical effect of requiring the higher standard of proof will be to reduce the agency's discretion in licensing matters. As a result, licenses may be granted which normally would not or should not be granted in direct contravention with this Court's mandate that Chapter 517 be interpreted in a way to effectuate its purpose of protecting the public.

Regarding the imposition of civil fines, the clear and convincing standard is not essential to satisfy due process under the United States Constitution. The higher standard of proof is not necessary to protect the rights of the accused when an administrative fine is imposed. Thus, the district court's extension of this Court's ruling in Ferris to imposition of civil fines is inappropriate.

ARGUMENT

I. OVERVIEW

As certified to by the district court below, this case is of great public importance regarding the regulation of securities in this state. It has been accurately noted that securities violations can involve grand schemes which "thrive[] by enticing prospective investors to participate in its enterprise, holding out as a lure the expectation of galactic profits. All too often, the beguiled investors are disappointed by paltry returns." Securities and Exchange Comm'n v. Koscot Interplanetary, Inc., 497 F.2d 473, 475 (Former 5th Cir. 1974). Furthermore, damages in securities cases may reach (and have reached) several hundreds of thousands of dollars if not more. See Woods v. Barnett Bank of Fort Lauderdale, 765 F.2d 1004, 1013 (11th Cir. 1985)($1,382,386 in net unrecovered losses). Accordingly, this Court, in acknowledging the public importance of securities regulation, has stated, "The legislature enacted chapter[] 517 . . . to protect the public . . . . Because of the statute['s] public importance, the state should not be unduly restricted in its attempt to enforce . . ." it. State v. Beeler, 530 So.2d 932, 934 (Fla. 1988). "Statutes of this character are upheld under the police power of the State. Their purpose is to protect the public against fraud and the statute will be given a broad and liberal interpretation to effectuate the purpose." McElfresh v. State, 9 So.2d 277, 278 (Fla. 1942).[1] Based

[1]See also Arthur Young & Co. v. Mariner Corp., 630 So.2d 1199, 1203 (Fla. 4th DCA 1994); Palmer v. Shaerson Lehman Hutton,

upon the foregoing, in recognizing the special importance of securities regulation, this Court has concluded that Chapter 517 should be liberally construed so that the state will not be unduly restricted in its enforcement thereof. Regrettably, the opinion of the district court is inconsistent with this important principle.

II. APPLICATION FOR REGISTRATION TO SELL SECURITIES

The district court, on page 8 of its Revised Opinion, concluded, "We construe the supreme court's explanation [in Ferris v. Turlington, 510 So.2d 292, 294-95 (Fla. 1987),] to mean that the same clear and convincing standard is applicable to disputes over granting of a license as it is to the revocation or suspension of a license." This Court in Ferris concluded that the clear and convincing standard of evidence applied to the revocation of a professional license because revocation implicated the loss of a livelihood. However, the First District Court of Appeal has now extended this Court's reasoning to the gain of a livelihood, which would vitiate the distinction between the privilege of possessing an existing license, see Astral Liquors, Inc. v. Department of Business Regulation, 463 So.2d 1130, 1132 (Fla. 1985), and the mere expectancy of acquiring the license in the future. Judge Booth (concurring and dissenting) was correct in noting on page 13 of the Revised Opinion that requiring the higher evidentiary standard is also inconsistent with the discretionary authority that this Court has recognized "is necessary for agencies involved in the issuance

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Inc., 622 So.2d 1085, 1091 (Fla. 1st DCA 1993).

of licenses and the determination of fitness of applicants for license." Astral Liquors, Inc., 463 So.2d at 1132. The practical effect of requiring the higher standard of proof will be to reduce an agency's discretion as the agency will not only have to prove that the act occurred, but will have to produce witnesses which have precise, explicit, and distinct recollection of what transpired so that there will be no hesitation to conclude that the act occurred. State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). As noted by Judge Booth on page 15 of the Revised Opinion, these additional proof requirements, together with the limited time within which an agency may deny a license, may result in licenses being granted which normally would not or should not be granted in direct contravention with this Court's mandate that Chapter 517 be interpreted in a way to effectuate its purpose, McElfresh, 9 So.2d at 278, which is to protect the public. Beeler, 530 So.2d at 934. Based upon the foregoing, the Department respectfully requests that this Court hold that in denying an application for registration to sell securities the Department not be required to prove allegations by clear and convincing evidence, but by the more reasonable standard of a preponderance of the evidence.[2]

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[2]Although this case is limited to the regulation of securities, affirming the district court's opinion on this point could cause a great degree of uncertainty in this state regarding the licensing process as it is not uncommon that persons other than state agencies are permitted to participate in certain licensing proceedings. See, e.g., Boca Raton Mausoleum, Inc., v. Department of Banking and Finance, 511 So.2d 1060 (Fla. 1st DCA 1987)(supplier of mausoleum crypts and other services had standing to join license application proceeding where granting of license to the applicant would cause injury-in-fact to the

III. THE IMPOSITION OF CIVIL FINES

The district court concluded on pages 9-10 of the Revised Opinion that the "imposition of a civil penalty based upon asserted violations of the regulatory statute should be proved by clear and convincing evidence." The Department, in its motion for rehearing before the district court, acknowledged that in the context of forfeiture proceedings this Court has concluded, "In noncriminal contexts, this Court has held that constitutionally protected individual rights may not be impinged with a showing of less than clear and convincing evidence." Department of Law Enforcement v. Real Property, 588 So.2d 957, 967 (Fla. 1991). However, the Department respectfully requests that this Court not apply the clear and convincing evidence standard to the imposition of civil fines for the following reasons. First, "[a]lthough there is a growing trend toward use of the more rigorous [clear and convincing] standard, it is apparent that such standard is not essential to satisfy due process under the United States Constitution." Rife v. Department of Professional Regulation, 638 So.2d 542, 543 (Fla. 2d DCA 1994).

Second, in other contexts where civil fines may be imposed, such as in civil contempt proceedings, Johnson v. Bednar, 573 So.2d

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supplier). Accordingly, the district court's opinion could be interpreted as applying the higher standard of proof to third party participants who seek to demonstrate that there is no need for the issuance of the license although the applicant would only have to prove need by a preponderance. In a battle between experts, the disparate burdens, rather than the quality of each expert's opinion, could prove decisive.

822, 824 (Fla. 1991), Florida courts have applied the preponderance of the evidence standard of proof. See Braisted v. State, 614 So.2d 639, 640 (Fla. 4th DCA 1993)(per curiam); Petition of Hughes, 318 So.2d 409, 410 (Fla. 4th DCA 1975); Martin v. State, 194 So.2d 8, 11 (Fla. 3d DCA 1967)(per curiam); In re S.L.T., 180 So.2d 374, 379 (Fla. 2d DCA 1965).

Third, the higher standard of proof is not necessary to protect the rights of the accused when an administrative fine is imposed because of the additional safeguard wherein the circuit court is authorized to review the appropriateness of the penalty in an action by the agency to enforce the penalty. Browning v. Department of Business Regulation, 574 So.2d 188, 194 (Fla. 1st DCA 1991). In contrast, however, unless an appeal is filed, see § 120.68(3)(a), Fla. Stat. (1993)("[I]f the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right . . . ."), no additional action is required of the agency in a license revocation or suspension proceeding to effectuate the order once the order has been entered. Based upon the foregoing, and as adequate safeguards presently exist to protect the interests of those accused of securities violations when fines are imposed, the Department respectfully requests that this Court hold that in imposing civil fines the Department is not required to prove violations of provisions in Chapter 517 regulating the sale of securities by clear and convincing evidence.

IV. CEASE AND DESIST ORDERS

Initially, the undersigned was concerned that the district court had sought to apply the clear and convincing standard to cease and desist orders due to the district court's statement on page 10 of the initial opinion that the "imposition of a civil penalty based upon asserted violations of the regulatory statute should be proved by clear and convincing evidence." (emphasis added). Accordingly, the district court was asked on pages 9-10 of the Department's motion for rehearing to modify the certification to include cease and desist orders. As the district court declined to so modify the certification, it seems more likely that the district court did not hold that the higher standard of proof should be applied to cease and desist orders as the term "civil penalty," as used by the district court, seems to have only contemplated the payment of money. See generally Sun Coast International, Inc., v. Department of Business Regulation, 596 So.2d 1118, 1121 (Fla. 1st DCA 1992)(a penalty is "a sum of money"). Nor would it have been appropriate for the district court to have concluded that the clear and convincing standard of proof applied to cease and desist orders as such application might cause agencies to forego their cease and desist authority for injunctive relief in the circuit courts as the standard of proof for injunctions appears to be a preponderance of the evidence. See Ericson v. Jayette, 5 So.2d 453, 454 (Fla 1941); 42 Am. Jur. 2d Injunctions § 287, at 1083 (1969)("The party seeking the injunction must prove his own case and adduce whatever proof is necessary to

show the existence of the conditions or circumstances upon which he bases the right to and the necessity for injunctive relief, and he must establish his right thereto by a preponderance of the evidence.")(footnote omitted).

V. BURDEN OF PERSUASION VERSUS BURDEN OF GOING FORWARD

The district court, on page 8 of the Revised Opinion, stated that "the Department had the burden of proving the alleged violations actually occurred if the registration is to be denied on that ground." (emphasis added). Arguably, as the district court used the term "burden of proving" rather than the term "burden of going forward with the evidence," the district court may have placed the ultimate responsibility of proving Respondents' ineligibility for a license upon the Department. However, such a holding, if it was intended, would be contrary to Florida law. See Riley v. Sweat, 149 So. 48, 50 (Fla. 1933)("[D]ealers in corporate and other forms of securities may . . . be required to . . . demonstrate to a state agency that they are of good repute and qualified to engage in such business . . . ."); see also Astral Liquors, Inc. v. Department of Professional Regulation, 432 So. 2d 93, 95 (Fla. 3d DCA 1983), approved, 463 So. 2d 1130 (Fla. 1985); Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

The distinction between the "burden of persuasion" and the "burden of going forward with the evidence" is well-established. These terms are often merged under the phrase "burden of proof." However, while the burden of going forward with the evidence may

shift between the parties in a licensing case as they produce evidence, the "ultimate burden of persuasion" remains upon the applicant during the entire proceedings to prove the applicant's entitlement to the license. See generally J.W.C. Company, Inc., 396 So. 2d at 787-90 (for a thorough discussion thereof). Therefore, at no time does the ultimate burden of persuasion shift to the Department to prove that the applicant is not entitled to a license.

CONCLUSION

In conclusion, the Department respectfully requests that this Court answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were sent by U. S. Regular Mail to the listed persons below on this 23 day of January, 1995.

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