

SUPREME COURT OF FLORIDA

CASE NUMBER: 91,230

District Court of Appeal,  
Third District - No. 96-1800

Circuit Court Case  
No.: 95-22930 CA 15

ST. JOHN MEDICAL PLANS, INC.,  
ST. JOHN CLINIC MEDICAL  
CENTER, INC., and MIGUEL  
ANGEL CRUZ PERAZA on behalf  
of the STATE OF FLORIDA,

Petitioners,

vs.

ALBERTO GUTMAN,

Respondent.

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**FILED**

SID J. WHITE

SEP 28 1997

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

BRIEF OF PETITIONERS

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## I. STATEMENT OF THE CASE AND FACTS

This case of first impression and great public importance arises from Alberto Gutman's misuse of his public position for his personal gain<sup>1</sup>.

The parties pertinent to this appeal of the final order of dismissal are St. John Medical Plans, Inc. St. John Clinic Medical Center, Inc. and Miguel Angel Cruz-Peraza, Plaintiffs, expressly acting on behalf of the State of Florida, and Alberto Gutman, Defendant, a member of the Florida Senate. [A.19-20]<sup>2</sup>.

On behalf of the State, the then-pending second amended complaint set forth the details of Defendant Gutman's misuse of his position as an influential state senator for the purpose of securing special privileges for himself, his family and friends. See paragraphs 11, 12(a) and 13, and Count IV in the second amended complaint. [A. 4-5, 9-13 and 19-20]. The complaint alleges Senator Gutman's misuse of his position to improperly work with PCA in targeting Max A Med for acquisition by a PCA subsidiary, then utilizing his public position to consummate the acquisition of Max A Med so as to

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<sup>1</sup> The count at issue is the fourth count of a six-count second amended complaint.

<sup>2</sup> For ease of reference, citations are to the appendix ["A"] or the record on appeal ["R"]. Because the clerk could not locate the second amended complaint to include it in the record, a copy is in the appendix hereto, with a complete copy of the pamphlet. "History of Article II, Section 8, Florida Constitution, The Sunshine Amendment".

inappropriately receive at least a \$500,000 payment personally from the PCA-paid funds.

The complaint set forth all allegations necessary to state a breach of public trust cause of action against Defendant Gutman pursuant to both the Florida Constitution and Part III of chapter 112, Florida Statutes. Defendant Gutman moved to dismiss, challenging the plaintiffs' standing to pursue the action. The circuit court granted the motion to dismiss with prejudice finding that the plaintiffs lacked standing. In granting the defendants' motion, the lower court did not find any deficiency in the complaint and did not find any failure to state a cause of action against Defendant Gutman. [R. 128-131]. Instead, the court based its May 29, 1996 dismissal on its finding that the plaintiffs lacked.

On June 28, 1996, plaintiffs appealed the ruling, seeking reversal of the order of dismissal and reinstatement of the breach of public trust claim. The district court affirmed, but certified the following question to be one of great public importance.

Does article II, section 8(c) of the Florida Constitution, by itself and without any legislative enactment, provide individual citizens of Florida with a cause of action for breach of the public trust for private gain against a public office or employee?

## II. SUMMARY OF ARGUMENT

The lower court erred in dismissing the breach of public trust claim with prejudice. As reflected in the second amended complaint, plaintiffs have standing to pursue the breach of public trust claim on behalf of the State.

The Sunshine Amendment brought the concept of ethics in government to the Florida Constitution. This 1976 amendment modified the common law concept of standing and, as in cases where taxpayers challenge government expenditures, vested everyone with the standing necessary to compel compliance with the ethics in government provisions:

A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse.

Because the complaint reflects that plaintiffs have constitutional standing and met the standing criteria in the related statutory provision, section 112.3175, Florida Statutes, the lower court erred in finding a lack of standing. Even if the lower court's interpretation of the chapter 112 standing requirements were correct, the statute would impermissibly contradict the constitutional provision reflecting the materiality and significance to every person of the right to a corruption-free government, and the statute should be declared unconstitutional to the extent it conflicts

with article II, section 8(c)<sup>3</sup>.

Finally, the case was pending before the lower court on defendant Gutman's motion to dismiss, with the factual allegations in the complaint uncontestable; the lower court erred in dismissing because the complaint reflected the plaintiffs' standing under both the narrower statutory language and the broader Article II Section 8 standing provision.

The trial court's ruling that plaintiffs are not materially affected by the complained of breach of the public trust is directly contrary to the allegations in the complaint and to the Sunshine Amendment. The lower court's application of pre-Sunshine amendment standing principles was inappropriate. Standing exists pursuant to Article II, Section 8, and any language to the contrary in part III of chapter 112 [Florida's Code of Ethics] is unconstitutional. The question certified should be answered in the affirmative, the dismissal should be reversed and the action reinstated.

III. ARGUMENT: THE COMPLAINT  
PROPERLY STATES A CAUSE OF ACTION  
FOR BREACH OF PUBLIC TRUST

Because the case was pending before the lower court on a motion to dismiss, the factual allegations in the complaint are

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<sup>3</sup> Consistent with the provisions of chapter 86, Florida Statutes, both the attorney general and state attorney were served with the plaintiff's documents challenging the constitutionality of the statutory materially affected language.



to be taken as true. The allegations in the pending complaint more than adequately set forth the constitutional and statutory bases underlying the standing of the plaintiffs to pursue this breach of public trust action. The lower court erred in finding a lack of standing; the order of dismissal should be reversed and the action reinstated, for the reasons set forth more fully herein.

A. Article II, Section 8 of the  
Florida Constitution Vests  
Plaintiffs With Standing.

Adopted by the voters in November 1976, the "Sunshine Amendment" became part of the Florida Constitution as Article V, Section 8 "Ethics in Government". In pertinent part, the Ethics in Government section provides:

Section 8. Ethics in government.-A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:

\* \* \* \* \*

(c) Any public officer or employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state for all financial benefits obtained by such actions. The manner of recovery and additional damages may be provided by law.

As recognized by the Florida Supreme Court in Florida Society of Ophthalmology v. Florida Optometric Associates, 489 So.2d 1118, 1119 (Fla. 1986), the rule is that "constitutional

language must be allowed to 'speak for itself'. Constitutional provisions are to be construed more liberally and more broadly than statutes and that the constitutional provisions should be construed consistently with the intent of the people, so as not to defeat the underlying objectives. Ibid.; see also Metropolitan Dade County v. City of Miami, 396 So.2d 144, 146 (Fla. 1980); Gallant v. Stephens, 358 So.2d 536, 539 (Fla. 1978).

The Florida Supreme Court has recognized the inappropriateness of construing a constitutional provision in such a way as to eviscerate a provision or render it superfluous or meaningless. Broward County v. City of Fort Lauderdale, 480 So. 2d 631, 633 (Fla. 1985).

It is a fundamental rule of construction of our constitution that a construction of the constitution which renders superfluous, meaningless or inoperative any of its provisions should not be adopted by the courts . . . . Construction of the constitution is favored which gives effect to every clause and every part thereof. Unless a different interest is clearly manifested, constitutional provisions are to be interpreted in reference to their relation to each other, that is in *pari materia*, since every provision was inserted with a definite purpose.

Id. at 633, citing Burnsed v. Seaboard Coastline Railroad, 290 So.2d 13, 16 (Fla. 1974).

The 1976 adoption of the Sunshine Amendment reflected the people's decision to include in Florida's constitution

itself the importance to each person of having a corruption-free government. The initial paragraph in Section 8 confirms that "a public office is a public trust", and explicitly vests each and every person with "the right to secure and sustain that trust against abuse". Article II, section 8, Florida Constitution. [Emphasis supplied].

The lower court completely ignored the significant change from pre-Sunshine Amendment law pertaining to standing, despite the reality that the effect of its ruling was to eviscerate the clear language of the provision acknowledging that

The people shall have the right to secure  
and sustain that trust against abuse.

When the people effect a significant change in the language of the constitution, courts must presume not only that the change was intentional, but that the people meant for the language to have a different result than under the prior language. See, e.g., State v. Creighton, 469 So.2d 735, 739 (Fla. 1985). Petitioners do not claim that the pre-Sunshine Amendment constitution vested them with standing to pursue this constitutional breach of public trust action. Their constitutionally bestowed standing has its origin in the people's adoption of the Sunshine Amendment, which rendered earlier standing cases inapposite. Because petitioners had asserted their now-constitutionally-vested right to pursue this

action pursuant to Article II, Section 8, the lower court's ruling erroneously ignored the people's intent and the rules regarding the construction of constitutional provisions. The order under review should be reversed.

B. Plaintiffs Have Standing to Pursue  
This Claim Pursuant to Section  
Section 112.3175, Florida Statutes.

The complaint also contains allegations reflecting the plaintiffs' standing to pursue this action pursuant to section 112.3175, Florida Statutes, which provides in pertinent part:

112.3175 Remedies; contracts voidable.-  
Any contract which has been executed in violation of this part [Part III - Code of Ethics for Public Officers and Employees] is voidable:

\* \* \* \*

(2) In any circuit court, by any appropriate action, by:

\* \* \* \*

(c) Any citizen materially affected by the contract and residing in the jurisdiction represented by the officer or agency entering.

On its face, the complaint contains the requisite allegations demonstrating the Plaintiffs' status as materially affected citizens. [If there were a pleading deficiency, it could have been corrected.] The lower court erred in dismissing the breach of public trust action with prejudice.

C. Plaintiffs Have Standing to Pursue This Claim Because Article II, Section 8 Recognizes That All Persons Are Materially Affected By Corruption In Government.

No reported case addressing the issue of whether Section 8(c) is self-executing could be located. There have been decisions relating to other Sunshine Amendment subsections. In Williams v. Smith, 360 So.2d 417 (Fla. 1978), the Florida Supreme Court interpreted the language of section 8(d)<sup>4</sup>. In finding that the plain language of Section 8(d) of the amendment prevented it from being self-executing, the court expressly noted, at 420, fn.6 that it was not concerned with any subsection of the Sunshine Amendment other than subsection 8(d). The Court observed that the variety of language in the other several subsections made it unwise to conjecture as to whether the other provisions were or were not self-executing. In Plante v. Smathers, 372 So.2d 933 (Fla. 1979), the Court addressed subsections 8(a), (h) and (i) and, finding each to be self-executing, commented, at 936, that:

In November 1976, the people of Florida adopted Article 2, Section 8, Florida Constitution, commonly referred to as the "Sunshine Amendment." In construing this section, it is our duty to discern and effectuate the intent and

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<sup>4</sup> (d) Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law. [emphasis supplied].

objective of the people. [cit. om.] The spirit of the constitution is obligatory as the written word [cit. om.] The objective to be accomplished and the evils to be remedied by the constitutional provision must be constantly kept in view, and the provision must be interpreted to accomplish rather than to defeat them. [cit. om.] A constitutional provision is to be construed in such a manner as to make it meaningful. A construction that nullifies a specific clause will not be given unless absolutely required by the context. Gray v. Bryant, 125 So.846 (Fla. 1960)

\* \* \* \*

Further, an interpretation of a constitutional provision which will lead to an absurd result will not be adopted when the provision is fairly subject to another construction and which will accomplish the manifest intent and purpose of the people. [cit. om.]

Clearly the primary purpose for which the Sunshine Amendment was adopted was to impose stricter standards on public officials so as to avoid conflicts of interests. The four major legitimate concerns of the people in advancing this amendment were accurately explained in Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978). These are the public's right to know an official's interest, deterrence of corruption and conflicting interests, creation of public confidence in Florida's public officials, and assistance in detecting and prosecuting officials who violate the law. [cit. om.]

The Florida Supreme court has acknowledged other constitutional provisions as self-executing. See e.g. ex rel Citizens Proposition for Tax Relief v. Firestone, 386 So.2d 561 (Fla. 1980) (state constitutional provision pertaining to

initiative petitions is self-executing). As the Citizens court said, at 566:

This is a self-executing constitutional provision. It clearly establishes a right to propose by initiative petition a constitutional amendment which may be implemented without the aid of any legislative enactment. Gray v. Bryant, 125 So.2d 846 (Fla 1960). In this regard, this initiative process has already produced a constitutional amendment which was adopted without the benefit of the subject statute or rule. Article II, Section 8 (Ethics in Government).

In the case at bar, the first sentence of subsection 8(c) is intact, clear and complete. Even if the legislature had not exercised the discretion extended by the people in the second sentence of subsection 8(c) to provide for recovery of "additional damages" beyond those mandated in the first sentence, the clear liability imposed on the public official in the first sentence would remain. Unlike the language at issue in subsection 8(d) in Williams, where the forfeiture was constitutionally mandated to occur only in such manner as may be provided by law, subsection 8(c) concisely and cogently indicates that any public officer or employee breaching the public trust for private gain "shall be liable to the state for all financial benefits obtained by such actions", period.

The only discretion remaining for legislative activity relating to subsection 8(c) is if the legislature chose to provide a manner in which the liability to the state may be satisfied or for additional damages [i.e., in addition to the

mandatory liability to the state under the first sentence for all financial benefits obtained]. The parameters within which the legislature could act were thus very narrow. Had the legislature not adopted the ethics code in part III of Chapter 112, those public officers breaching the public trust for private gain would still be liable to the state for all financial benefits they obtained. The constitutional grant of standing to the people to act to secure the public trust is intact and independent, neither entwined with nor dependent upon any exercise of legislative authority.

Nothing in the legislative action sentence of subsection 8(c) authorized the legislature to limit to only certain persons the constitutional standing given to all people to secure a corruption free government. Indeed, the legislature's "materially affected" definition in section 112.312(16) is in direct conflict with the general grant of standing at the beginning of article II, section 8 "the people shall have the right to secure and sustain that trust against abuse".<sup>5</sup>

Even if the constitution were not self executing, the

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<sup>5</sup> It might be argued that the introductory sentence in section 112.312 (definitions) indicates that the definitions in said section are for use in part III of chapter 112 and for purposes of the provisions of section 8 of the Florida Constitution, "unless the context otherwise requires". To avoid the unconstitutionality clearly resulting from use of the legislative definition of "materially affecting", said definition must be ignored (if not declared unconstitutional); to give effect to the citizens' clear statement and grant of standing in Article II, section 8.



application of section 112.3175 in pari materia with subsection 8(c) reflects the existence of a cause of action as pleaded. Plaintiff has properly pleaded ultimate facts reflecting the direct impact on the plaintiffs resulting from the breach of public trust by defendant Gutman.

Plaintiffs properly stated a cause of action against defendant Gutman pursuant to subsection 8(c) and section 112.3175, Florida Statutes. To the extent the subsection 112.312 definition of "materially affected" is relevant and applicable, said definition is unconstitutional and constitutes legislative overreaching contrary to the express wishes of the people. To properly effectuate the clear intention of the people of Florida in adopting the Sunshine Amendment, in accordance with the interpretative rules delineated by the Florida Supreme Court in State ex rel Citizens Proposition, supra, the Court should declare the statutory definition of "materially affected" unconstitutional.

D. If Section 112.3175 Is Interpreted to Deny That Plaintiffs Are Materially Affected By Defendant Gutman's Breach of Public Trust, the Statute Conflicts with Article II, Section 8 and Should Be Declared Unconstitutional.

The Sunshine Amendment, adopted by the voters of Florida as section 8 of article II of the Florida Constitution relates to ethics in government.

In adopting the Sunshine Amendment, the citizens of

Florida expressly bestowed standing upon each person; the pertinent language is: "The people shall have the right to secure and sustain that trust against abuse". Thus, as adopted, the Florida Constitution itself vests each person with the right to access the courts pursuant to article I, section 21 to enforce the provisions in subsection 8(c).

Such a broad grant of standing is not unusual in Florida jurisprudence. The Florida Supreme Court has recognized the right of every citizen and taxpayer to challenge governmental budgeting activities. See e.g. Chiles v. Children, 589 So.2d 260 (Fla. 1991) at 263 fn.5, where this court acknowledged its long history of holding that citizens and taxpayers can challenge the constitutional validity of an exercise of the legislature's taxing and spending power without having to demonstrate a special injury, citing Brown v. Firestone, 382 So.2d 654 (Fla. 1980); Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972) and various other cases.

The constitutional right of each and every person to a corruption-free government cannot be overlooked. The impact on the people of corrupt public officials and of the people's lack of confidence in their public officials justifies enforcing the standing provisions of the Ethics in Government provisions in the Florida Constitution, and allowing these petitioners to go forward "on behalf of the state" with this action against Senator Gutman. The history of the Sunshine Amendment reflects

the "special injury" imposed on such citizen when public officials misuse their public positions for their personal gain.

The courts have come to recognize that citizens and taxpayers have sustained any requisite "special injury" as a matter of law in cases challenging taxing and spending. Horne, supra at 662. The Horne court also recognized the political realities which may divert "the state" from pursuing valid actions, and held that citizen standing existed:

Despite our reluctance to open the door to possible multiple suits by "ordinary citizens", nonetheless, it is the "ordinary citizen" and the taxpayer who is ultimately affected and who is sometimes the only champion of the people in an unpopular cause.

Horne, supra, at 663.

Undeniably, Florida's attorney general has standing pursuant to subsection 112.3175(2) to pursue this action on behalf of the state. The reasons for his failure to act are irrelevant and should not preclude this constitutionally-contemplated action from being pursued by petitioners on behalf of the state, to secure and sustain the public trust against abuse by Senator Gutman.

#### IV. CONCLUSION

The lower court erred in ignoring the significance of the people's adoption of the Sunshine Amendment, which vests

each citizen with the equivalent of any requisite standing, material impact and special injury. The plaintiffs properly stated a cause of action to compel Alberto Gutman to pay to the State of Florida the sums he wrongly received in the Max A Med deal.

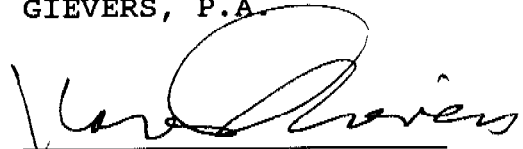
It is a matter of the greatest public importance for this Court to protect the constitutional grant of standing, and give proper meaning to the constitutional language approved by the voters. Any decision other than a reversal of the lower courts' rulings effectively condones the legislature's decision to decimate the impact of the Sunshine Amendment Public Trust provisions.

The order and final judgment of dismissal should be vacated, and the breach of public trust action reinstated.

The question certified should be answered in the affirmative, the district court's ruling reversed, and the case remanded with instructions to allow the breach of public trust action to go forward.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to all parties on the attached service list this 22<sup>nd</sup> day of September, 1997.

  
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