ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 91,230

District Court of Appeal
Third District Case No.: 96-1800

Eleventh Judicial Circuit in and for
Dade County, Florida
Circuit Court Case No.: 9522930

ST. JOHN MEDICAL PLANS, INC., et al.,

Petitioners,

vs.

ALBERT0 GUTMAN,

Respondent.

BRIEF OF RESPONDENT GUTMAN

DYANNE E. FEINBERG, ESQ.
GILBRIDE, HELLER & BROWN, P.A.
Attorneys for ALBERT0 GUTMAN
One Biscayne Tower - 1570
2 South Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 358-3580

TABLF OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

The sole issue in this appeal is whether Plaintiffs have standing to bring an action for "breach of public trust" against a Florida Senator based on a transaction that did not involve the Plaintiffs and did not cause any damage to the Plaintiffs. The Third District Court of Appeal properly held that neither the Florida Constitution nor the Florida Statutes provide individual citizens of Florida with a cause of action for breach of the public trust against a public official in the absence of any special injury or damage. This Court should decline to exercise jurisdiction over this appeal, or should affirm the decision of the Third District.

STATEMENT OF THE CASE AND FACTS[1]

Plaintiffs filed a "kitchen-sink" complaint against a host of Defendants, including the Florida Agency for Health Care Administration ("AHCA"), Physician Corporation of America ("PCA"), Senator Alberto Gutman ("Gutman"), Isadore S. Schwartz, Sylvia Bergoffen, Clara Berger Oliver, Raphael Archangel Garcia, Bruno Barreiro, Sr., Bruno Barreiro, Jr., Alicia Barreiro, and Alan Dorne. This Second Amended Complaint contained five alleged causes of action.

Count I was against AHCA for "unconstitutional taking." The gravamen of this claim was that the state agency wrongfully canceled and refused to renew its contract with

[1] This separate Statement of the Case and Facts is submitted in order to supplement the incomplete statement provided by the Plaintiffs in their Brief. The Plaintiffs/Petitioners, St. John Medical Plans, Inc., St. John Clinic Medical Center, Inc., and Miguel Angel Cruz Peraza, shall be collectively referred to as the Plaintiffs in this Brief.

Plaintiff St. John Medical Plans, Inc. ("St. John"). Among the allegations against AHCA were that it acted "in violation of Florida's due process, public records and Government in the Sunshine laws," that it had "arbitrary, capricious, subject-to-change-at-whim secret rules and policies," and that its cancellation of Plaintiff's contract was "motivated by some other agenda," i.e., for the purpose of "retaliating" against St. John. (Appendix to Petitioners' Brief, App.1, para. 12 (j) and (o)). The claim against AHCA was transferred to Tallahassee on the mandate of the Third District. St. John Medical Plans. Inc. v. AHCA, 674 So. 2d 911 (Fla. 3d DCA 1996).

Counts II and III of the Second Amended Complaint also concern the cancellation of St. John's contract by AHCA. These claims are against PCA and Gutman for tortious interference and conspiracy to tortiously interfere with the relationship between St. John and AHCA. In these counts, Plaintiff alleges that PCA and Gutman "collaborated to obtain the retaliatory immediate cancellation of St. John Medical Plans' still valid contract with the State." (Appendix to Petitioners' Brief, App. 1, para. 26).[2]

Count IV of the Second Amended Complaint, in contrast to the other counts that at least allege damage to the Plaintiffs,[3] concerns a transaction entirely unrelated to the

---

[2] Counts II and III of the Second Amended Complaint have since been dismissed with prejudice by the trial court in its Order Dismissing Claims by St. John Medical Plans, Inc., as a Sham, entered on March 17, 1997. This Order granted Motions to Strike Sham Pleading filed by Gutman and PCA on the ground that the Plaintiffs have not one iota of evidence that St. John's contract was canceled and non-renewed by AHCA for any reason other than St. John's financial insolvency and numerous other deficiencies noted by AHCA. The Plaintiffs have taken an appeal of this Order to the Third District Court of Appeal which is pending at this time.

[3] Count V of the Complaint is brought by the Plaintiff clinic and alleges that PCA failed to enter into a proper provider agreement with the clinic thereby causing it damage.

Plaintiffs. Paragraph 12 of the Second Amended Complaint alleges that in or about August 1994, Gutman received an "unlawful fee" of $500,000 for coordinating the purchase of Max A Med Health Plans ("Max A Med"). [4] Within Count IV, which incorporates paragraph 12, Plaintiffs allege that they are "acting on behalf of the State of Florida," that Gutman's conduct in connection with the Max A Med sale constitutes a breach of the public trust as proscribed by the Florida Constitution and Chapter 112, Florida Statutes, and that the State is entitled to damages in that amount.

The Plaintiffs in Count IV sued not only Gutman, but all of the individual Defendants identified above. All Defendants that had been served filed Motions to Dismiss. (R. 1; R.6; R. 19; R. 35; R. 44). The trial court heard argument of counsel at a specially set hearing held on April 26, 1996. (R. 84). On May 31, 1996, the trial court entered an Order Granting Motions to Dismiss Count IV of Plaintiffs' Second Amended Complaint with Prejudice on the grounds that Plaintiffs lacked standing to bring the action. (R. 128). After filing the appeal, Plaintiffs voluntarily dismissed the appeal as to all of the Defendants other than Gutman.

On July 16, 1997, the Third District Court of Appeal rendered its Opinion affirming the trial court's finding that the Plaintiffs lacked standing under both the Florida Constitution and Section 112 of the Florida Statutes. The Third District certified the question to this Court as involving an issue of great public importance.

---

[4] Gutman strongly disputes these allegations of the Second Amended Complaint as well, but recognizes that the invalidity of these factual allegations may not be addressed on a Motion to Dismiss.

ISSUE ON APPEAL

Gutman disagrees with the issue on appeal framed by Plaintiffs, and restates the issue for determination by this Court as follows:

> WHETHER THE TRIAL COURT PROPERLY DISMISSED COUNT IV OF THE SECOND AMENDED COMPLAINT WHERE THE PLAINTIFFS LACK STANDING TO BRING A CLAIM UNDER THE FLORIDA CONSTITUTION OR CHAPTER 112 OF THE FLORIDA STATUTES

SUMMARY OF THE ARGUMENT

Whether Count IV of the Second Amended Complaint is brought under the Florida Constitution or Chapter 112 of the Florida Statutes, the Plaintiffs lack standing to bring the action. First, by its plain language, the Florida Constitution only allows an action for damages for breach of the public trust to be brought by the State of Florida. Moreover, because the relevant section of the Florida Constitution is not self-executing, there is no cause of action that the Plaintiffs can bring thereunder.

As to an alleged violation of Chapter 112, Section 112.3175, Florida Statutes, confers standing only on a citizen "materially affected" by such a violation. Plaintiffs do not satisfy the statutory definition of "materially affected," as they did not suffer a special injury as defined by Florida case law. Finally, Chapter 112 is not unconstitutional because it is in harmony with the Florida Constitution.

The Opinion of the Third District should be affirmed.

ARGUMENT

THE TRIAL COURT PROPERLY DISMISSED COUNT IV OF THE SECOND AMENDED COMPLAINT WHERE THE PLAINTIFFS LACK STANDING TO BRING A CLAIM UNDER THE FLORIDA CONSTITUTION OR CHAPTER 112 OF THE FLORIDA STATUTES

A. THE PLAINTIFFS LACK STANDING TO SUE UNDER ARTICLE II, SECTION 8 OF THE FLORIDA CONSTITUTION

The Plaintiffs lack standing to sue under Article II, Section 8 (c) of the Florida Constitution because this constitutional provision does not confer standing to sue for damages on any individual or entity other than the State of Florida. Further, there is no right to sue directly under this constitutional provision because it is not self-executing.

1. Article II, Section 8 (c) of the Florida Constitution confers standing to sue for damages only on the State of Florida

Article II, Section 8 (c) of the Florida Constitution provides:

> Any public officer of 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.

(Emphasis added). As Plaintiffs argue in their Brief, the rule is that "constitutional language must be allowed to 'speak for itself'." Florida Society of Ophthalmology v. Florida Optometric Assoc., 489 So. 2d 1118, 1119 (Fla. 1986). This provision of the Constitution plainly provides that only the State of Florida may sue and recover any financial benefits gained by a public official through a breach of the public trust.

Any doubt as to the plain meaning of this constitutional provision is resolved by the legislative history of the Sunshine Amendment, which was conveniently furnished by Plaintiffs in their Appendix to Petitioners' Brief. In that portion entitled "An Explanation of the Sunshine Amendment," the legislative history states:

> The amendment would allow ***the state to*** sue to collect from a corrupt official any financial benefits the official may have obtained through breach of the public trust.

(Appendix to Petitioners' Brief, App. 2, p. 8) (emphasis added).

Plaintiffs rely heavily on the introductory language in Section 8, "Ethics in Government" for their argument that they, along with each and every individual or entity within the State of Florida, have the right to sue any State Legislator for breach of the public trust. This introductory language states that: "A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse." However, as the legislative history also points out, this preface to the amendment is just a summary of its principal purpose. (Appendix to Petitioners' Brief, App. 2, p. 7).

Further, simply because the preface to Article II, Section 8 states that the people have a "right" to secure the public trust, this does not, without more specific enabling language, allow any individual to act as a "private attorney general" to enforce these rights. For instance, the Plaintiffs allege in their Second Amended Complaint, as well as in their Brief on page 1, that they bring this action "on behalf of the State of Florida," Nothing in the pleadings suggests that Plaintiffs have the imprimatur of the State of Florida in bringing this action. Instead, logic suggests that the State would properly take offense at being used as a tool by a party whose true agenda is to attempt to shift the blame to third parties

for its own misfeasance which led to the cancellation and non-renewal of its contract with AHCA.

Because the plain language of Article II, Section 8 (c) allows only the State to bring an action for damages caused by a breach of the public trust resulting in private gain, Plaintiffs lack standing to bring this action under the Florida Constitution.

2. Article II, Section 8 (c) of the Florida Constitution is Not Self-Executing

Generally, the constitution is a framework of the government containing the general principles upon which the government must function. "It is not designed to provide detailed instructions for the method of its implementation. This must of necessity be left up to the legislature." Johns v. May, 402 So. 2d 1166, 1169 (Fla. 1981). The critical factor in determining whether a constitutional provision should be construed as self-executing is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. State of Florida ex rel. v. Firestone, 386 So. 2d 561 (Fla. 1980); Gray v. Bryant, 125 So. 2d 846 (Fla. 1960).

While certain provisions of Article II, Section 8 have been held to be self-executing, other provisions have been held not to be self-executing in the absence of implementing legislation. For instance, Article II, Section 8 (a) was held to be self-executing because of a detailed schedule provided in Article II, Section 8 (h). Plante v. Smathers, 372 So. 2d 933 (Fla. 1979). However, Article II, Section 8 (c) is not sufficiently detailed so as to be self-executing.

In the case of Williams v. Smith, 360 So. 2d 417 (Fla. 1978), the Supreme Court of Florida examined whether Article II, Section 8 ***(d)*** was self-executing. That section provides:

> 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 added).

In holding that this provision is ***not*** self-executing, the Supreme Court used the test in Gray v. Bryant, which is whether the provision lays down a sufficient rule so as to protect the constitutional right without the aid of legislative enactment. The Court found that because this provision requires so much in the way of definition, delineation of time and procedural requirements, that the intent of the people could not be carried out without legislative aid, For instance, the Court found a need for a definition of "a felony involving a breach of public trust." Further, there existed many questions regarding what rights were subject to forfeiture. Finally, the provision recognized that a procedure for accomplishing the forfeiture is necessary. Id. at 420-21 n. 8.

Similarly, Article II, Section 8 (c) does not specifically define a breach of the public trust. Nor does it provide for the manner of recovery. Instead, as stated in the provision itself: "The manner of recovery and additional damages ***may be provided by law***." (Emphasis added). This is the same language contained in Section 8 (d) that the court in Williams found not to be self-executing.

Once again, the legislative history is determinative of this issue. In the section entitled "An Explanation of the Sunshine Amendment," it is stated: "Also ***in need of***

legislative implementation are . . . laws providing for the manner in which financial benefits obtained as a result of official misconduct are to be recovered by the state. . . ." (Appendix to Petitioners' Brief, App. 2, pp. 17-18) (emphasis added).

The legislative history also contains a Comparative Analysis of Ethics and Disclosure Laws and Enforcement, authored by Lawrence A. Gonzalez, Executive Director of the Commission on Ethics. In Comment 19 which addresses Article II, Section 8 (c), the author states:

> This section established as a constitutional principle that officials who profit from a breach of public trust and persons inducing such breaches shall make restitution to the state for all financial benefits obtained. ***. . . Legislation will be necessary to implement this provision by establishing procedurally the manner in which the state shall recover all ill-gotten gain. Through legislative enactment additional damages may also be prescribed.***

(Appendix to Petitioners' Brief, App. 2, p. 33) (emphasis added).

Both the Florida Constitution and the legislative history make it clear that only the State may bring an action for damages pursuant to Article II, Section 8 (c). Further, the constitutional provision is not self-executing and therefore the Plaintiffs have no right to bring an action thereunder. For these reasons, the Plaintiffs lack standing to bring this action under Article II, Section 8 (c) of the Florida Constitution.

B. THE PLAINTIFFS LACK STANDING TO BRING AN ACTION PURSUANT TO CHAPTER 112 OF THE FLORIDA STATUTES

Count IV of the Second Amended Complaint also purports to bring an action for breach of the public trust contrary to Chapter 112. (Appendix to Petitioners' Brief, App. 1,

para. 32). This claim seeks restitution to the State pursuant to Section 112.3175, Florida Statutes. The very language of this statutory provision precludes Plaintiffs from claiming standing to bring this action.

Section 112.313 governs the standards of conduct for public officers and employees and agencies. It prohibits, inter alia, solicitation or acceptance of gifts, doing business with one's agency, unauthorized compensation, misuse of public position, conflicting employment or contractual relationship, and disclosure or use of certain information. Section 112.3173 details certain specified offenses by public officers and employees.

The provision upon which Plaintiffs rely in an effort to void the "Max A Med transaction" is Section 112.3175. This section provides that:

> Any contract which has been executed in violation of this part is voidable:
>
> (1) By any party to the contract.
>
> (2) In any circuit court, by any appropriate action, by:
>
> (a) The [Ethics] [C]ommission.
>
> (b) The Attorney General.
>
> (c) Any citizen materially ***affected*** by the contract and residing in the jurisdiction represented by the officer or agency entering into such contract.

(Emphasis added).

Plaintiffs are not parties to the Max A Med transaction. Thus, Plaintiffs would have standing only if they are "materially affected" by the transaction complained of. Plaintiffs are not "materially affected" by the Max A Med transaction because first, they do not meet the statutory definition of this term, and second, they have not suffered a "special injury"

as required under Florida law. Finally, Chapter 112 is not unconstitutional because it is in harmony, not in conflict, with the Florida Constitution.

1. Plaintiffs do not meet the statutory definition of "materially affected" under Section 112.312 (161. Florida Statutes

The term "materially affected" is defined in Section 112.312 (16) as follows:

> "Materially affected" means involving an interest in real property located within the jurisdiction of the official's agency or involving an investment in a business entity, a source of income or a position of employment, office or management in any business entity located within the jurisdiction or doing business within the jurisdiction of the official's agency which ***is or will be affected in a substantially different manner or degree than the manner or degree in which the public in genera/ will be affected,*** or, if the matter affects only a special class of persons, then affected in a substantially different manner or degree in which such class will be affected.

(Emphasis added).

Plaintiffs first attempt to ignore the statutory language by alleging in paragraph 33 (a) that: "All persons are materially and adversely impacted by the misuse of a public office and abuse of the public's trust. . . ." This argument is specious, since if all persons are materially impacted by a breach of public trust, the statutory definition of the term "materially affected" would be superfluous.

Plaintiffs alternatively allege in paragraph 33 (b) that the successful completion of the Max A Med transaction directly facilitated the ability of Gutman to continue his and PCA's "predatory practice and schemes" of utilizing his "political influence for his and PCA's own financial interests, contrary to the interest ***of the public*** and to the interest [of] targeted companies ***such as*** those of the Plaintiffs." [sic] (Emphasis added). This

allegation supports the trial court's finding that the Plaintiffs lack standing because it alleges an injury that is not substantially different in manner or degree from that in which the public in general will be affected.

2. Plaintiffs have not suffered anv "special iniurv" different from the public generally as reauired bv Florida law

As if recognizing that they do not meet the definition of "materially affected" in Chapter 112, Plaintiffs argue that this definition should not be applied to their claim because the statutory definition must be read in oari materia with Article II, Section 8 (c) of the Florida Constitution. Plaintiffs ignore that the common law "special injury" rule is consistent with the statutory definition in Chapter 112 and applies equally to constitutional and other claims.

The "special injury" rule had its genesis in Sarasota County Analers Club. Inc. v. Kirk, 200 So. 2d 178 (Fla. 1967). There, the Florida Supreme Court adopted in full the decision of the district court in Sarasota County Analers Club v. Burns, 193 So. 2d 691 (Fla. 1 st DCA 1967). In Sarasota County, a county anglers' club and a citizen of the county in which the defendants were dredging and filling bottom lands brought suit against the defendants to abate an alleged nuisance. The court found no standing on the part of the plaintiffs where they failed to show how they were damaged as private citizens any different from the general public.

This "special injury" rule was further explained in the decision of United States Steel Corp. v. Save Sand Kev. Inc., 303 So. 2d 9 (Fla. 1974). In that case, the court held that a non-profit citizen group lacked standing to sue to enjoin interference with property rights

by a steel corporation absent an allegation of a special injury differing in kind from that suffered by the public generally.

In so holding, the court quoted extensively from a decision of the Second District Court of Appeal in Askew v. Hold the Bulkhead-Save Our Bays. Inc., 269 So. 2d 696 (Fla. 2d DCA 1972). In denying standing to sue, the Court stated:

> Neither of appellees has alleged or shown that one or the other of them will suffer a **special** injury or that either has a **special** interest in the outcome of this action. In order to maintain this kind of action, absent a sufficient predicate to a proper class suit (and there is no such predicate here) it is well settled that a plaintiff must allege that his injury would be different in degree and kind from that suffered by the community at large. [Cites omitted].
>
> If it were otherwise there would be no end to potential litigation against a given defendant, whether he be a public official ***or*** otherwise, brought by individuals or residents, all possessed of the same general interest, since none of them would be bound by res judicata as a result of prior suits; ***and as against public authorities, they may be intolerably hampered in the performance of their duties and have little time for anything but the interminable litigation.***

303 So. 2d at 12 (quoting 269 So. 2d at 697) (bold in original, bold and italics added).[5]

---

[5] The cases cited by Plaintiffs which decline to follow the "special injury rule" all involve challenges to the *constitutionality* of a statute or ordinance. These cases hold that where an individual seeks to attack a statute or ordinance as void on the ground that it was illegally enacted, the "special injury" rule does not apply. See e.g., Chiles v. Children , 589 So. 2d 260, 263 n.5 (Fla. 1991)(citizen and taxpayer can *challenge the constitutionality* of an exercise of the legislature's taxing and spending power without demonstrating special injury); see also Brown v. Firestone, 382 So. 2d 654 (Fla. 1980) (same); Dep't of Admin. v. Horne, 269 So. 2d 659 (Fla. 1972) (same). This case does not involve a direct challenge to the constitutionality of Chapter 112, instead, the action purports to be one for damages to the State. That the Plaintiffs challenge the constitutionality of Chapter 112 on appeal does not give Plaintiffs standing to bring an action in the trial court for damages to the State.

The "special injury" rule is very close in substance to the "materially affected" definition in Chapter 112. Regardless of whether the Plaintiffs rely on the Florida Constitution or Chapter 112 of the Florida Statutes, they still must satisfy the test for standing that has been applied whenever a private entity has brought suit based on conduct effecting the public generally. In this case, the conduct complained of by Plaintiffs in connection with the Max-A-Med transaction effects the public generally, and Plaintiffs have not suffered any "special injury" from the alleged wrongful conduct differing in kind from that of the general public. Accordingly, Plaintiffs lack standing to bring an action for breach of public trust.

3. Chapter 112 is not unconstitutional because it is consistent with and not in conflict with the Florida Constitution

Finally, Chapter 112 is not unconstitutional because it is not in conflict with Article II, Section 8 of the Florida Constitution, but is completely consistent with this provision. Section 8 (c) provides that a public officer shall be "liable to the state" for all financial benefits obtained by a breach of the public trust. Section 112.3175, Florida Statutes, provides that a contract executed in violation of the public trust "is voidable" in an action brought by, inter alia, the Attorney General. The constitution and statutes provide consistent mechanisms whereby violations of the public trust may be redressed by the State. The constitution provides for the State to seek restitution of gains procured through a breach of the public trust, and also for the State to void a contract executed in violation of such breach.

In fact, Section 112 grants rights that are in addition to those afforded by the constitution. As shown above, the only party that may sue a public official under Section 8 (c) of the Florida Constitution is the State of Florida. Under Chapter 112, both the State and those citizens "materially affected by the contract" may sue to void a contract obtained by breach of the public trust. Contrary to the Plaintiffs' argument, Chapter 112 grants rights that are broader than, not narrower than, the Florida Constitution and is not unconstitutional.

CONCLUSION

Neither the Florida Constitution nor the Florida Statutes confer standing on the Plaintiffs to bring this action. The public policy behind the standing requirement is clear. The Sunshine Amendment was not intended to permit an unfounded attack on a public official brought by a party with a hidden agenda. It is clear from the entirety of Plaintiffs' Second Amended Complaint that their true motive in bringing this action is to charge others with responsibility for the cancellation and non-renewal of St. John's contract with AHCA. Regardless of whether the Defendants are liable for such actions (and the trial court found they are not), these facts have nothing to do with the Max A Med transaction and Plaintiffs have no standing to sue for this claim. To allow such a claim would cast wide open the floodgates of litigation by citizens with hidden agendas to sue state legislators for any perceived impropriety, such as allowing perennial candidates for political office to abuse the judicial system for advancement of their own political goals. Whether the Plaintiffs are in fact "white knights" or "errant fools," they nonetheless lack standing to sue. The Opinion of the Third District Court of Appeal must be affirmed.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing has been furnished via U.S. Mail this **12th** day of **November,** 1997 to all counsel on the attached service list.

GILBRIDE, HELLER & BROWN, P.A.
Attorneys for Respondent Gutman
One Biscayne Tower - Suite 1570
2 South Biscayne Boulevard
Miami, Florida 33131
Tel.: (305) 358-3580

By: _____
DYANNE E. FEINBERG
Fla. Bar No. 371548

SERVICE LIST

Karen, Gievers, Esq.
750 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130

James V. Johnstone, Esq.
7200 N.W. 19th Street
Suite 600
Miami, Florida 33125

The Honorable Robert Butterworth
Attorney's General Office
The Capitol
Tallahassee, Florida 32399-1099.