SUPREME COURT OF FLORIDA

THE GOLF CHANNEL, a/k/a TGC, INC.

Petitioner,

v.

MARTIN JENKINS,

Respondent.

CASE NO. 93-426

District Court of Appeal, 5th District - No. 97-2049

REPLY BRIEF OF PETITIONER THE GOLF CHANNEL a/k/a TGC, INC.

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SUMMARY OF THE ARGUMENT

Respondent has failed in his Answer Brief to address the sole issue in this case, i.e., the Fifth District Court of Appeal's error in failing to follow well established rules of statutory construction when interpreting the Florida Whistleblower's Act. The Fifth District Court of Appeal's decision and the *Baiton v. Carnival Cruise Lines, Inc.,* 661 So. 2d 313 (Fla. 3d DCA 1995) opinion run afoul of the rules of statutory construction by rendering Section 448.103(1)(c) as having no meaning. Section 448.102 should be read **in tandem** with Section 448.103. Sections 448.102(1), 448.102(2), and 448.102(3) sets forth the **"Prohibitions"** under the Whistleblower Act. Section 448.103(1) affords the **"remedy and relief"** available to employees who have been retaliated against for actions they have taken pursuant to either Sections 448.102(1), 448.102(2), or 448.102(3) and incorporates by reference, the written notice requirement contained in Section 448.102(1). Section 448.102(1) requires the employee to have given the employer written notice and an opportunity to cure. Thus, when read together, Section 448.103(1)(c) clearly requires written notice in all cases brought under the Whistleblower Act.

The *Potomac Systems Engineering, Inc. v. Deering,* 683 So. 2d 180 (Fla. 2d DCA 1996) court, following the *Martin v. Honeywell, Inc.*, 1995 WL 868604 (M.D. Fla. July 18, 1995) decision, held that the notice requirement applied in all cases brought under the Whistleblower Act based on the plain language in Section 448.103(1)(c).

Respondent cannot evade the clear mandate of the statute merely by deeming it "poorly drafted." Moreover, the fact that Respondent contends his efforts to provide written

notice were “thwarted” is of no consequence and does not excuse the fact that Respondent **did not** provide written notice to Petitioner though he had ample opportunity to do so.

This Honorable Court should reject *Baiton* and the Fifth District Court of Appeal’s decision in the instant case.

ARGUMENT AND CITATIONS OF LEGAL AUTHORITY

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S ORDER DISMISSING RESPONDENT'S AMENDED COMPLAINT FOR FAILURE TO PROVIDE WRITTEN NOTICE TO TGC PRIOR TO FILING SUIT.

A. The Issue In This Case Is One Of Statutory Construction

Respondent's Answer Brief generally argues that the Whistleblower Act would be unfair if written notice was required in all cases brought under the Act. The issue in this case is not whether the Act is "fair" or how it could be redrafted to be "fair", but, rather, how a Court must construe an unambiguous statute. The Whistleblower Act clearly requires employees in all cases brought under the Act, to first provide the employer with **written notice** and an opportunity to cure. *See Potomac Systems Engineering, Inc. v. Deering*, 683 So. 2d 180, 181-82 (Fla. 2d DCA 1996); *Martin v. Honeywell, Inc.*, 1995 WL 868604 (M.D. Fla. July 18, 1995) (holding "the plain language of the statute imposes a written notice and opportunity to cure requirement as an element of proof").

B. Requiring Notice Protects Employees From Retaliation

Respondent argues that there is no justification for requiring the employee to give written notice when traveling under Section 448.102(3). Respondent reasons that an employee may choose to "quietly" address unlawful activity by informing his "bosses" without written notice, thereby respecting the confidentiality of the employer. Respondent further argues an employee may be concerned about retaliation if required to provide written notice rather than

"quietly" addressing his concerns about the unlawful activity with his supervisor. This argument is devoid of logic.

As mentioned in Petitioner's Brief, the Whistleblower Act was designed to protect objecting employees from retaliation. Written notice of one's complaints not only notifies the employer of the alleged illegal activity, it also serves as a warning to the employer **not** to take action against the employee for having complained. Retaliation is a difficult undertaking in the face of a paper trail. Thus, simply put, if an employer wants to terminate an employee following a written complaint, it had better have a good and independent reason. The written notice provides the employee with ample evidence to support an action in the event of retaliation. Thus, written notice serves as both a shield to protect employees from retaliation following valid complaints and a sword to initiate litigation in the event of a discharge in violation of the Act. If an employer was inclined to retaliate against an employee for addressing unlawful activity, it could more easily do so where the employee only verbally communicated concerns about unlawful activity. If that employee had provided written notice, he would be protected in the event of retaliation. Even the most unsophisticated employee can recognize the benefits of putting his complaint in writing.

C. The Act Is Subject To One Interpretation Under The Rules of Statutory Construction

Contrary to Respondent's assertion in his Answer Brief, the language contained in Section 448.103(1)(c) is open to only one interpretation. That is, Section 448.103(1)(c) clearly mandates that written notice is required in all cases brought under the Whistleblower Act. The Fifth District Court of Appeal in this case departed from this obvious and logical

interpretation of the Act. That Court followed the Third District Court of Appeal in *Baiton v. Carnival Cruise Lines, Inc.,* 661 So. 2d 313 (Fla. 3d DCA 1995), who interpreted Section 448.103(1)(c) as being superfluous or having no meaning. In other words, these courts found Section 448.103(1)(c) was only a reminder that written notice is required if proceeding under Section 448.102(1). This reasoning runs afoul of the rules of statutory construction.

It is a cardinal rule of statutory interpretation that courts should avoid readings that would render part of a statute meaningless. *Forsythe v. Longboat Key Beach Erosion,* 604 So. 2d 452, 456. The Fifth District Court of Appeal here, and the court in *Baiton,* did exactly that. They followed readings that rendered Section 448.103(1)(c) meaningless. Respondent would have this Honorable Court do the same. However, this Court should reject these arguments and hold Section 448.102 must be read **in tandem** with Section 448.103.

Section 448.103(1)(c) **unambiguously** states the "employee may not recover in **any** action brought pursuant to this subsection if he failed to notify the employer about the illegal activity, policy, or practice **as required by s. 448.102(1)**." Section 448.102 sets out the **"Prohibitions"** under the Whistleblower Act and Section 448.103 sets forth the **"remedy and relief"** available under the Whistleblower Act. Section 448.102 does not independently set forth any procedure by which an employee who has been the object of retaliatory personnel action may file suit. That Section merely outlines the various prohibitions under the Whistleblower Act. On the other hand, Section 448.103(1) specifies the exclusive and exact procedure by which an employee who has been the victim of retaliation may file suit under the Whistleblower Act. Reading Sections 448.102 and 448.103 together, notice is clearly required for all actions

brought under the Act. This is the correct statutory interpretation of the Act and the only reading which harmonizes both sections of the statute.

D. The Act Is Unambiguous And The Fifth District Court of Appeal Erred In Concluding Otherwise

Respondent also contends the Whistleblower Act is ambiguous and would have this Honorable Court determine what the Legislature intended when it enacted the Whistleblower Act. However, this argument is also without merit. Only when a statute is of doubtful meaning should matters extrinsic to the statute be considered in construing the language employed by the legislature. *Florida State Racing Comm'n v. McLaughlin*, 102 So. 2d 574, 576 (Fla. 1958). The language of the Whistleblower Act is unambiguous. In the case at bar, the Fifth District Court of Appeal in making its decision deemed the Whistleblower Act ambiguous. Then, the Court considered matters extrinsic to the statute in an effort to justify their decision. There is absolutely nothing "confusing" or ambiguous about the language in the Whistleblower Act. The Fifth District Court of Appeal went beyond the plain meaning of the statute and gave it a meaning contrary to its intent and in violation of the rules of statutory interpretation.

The law is well settled that where the plain language of a statute is clear and unambiguous on its face, it must be given its plain and ordinary meaning. *Mayo Clinic Jacksonville v. Dept. of Professional Regulation, Bd. of Medicine,* 625 So. 2d 918 (Fla. 1st DCA 1993). Unambiguous language is not subject to judicial construction however wise it may seem to alter the plain language. *Corfan Banco Asuncion Paraguay v. Ocean Bank,* 1998 WL 299669 (Fla. 3d DCA 1998). Courts may not twist the plain wording of statutes in order to achieve

particular results. *Weber v. Dobbins,* 616 So. 2d 956 (Fla. 1993). Even when courts believe the legislature intended a result different from that compelled by the unambiguous wording of a statute, they must enforce the law according to its terms. *Id.* A legislature must be presumed to mean what it has plainly expressed, and if an error in interpretation is made, it is up to the legislature to rewrite the statute to accurately reflect legislative intent. *Id.*

In the case at bar, Respondent requests this Court do exactly what the Fifth DCA did -- twist the plain wording of statutes in order to achieve particular results. This Court must not alter the plain meaning of the Whistleblower Act to reach what Respondent considers to be the Legislature's intent. In support of his argument, Respondent identified several scenarios that would seem unfair if notice was required under all three sections of the Whistleblower's Act. Indeed, Respondent discussed the exact hypothetical the Fifth District Court of Appeal used in its decision. That hypothetical involved an employee that is terminated on the spot by his supervisor for refusing to dump hazardous waste in a waterway. Obviously, this hypothetical creates some concern since the employee would not have an opportunity to provide written notice in compliance with the Whistleblower Act. Nevertheless, the plain and unambiguous language of Section 448.103(1)(c), mandates that the employee in this hypothetical would not have a cause of action under Section 448.102(3), because he failed to provide written notice.

However, in many instances where an employee "blows the whistle" on their employer by reporting alleged violations of the law, the employee will be protected under the very statute or law he contends the employer has violated. For example, the employee in Respondent's hypothetical will most certainly be protected from retaliatory discharge under federal environmental laws. A variety of federal statutes protect employees "who blow the

whistle” on their employers by reporting environmental violations.[1] Thus, the employee in Respondent’s hypothetical would not be without remedy, even though he failed to comply with the requirements of the Florida Whistleblower Act.

Unfortunately, there are always situations that will fall outside the purview of a statute which will not seem “fair”. However, no matter how troubling a scenario may seem, this Court should not be persuaded by Respondent’s hypotheticals and depart from the plain meaning of the statute. Even if this Court is convinced the Legislature could not have envisioned such a harsh result, it must still follow the plain meaning of the statute. The legislature must be presumed to mean what it has plainly expressed in the statute. If an error in interpretation is made with respect to that statute, it is up to the legislature to rewrite the statute to accurately reflect the legislative intent.

It is possible that the Legislature may not have envisioned all of the consequences flowing from its enactment of the Whistleblower Act. However, such lack of vision does not make the statute ambiguous. *Forsythe, supra,* 604 So. 2d at 456. In any event, such envisioning should be left to the Legislature to examine and debate the pertinent considerations surrounding the enactment of a statute. Thus, in the case at bar, even though the Fifth District Court of Appeal was convinced the legislature really meant and intended that notice not be required under Sections 448.102(2) and 448.102(3), it could not depart from the plain meaning of the statute as it did in this case.

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[1] *See, e.g.,* Toxic Substance Control Act s 23, 15 U.S.C. s 2622 (1988); Federal Water Pollution Control Act s 507, 33 U.S.C. s 1367 (1994); Public Health Service Act s 1450, 42 U.S.C. s 300j-9(i)(1) (1994); Solid Waste Disposal Act s 7001, 42 U.S.C. 6971(a) (1988); Comprehensive Environmental Response, Compensations and Recovery Act s 110, 42 U.S.C. s 9610 (1994).

Keeping in mind that Florida is an "at will" employment state, on occasion, the "at will" employment doctrine will cause cold-hearted and even draconian results -- but it is the law of Florida. *See Zombori v. Digital Equipment Corp., 878 F. Supp. 207* (N.D. Fla. 1995), *aff'd*, 103 F.3d 147 (11th Cir. Nov. 26, 1996). While the Fifth District Court of Appeal made a conscientious effort in coming to its decision in this case, it nevertheless failed to enforce the statute according to its plain meaning. Respondent cannot evade the mandate of the statute merely by deeming it "poorly drafted." Rather, because the Act is an exception to Florida's common law employment "at-will" doctrine, Respondent must strictly comply with the literal requirements of the Act in order to invoke its protection. *See, e.g., Forrester v. John H. Phillips, Inc.,* 643 So.2d 1109 (Fla. DCA 1994) (holding that the Legislature's prohibition against retaliatory conduct for an employee reporting violations of "law, rule, or regulation" should not be interpreted to include matters of public policy). Indeed, the language of the Whistleblower Act reveals a clear legislative intent to carve only a small exception to the employment at-will doctrine.

Thus, this Honorable Court should follow the Second District Court of Appeal in its decision in *Potomac Systems Engineering, Inc. v. Deering,* 683 So. 2d 180 (Fla. 2d DCA 1996) and reject the argument that written notice is not required under Section 448.102(3). *Potomac*, in agreement with the court in *Martin v. Honeywell, Inc,* 1995 WL 868604 (M.D. Fla. July 18, 1995), held that Section 448.102 must be read **in tandem** with Section 448.103. *See Potomac,* 683 So.2d at 182. These Courts clearly gave significance and effect to each provision of the statute in compliance with the correct rules of statutory interpretation.

E. Wanting To Provide Notice Does Not Satisfy The Act's Notice Requirement

As *Potomac* and *Martin* establish, before being entitled to invoke the protection of the Whistleblower Act, Respondent must have notified Petitioner of his complaints in writing. Respondent cannot avoid this requirement by making a self-serving argument that he wanted to make a written report but was told not to by his boss. Moreover, Respondent had at least one year between the time of his alleged oral complaint and his termination, to provide Petitioner with written notice of the alleged wrongdoing. Respondent's assertions that he "wanted to make a written report of the activity" does not change the fact that he **did not** make a written report as required by the Act. Accordingly, the Amended Complaint was properly dismissed with prejudice by the trial court and the Fifth District Court of Appeal erred by vacating the trial court's order and remanding for further proceedings. This Honorable Court should follow the decisions in *Potomac* and *Martin,* reject the *Baiton* decision and reverse the Fifth District Court of Appeal's opinion in the instant case.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests this Honorable Court reverse the decision of the Fifth District Court of Appeal vacating the trial court's Order dismissing Respondent's Complaint, and remanding for further proceedings.

Dated this ___ day of September, 1998.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner The Golf Channel a/k/a TGC, Inc. has been furnished by U.S. Mail, postage pre-paid, to Keith R. Mitnik, Esq., Morgan, Colling & Gilbert, P.A., P.O. Box 4979, Orlando, FL 32802, this ____ day of September, 1998.

____
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