IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

v. **CASE NO.: SC07-1131**

CONTRACTPOINT FLORIDA PARKS, L.L.C., ET AL.,

Respondents.

_____/

INITIAL BRIEF OF THE STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

On Review of A Certified Question From The District Court Of Appeal, First District

---

BILL MCCOLLUM
ATTORNEY GENERAL

SCOTT D. MAKAR
Solicitor General

LOUIS F. HUBENER
Chief Deputy Solicitor General
Florida Bar No. 0140084

OFFICE OF THE ATTORNEY GENERAL
The Capitol - PL-01
Tallahassee, FL 32399
(850) 414-3300

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA CONSTITUTION

LAWS OF FLORIDA

FLORIDA STATUTES

ARTICLES

STATEMENT OF THE CASE AND FACTS

A. Background

In April 2001, the Florida Department of Environmental Protection ("DEP"), entered into an agreement with the appellant, ContractPoint Florida Parks, L.L.C. ("ContractPoint"). R1:167 and R1:178. Pursuant to the agreement, ContractPoint was to finance, construct and operate 143 vacation cabins, along with associated concessions, in eight state parks. R1:167. The consideration was the exclusive right to operate the cabins and concessions until December 31, 2032, with two renewal options of 10 years contingent upon satisfactory performance. DEP was to pay nothing under the agreement. R1:179-180.

No cabins were built, however, and ultimately ContractPoint filed a multi-million dollar breach of contract action against DEP alleging wrongful termination of the agreement and seeking damages and lost profits for the duration of the agreement, including the two renewal periods. Following a jury trial in 2005, judgment was entered against DEP for $628,543.00. R1:6-7. Mindful of section 11.066, Florida Statutes, and lacking an appropriation for this judgment, DEP did not pay it.

B. Course of Proceedings and Disposition in the Lower Courts.

ContractPoint, in a new action, filed a petition for writ of mandamus alleging that DEP was under a clear legal duty to make payment. R1:1. In its motion to dismiss the alternative writ of mandamus, DEP contended that, there being no appropriation to pay the judgment, section 11.066, Florida Statutes, barred payment, thus precluding mandamus as an available remedy. R1:34. In support of the motion, the affidavit of Michael Bullock, Director of the Division of Recreation and Parks, stated:

> 4. At no time during that period [2000 to the present] has money in any appropriations act, general or special, been allocated to pay the subject judgment. Nor are there funds remaining from the "cabins initiative" allocation to pay the judgment.

R1:40-41; R1:195-196. The motion further pointed out that courts have no authority to order appropriations. This being so, DEP argued that ContractPoint had no right to a writ of mandamus.

ContractPoint's memorandum in opposition to DEP's motion asserted that five years previously, in Fiscal Year 2000-2001, the legislature had appropriated $9,500,000 for the cabins initiative. R1:133, 135. It also contended that DEP's argument was an "impermissible reassertion" of sovereign immunity that,

if adopted by the court, would render all state contracts "illusory." R1:136, 139-140.

In reply, DEP again asserted that sovereign immunity and separation of powers prevent courts from ordering payment of money the legislature has not appropriated, and again pointed out that the $9,500,000 appropriated in Fiscal Year 2000-2001 had been expended on state parks cabins, as stated in the Division Director's affidavit. R1:172-174; R1:195-196. Further, no appropriation would have been made to pay ContractPoint since, under the agreement, ContractPoint was to finance and construct the cabins and concession facilities on its own account, its consideration being the right to operate the cabins and concessions and receive income therefrom. R1:174, 179-180. DEP was to pay nothing to ContractPoint under the agreement. Id.

DEP contended that the plain language of sections 11.066(3) and (4), Florida Statutes, made it clear that a judgment can be enforced only if the legislature has appropriated money to pay the judgment. R1:174-175. Without such an appropriation, DEP had no clear legal duty to pay, ContractPoint had no legal right to demand payment from DEP, and the alternative writ had to be denied. Id.

The trial court agreed with DEP, finding that:

> [T]he language in Section 11.066 is very clear. No monetary judgment shall be paid unless there is an appropriation made by law to pay the judgment. And that is not the case here.

R2:220 (emphasis in the order). The trial court held that section 11.066 was a reassertion of the State's sovereign immunity. R2:221-222. "[I]n the face of the clear language of Section 11.066, Florida Statutes, I am not prepared to say that the Defendants had a clear legal duty to pay the judgment of the Plaintiffs without a specific appropriation for that purpose." R2:222. Accordingly, the trial court denied the writ on the merits.

The First District Court of Appeal reversed the trial court. It concluded that this Court's decision in Pan-American Tobacco Corp. v. Dep't of Corrections, 471 So. 2d 4 (Fla. 1984), meant that the application of the sovereign immunity doctrine to contract actions "would result in the State's inability to enter into binding contracts." Slip op. at 3-4. The First District believed the trial court's determination "that section 11.066, Florida Statutes (1991), superseded the decision in Pan-Am Tobacco" was wrong. Because section 11.066 did not "express any legislative intent to overturn 22 years of case law subjecting the state to breach of contract actions," the First District would not infer a "legislative intent to render all state

contracts void and meaningless for lack of mutuality of obligation." Slip op. at 5.[1]

The First District also relied on section 258.015(3)(a), Florida Statutes, as indicative of legislative intent. That section, enacted in 1996, states in part that "[t]he Legislature finds it to be in the public interest to provide incentives for partnerships with private organizations with the intent of producing additional revenue to help enhance the use and potential of the state park system." Slip op. at 6. The First District noted that the contract referenced this statute. Slip op. at 6, n. 1.

Finally, the First District was "not unmindful" that "the wording of the statute in question does not exclude contract actions," and that it was not "clear how DEP will comply if, in fact, there is not a legislative appropriation to cover the judgment[.]" Consequently, it certified the following question as one of great public importance:

> **DOES SECTION 11.066, FLORIDA STATUTES, APPLY WHERE JUDGMENTS HAVE BEEN ENTERED AGAINST THE STATE OR ONE OF ITS AGENCIES IN A CONTRACT ACTION?**

Slip op. at 6-7.

---

[1] Because section 11.066 was enacted in 1991, which was seven years after the Pan-Am Tobacco decision in 1984, the reference to 22 years is inaccurate. See ch. 91-109, §40, Laws of Florida (1991). Section 11.066 did not follow 22 years of case law.

STANDARD OF REVIEW

ContractPoint's entitlement to mandamus relief, an order directing DEP to pay the judgment, is dependent upon a showing of the existence of a clear legal right on the part of the petitioner, an indisputable and ministerial duty on the part of the respondent, and the absence of any adequate legal remedy. Wuesthoff Mem. Hosp., Inc. v. Florida Elections Comm'n, 759 So. 2d 179 (Fla. 1st DCA 2001). Mandamus may not be used to establish the existence of a right, but only to enforce a right already clearly and certainly established in the law. Florida League of Cities v. Smith, 607 So. 2d 397, 400-401 (Fla. 1992).

In ruling that section 11.066 did not apply to contract actions and that ContractPoint was entitled to relief, the First District decided a question of law. Because the interpretation of a statute is a pure question of law, this Court's review is de novo. Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 813 So. 2d 155, 159 (Fla. 4th DCA 2002).

SUMMARY OF THE ARGUMENT

Because the plain and unambiguous language of section 11.066 applies to judgments in contract actions, the First District erred in relying on other interpretive principles and failing to apply the plain meaning rule.

Section 11.066 is an exercise of the legislature's exclusive constitutional power over appropriations and its authority to determine to what extent the State's sovereign immunity may be abrogated. This Court's decision in Pan-Am Tobacco Corp. v. Dep't of Corrections, 471 So. 2d 4 (Fla. 1984), does not purport to limit that power and authority.

Applying section 11.066 according to its plain meaning does not lead to the "absurd result" of making all state contracts "void and meaningless." State contracts have always been subject to the constitutional authority of the legislature over appropriations. Section 11.066 does not deprive parties to state contracts of the right to sue the state and obtain a judgment. Moreover, nothing in that statute suggests the legislature will not fairly consider all judgments.

ARGUMENT

The First District erred in concluding that ContractPoint was entitled to mandamus relief to enforce its judgment against DEP. Contrary to the plain and unambiguous language of section 11.066, Florida Statutes, the court held that that statute could not have been intended to apply to judgments in contract actions.

Section 11.066 unequivocally states that a state agency **i)** shall not pay or be required to pay monetary damages under **"the judgment"** of any court except pursuant to appropriation made by law, **ii)** that the sole remedy of **"a judgment creditor,"** if there has not been an appropriation made by law to pay **"the judgment,"** is to petition the legislature for an appropriation to pay **"the judgment,"** and **iii)** that it is a defense to an alternative writ of mandamus to enforce such **"a judgment"** that there is no appropriation. § 11.066(3) and (4), Fla. Stat.[2]

Section 11.066 does not distinguish among types of judgments, and expresses no legislative intent to exclude contract judgments. Indeed, under Florida law contracts with

[2] The term "appropriation made by law" has the same meaning as in Article VII, Section 1(c), of the Florida Constitution and means "money allocated for a specific purpose by the Legislature by law in a general appropriations act or a special appropriations act." §11.066(1), Fla. Stat.

the state are always subject to the appropriations power of the legislature. Numerous Florida statutes make that clear. For the reasons expressed below, the First District's conclusion that section 11.066 is without meaning or legal significance should be reversed.

I. THE FIRST DISTRICT ERRED IN DISREGARDING THE PLAIN LANGUAGE OF SECTION 11.066, FLORIDA STATUTES.

A. The Plain and Unambiguous Language of Section 11.066 Prohibits Payment of Monetary Judgments, Including Judgments in Contract Actions, Without an Appropriation Therefor.

In rejecting the plain and obvious meaning of section 11.066 and holding that the legislature is presumed to know the judicial construction of "existing law" when it enacts new law, the First District both misapplied and misstated that presumption.

The preeminent principle of statutory interpretation -- what this Court has repeatedly called the "polestar" that guides a court's inquiry -- is legislative intent. City of Clearwater v. Acker, 755 So. 2d 597 (Fla. 1999). "If the language of a statute is plain and unambiguous, it must be enforced according to its plain meaning." Mitchell v. State, 911 So. 2d 1211, 1214 (Fla. 2005). In such cases the courts must derive legislative intent from the words used, without involving rules of construction or speculating as to what the legislature intended.

State v. Dugan, 685 So. 2d 1210, 1212 (Fla. 1996); Zuckerman v. Alter, 615 So. 2d 661, 663 (Fla. 1993). Courts may not resort to rules of construction when the words of a statute are clear and legislative intent is manifest. Carawan v. State, 515 So. 2d 161, 165 (Fla. 1987)("[C]ourts never resort to rules of construction when the legislative intent is plain and unambiguous."); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)(same). Only where no clear intent exists does any other rule of statutory construction come into play. Carawan, 515 So. 2d at 165.

Because the language of section 11.066 makes legislative intent crystal clear, the plain meaning rule cannot be trumped by resort to the principle that the "'legislature is presumed to know the judicial constructions of a law when enacting a new version of that law' and 'the legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed in the new version.'" See Slip. op. at 5 (citing Jones v. ETS of New Orleans, 793 So. 2d 912, 917 (Fla. 2001)).[3] Further, when it enacted section 11.066 in 1991, the legislature was not adopting a new version of a previously

[3] The First District's opinion tersely paraphrases rather than quotes the actual language from Jones v. ETS of New Orleans. See Slip op. at 5.

existing statute that was freighted with "prior judicial constructions." It was enacting a new statute pursuant to its constitutional authority to control expenditures and to define the extent to which sovereign immunity would be waived. Hence it had no obligation to say that "the judgment of any court" or "a judgment for monetary damages" meant all judgments for damages. The plain and unambiguous language of the statute applies to all judgments.[4]

Moreover, if speculation about the legislature's intent were appropriate, one might convincingly postulate that section 11.066 was enacted in 1991 as a direct response to an article appearing in the Florida Bar Journal in 1990. See David K. Miller and M. Stephen Turner, Enforcement of Money Judgments Against the State, Fla. B.J., July/August 1990 at 27. (App. 13) This article advocated the use of a mandamus action to compel state agencies to pay monetary judgments, including those in contract actions, irrespective of whether the agency had an appropriation to pay the judgment. The legislature's prompt

[4] The First District also relied on Knowles v. Beverly Enterprises–Florida, Inc., 898 So. 2d 1 (Fla. 2004). But that case, like Jones, concerned pre-existing statutory laws. And as Knowles itself pertinently states, "there must be a hopeless inconsistency before rules of construction are applied to defeat the plain language of one of the statutes." 898 So. 2d at 9 (citations omitted).

rejoinder to that article, the enactment of section 11.066, expressly made the lack of an appropriation a defense to such actions.

If anything, section 11.066 was aimed squarely at judgments in contract actions since the legislature has elsewhere authorized payment for tort, civil rights, and attorney fee judgments to be made directly from the Risk Management Trust Fund. See §§ 284.38 and 768.28(5), Fla. Stat. That portion of judgments in tort actions that exceeds $200,000, however, must be reported to the legislature for payment. § 768.28(5).

Hence, to the extent inquiry beyond the plain language of section 11.066 may be called for, one must conclude that monetary judgments, as contemplated by that statute, included judgments in contract actions. The First District's legal conclusions to the contrary are erroneous.

B. Section 11.066 Reflects the Legislature's Constitutional Authority to Decide When and How to Pay Judgments in Contract Actions.

It cannot be disputed that the legislature has exclusive authority to abrogate sovereign immunity and to appropriate state funds.[5] These powers are exercised through duly enacted

[5] See Art. VII, §1(c), Fla. Const. (no money shall be drawn from the treasury except in pursuance of appropriation made by law); Art. X, §13, Fla. Const. (sovereign immunity); Art. III, §1, Fla. Const. (legislative power vested in legislature); Art. V,

statutes. American Home Assurance Co. v. National R.R. Passenger Corp. 908 So. 2d 459, 471, 474-475 (Fla. 2005). As this Court stated, policy considerations underlying sovereign immunity include the constitutional separation of powers, protection of the public treasury against profligate encroachments, and maintenance of the orderly administration of government. Id. at 471. With respect to separation of powers, this Court has also explained that "certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance." Id. (quoting Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1022 (Fla. 1979)).

Section 11.066, enacted in 1991, manifests the legislature's unequivocal intent to require an appropriation for a judgment as a precondition to payment from the state's coffers. As a limitation on the waiver of sovereign immunity, this statute "should be strictly construed in favor of the state, and against [a] claimant." Windham v. Florida Dep't of Transp., 476 So. 2d 735, 739 (Fla. 1st DCA 1985); accord American Home Assurance Co., 908 So. 2d at 872 (Supreme Court "must strictly construe" legislative waiver of sovereign immunity).

---

§14, Fla. Const. (judiciary shall have no power to fix appropriations); Art. II, § 3 (separation of powers).

This Court's decision in Pan-Am Tobacco Corp. v. Dep't of Corrections, 471 So. 2d 4 (Fla. 1984), cannot be construed to limit the legislature's right to exercise its clear constitutional authority; to hold otherwise would be to say that courts may order appropriations when the legislature has not. Nothing in Pan-Am Tobacco would countenance such usurpation of the separation of powers doctrine embodied in our constitution. Indeed, in Pan-Am Tobacco the Court relied on nothing more than what it presumed to be legislative intent, finding an implied waiver of sovereign immunity based on the fact that the legislature had authorized various agencies to enter into contracts. "This is not the first time this Court has looked to the legislative intent in general law to find a sovereign amenable to suit." 471 So. 2d at 5-6 (emphasis added). See also County of Brevard v. Miorelli Eng'g Inc., 703 So. 2d 1049, 1050 (Fla. 1997) ("Although no express legislative waiver has been granted for contract claims, this Court in Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984), found an implied waiver of sovereign immunity in contract on the premise that because the legislature authorized state entities to enter into contracts, it must have intended such contracts to be valid and binding on both parties.").

Section 11.066 is merely a reassertion of the legislature's

constitutional authority that says judgments in any contract action will not be paid automatically and without a specific appropriation. The legislature has the authority to specify on what basis money shall be withdrawn from the state treasury, just as it has the right to limit damages recoverable in tort actions. American Home Assurance Co., 908 So. 2d at 472, 474-475; § 768.28, Fla. Stat.

The First District also relied on section 258.015(3), Florida Statutes, as a reason to compel payment without an appropriation. That section focuses on private donations, not contracts. Subsections (3)(a) and (b) only create a mechanism to improve the state park system by providing that the legislature may appropriate money from the Land Acquisition Trust Fund to match contributions of private donors. This statute hardly creates a "hopeless inconsistency" with section 11.066 that justified the First District's total disregard of that statute's plain meaning. See Knowles, 898 So. 2d at 9. Again, the First District's legal conclusions to the contrary are erroneous.

C. Applying Section 11.066 According to its Plain and Unambiguous Language Does Not Lead to an Absurd Result.

Finally, the First District erred in concluding that application of section 11.066 to judgments in contract actions

would lead to an absurd result -- making all contracts with the state "void and meaningless." App. 5. Its legal conclusion, that section 11.066 is meaningless and unenforceable, ignores both the legislature's constitutional duty to protect the public fisc and the numerous ways in which it has done so.

It is not unreasonable for the legislature to think that in a time when litigation results are often unpredictable and breach of contract actions may seek tens or hundreds of millions of dollars, that it should have the final say on what might be appropriated from the state treasury. That is emphatically its constitutional responsibility. Nothing suggests that the legislature will not fairly consider all contract judgments when properly presented through the petition process. ContractPoint has not even taken that small step.

Government contracting differs from the private sector in many important ways. Contracts in the governmental context are always contingent on legislative appropriations. Section 287.0582, Florida Statutes, for example, forbids agencies to contract for the purchase of goods or services for a period in excess of one fiscal year unless the contract includes a statement that it is contingent upon an annual appropriation by the legislature. An agency may not contract to spend money in excess of the amount appropriated to it unless specifically

authorized by law. § 216.311(1), Fla. Stat. Any contract in violation of the provisions of chapter 216 is null and void. Id.

Thus, even though a party contracting with the state may invest heavily in capital equipment on the expectation that appropriations will continue from year to year, it has no right to damages if the legislature fails to fully fund the contract. See Dep't of Health and Rehab. Servs. v. Southern Energy, Ltd., 493 So. 2d 1082 (Fla. 1st DCA 1986); see also United Faculty of Florida v. Board of Regents, 365 So. 2d 1073, 1078 (Fla. 1st DCA 1979) ("That the legislature might not provide full funding for the collective bargaining agreement was a contingency well known to the parties before, during, and after negotiations."). In addition, state contracts frequently contain an "at-will" termination clause. See Dep't of Health & Rehab. Servs. v. Belveal, 663 So. 2d 650, 652 (Fla. 2d DCA 1995). The fact that a contract may not be funded or may be terminated is simply a risk to be borne; it does not make the contract void and meaningless.

There is a certain irony in the First District's insistence that section 11.066, read literally, would render contracts void. The very purpose of those doing business in the corporate form, such as ContractPoint, is to limit the liability of those

who direct and profit from the corporation's business. See In re Forbes, 186 B.R. 764, 768 (Bankr. S.D. Fla. 1995)("Officers, directors, and shareholders are not generally personally liable for liabilities incurred by corporations in which they have an interest."); Byron v. Marine Carriers (USA), Inc., 668 So. 2d 273, 274 (Fla. 1st DCA 1996)([A]s a general rule the so-called "corporate shield" doctrine immunizes from suit a corporate employee acting in his corporate capacity."). See also §§ 608.4227 and 608.4228, Fla. Stat. (limiting liability of managers and members of limited liability companies); § 607.0831, Fla. Stat. (limiting liability of corporate directors). Those corporations and limited liability companies with few or no appreciable assets are effectively judgment proof. That in itself is a species of immunity, although it is not generally said to make a contract void, meaningless, or illusory. Such entities can also seek refuge in bankruptcy laws that may return judgment creditors pennies on the dollar, if that.

Risk is inherent in nearly every contract; it does not make contracts illusory. While section 11.066 may create some degree of uncertainty with respect to a party's right to collect on a judgment, that is not the same as saying that the state agency has no obligation to perform under a contract and therefore the

contract is wholly illusory and void. Indeed, section 11.066 still permits suits against the state or its agencies for breach of contract; it allows judgments in breach of contract suits to be entered against the state and its agencies and paid from duly specified appropriations; and, it allows for satisfaction of contract judgments through the claims process if the legislature has otherwise failed to appropriate money to pay the judgment.

Nothing in section 11.066 suggests a party will not be paid for services rendered or goods delivered in accordance with a contract. Nothing in section 11.066 renders a contract "illusory" or sends a signal to agencies to engage in bad faith dealing, as the First District's holding would seem to suggest. In any case, irrespective of how state contracts should be characterized in light of section 11.066, that statute is a policy choice the legislature is free to make under its plenary constitutional authority. See Art. VII, § 1(c), and Art. X, § 13, Fla. Const.

* * * *

Because section 11.066 must be interpreted according to its plain and unambiguous language, DEP had no indisputable, ministerial duty to pay the judgment in the absence of an appropriation therefor. Accordingly, the First District erred in reversing the trial court's denial of a writ of mandamus.

CONCLUSION

For all the foregoing reasons, the decision of the First District should be reversed.

Respectfully Submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

SCOTT D. MAKAR
Solicitor General

_____
LOUIS F. HUBENER
Chief Deputy Solicitor General
Florida Bar No. 0140084

OFFICE OF THE ATTORNEY GENERAL
PL- 01 - The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3681

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing has been furnished by U. S. Mail this _____ day of August, 2007, to:

MIKE PISCITELLI
Vezina, Lawrence & Piscitelli, P.A.
300 Southwest First Avenue - Suite 150
Fort Lauderdale, Florida 33301
(954) 728-1270
Counsel for ContractPoint Florida Parks, L.L.C.

BRADLEY S. COPENHAVER
Vezina, Lawrence & Piscitelli, P.A.
413 East Park Avenue
Tallahassee, Florida 32301
(850) 224-6205
Counsel for ContractPoint Florida Parks, L.L.C.

_____
Louis F. Hubener

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared with Courier New 12-point in compliance with Fla. R. App. P. 9.210(a)(2).

_____
Louis F. Hubener