IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-2455

Lower Tribunal Nos.: 1D09-4956
08-1144GM
08-1465GM

MARTIN COUNTY CONSERVATION ALLIANCE and 1000 FRIENDS OF FLORIDA, INC.,

Petitioners,

v.

MARTIN COUNTY, DEPARTMENT OF COMMUNITY AFFAIRS; MARTIN ISLAND WAY, LLC; and ISLAND WAY, LC,

Respondents.
_____/

AMICUS CURIAE BRIEF OF FLORIDA WILDLIFE FEDERATION IN SUPPORT OF PETITIONERS (BY LEAVE OF COURT)

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Preface

On May 25, 2012, pursuant to Fla.R.App.P. 9.370, Florida Wildlife Federation (FWF) filed a motion for leave to file an amicus curiae brief in opposition to the First District Court of Appeals two sanction orders; the sua sponte attorney's fees sanction opinion, and the order granting a motion for attorney's fees under Section 120.595, Fla. Stat.

On June 19, 2012, the Court entered an order which held that the "motion for leave to file brief as amicus curiae filed by the Florida Wildlife Federation is hereby granted and they are allowed to file brief in support of appellant. The brief by the above amicus curiae shall be served pursuant to Florida Rule of Appellate Procedure 9.370(c)."

The undersigned legal counsel of the FWF first received a copy of the June 19th order on the afternoon of Thursday, June 21, 2012. He promptly prepared and served this amicus curiae brief on Friday, June 22, 2012.

Interest of FWF

The FWF is a state-wide, not-for-profit conservation organization. FWF was formed in 1937 and incorporated under Florida law in 1946 as a not-for-profit corporation. The FWF has approximately 14,000 members and approximately 60,000 supporters. The corporate purpose of the FWF is to promote the

preservation, management, and improvement of Florida's fish and wildlife, water quality, and plant life. The FWF believes in responsible public use and enjoyment of our natural environment, including sustainable fishing and hunting, and all other resource-compatible forms of outdoor recreation.

In promoting it's corporate purposes the FWF has appeared, and reasonably foresees to frequently appear in the future, in both Florida judicial proceedings and Florida quasi-judicial administrative proceedings on behalf of FWF and it's members. The FWF frequently litigates to enforce and implement environmental and land use planning laws, including making good faith arguments for the extension, modification, or reversal of existing law, and the establishment of new law.

The following are examples of some of FWF's appellate advocacy in Florida state courts involving environmental, land use planning, and private property rights issues. Florida Wildlife Federation v. Dept. of Environmental Regulation, 390 So.2d 64 (Fla. 1980)(judicially established that Section 403.412, Fla. Stat. is a cause of action to enforce Florida's environmental laws); Florida Wildlife Federation v. Collier County, Florida and DCA, 819 So.2d 200 (Fla. 1st DCA 2002)(good faith argument for legal interpretations that would have strengthen wildlife habitat protections of listed species); Florida Wildlife

Federation v. St. Johns County and DCA, 909 So.2d 347 (Fla. 1st DCA 2005)(good faith argument for legal interpretations that would have strengthen wetland buffer setbacks); Hussey v. Collier County, et al., Case Nos. 2D11-1223 & 2D11-1224 (Fla. 2d DCA 2012) (Defendant-in-Intervention assisting Collier County defend against a Bert Harris Act takings claim--made good faith argument for the establishment of new takings law in Florida; matter currently pending before the Second District Court of Appeal with FWF as a respondent).

The FWF also frequently appears in Florida quasi-judicial administrative proceedings, defending and challenging proposed agency actions and rules, and often appeals agency final orders in these proceedings. The following are a portion of DOAH cases in which FWF has litigated, or is litigating, environmental and land use planning issues. Florida Wildlife Federation v. Dept. of Envir. Protection, DOAH Case No. 03-3553RP (Proposed Total Maximum Daily Loads (TMDLs) for northern tributaries to Lake Okeechobee held to be an invalid exercise of legislative authority); Florida Wildlife Federation v. Dept. of Envir. Protection, DOAH Case No. 12-157RP (rule challenge to DEP's new numeric nutrient water quality standards); DCA, et al. v. Collier County, et al., DOAH Case No. 98-0324GM, 22 FALR 212, (Admin. Comm. 1999) (FWF intervened on side of the Fla. Dept. of Comm. Affairs and successfully challenged Collier County's

comprehensive land use plan amendments resulting in an innovative rural lands stewardship plan in Collier County); Cemex Construction Materials Florida, LLC v. Lee County and FWF, DOAH Case No. 10-2988GM (DEO Final Order 2012)(FWF assisted Lee County successfully defend Lee County's comprehensive land use plan amendment that benefitted occupied Florida panther habitat); 15,000 Coalition v. Collier County and FWF, DOAH Case No. 02-3796GM (DCA 2004)(FWF assisted Collier County successfully defend comprehensive land use plan amendments concerning panther habitat protection criteria before the DOAH and the First District Court of Appeal (Case No. 1D03-3543)); Florida Wildlife Federation v. Collier County, 23 FALR 2098 (DCA 2002) (good faith argument for legal interpretation of Growth Management Act, with appeal to First District Court of Appeal (819 So.2d 200)); Florida Wildlife Federation v. St. Johns County, 25 FALR 4523 (DCA 2004)(good faith argument for legal interpretations that would have strengthen wetland buffer setbacks, with appeal to First District Court of Appeal (909 So.2d 347)).

The FWF has a special interest in the issue before the court in this appeal because the sanction orders below unduly and severely chill the FWF's right to make good faith arguments for an extension, modification, or reversal of existing law, or the establishment of new law. The sanction orders below chill the FWF's

enthusiasm and creativity in pursuing good faith factual or legal theories before Florida's appellate courts. The FWF frequently makes such good faith arguments in Florida courts.

Summary of Argument

Abuse of Discretion

The two sanction orders below are an abuse of discretion. First, simply losing an appeal on the merits or on standing does not justify the imposition of sanctions. Second, the Petitioners claims below were good faith arguments under Section 57.105(2), Fla. Stat. which are not subject to Section 57.105 sanctions. Third, the sua sponte court order below did not provide the Petitioners with an opportunity to withdraw or correct the appeal, thus, it was an abuse of discretion for the court to impose sanctions under Section 57.105. Fourth, the sanction orders below unduly chill vigorous appellate advocacy by average citizens, not-for-profit corporations, and small business entities. The sanction orders impede access to Florida courts by the threat of sanctions against litigators and their attorneys if they lose their appeal.

Unconstitutional Statutory Interpretation

The sanction orders interpret Section 57.105, Fla. Stat. and Section 120.595(5), Fla. Stat. in a manner that is a violation of citizens qualified privilege

and right to petition the judicial branch of government. The sanction orders unnecessarily and severely chill appellate advocacy when a less chilling reasonable alterative interpretation of Section 57.105 exists that is consistent with the good faith argument language of Section 57.105 and the intent of Section 57.105 to deter baseless litigation.

Worded virtually identical to the good faith argument language of Section 57.105(2), Fla. Bar Rule 4-3.1 provides that "a good faith argument for an extension, modification, or reversal of existing law" is not frivolous or subject to sanctions "even though the lawyer believes that the client's position will not prevail." The good faith argument language of both Section 57.105(2) and Fla. Bar Rule 4-3.1 establish the intent is not for sanctions simply for losing an appeal on the merits or on standing.

A reasonable interpretation of Section 57.105 is that good faith arguments under Section 57.105(2) are arguments which are not knowingly false or made with reckless disregard of the facts and law. This interpretation of Section 57.105(2) complies with the constitutional limits of the right to petition clause of the First Amendment of the U.S. Constitution, and the right to petition clause of Art. 1, §5 of the Fla. Const. Stricter interpretations of Section 57.105 are prohibited by the right to petition clauses of the state and federal constitutions.

Argument

I. The imposition of sanctions under Sections 57.105 and 120.595, Fla. Stat. was an abuse of discretion.

The sua sponte majority opinion unreasonably imposed sanctions based upon the majority's ruling that dismissal of the Petitioners suit for failure to demonstrate standing warranted the court imposing the sanction of attorney's fees under Section 57.105, Fla. Stat. and Section 120.595(5), Fla. Stat. This was an abuse of discretion. Simply losing an appeal on the merits or on standing does not justify the imposition of sanctions under Section 57.105 or Section 120.595(5).

Section 57.105(2), Fla. Stat. provides that sanctions under Section 57.105(1) do not apply to claims or defenses initially made to the court as "a good faith argument to for the extension, modification, or reversal of existing law or the establishment of new law...". The majority opinion did not properly evaluate whether Petitioners claim initially was a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. Thus, the majority opinion is in contravention of the intent of Section 57.105 to protect parties and attorneys who make good faith arguments from sanctions.

The District Court should have interpreted Section 57.105 to no apply sanctions in this case which involves a good faith argument to expand, modify, or

reverse existing law. Because appellate courts are courts of last resort, and often the only part of the judicial branch which will hear cases involving administrative agency final orders, the District Courts should have broadly construed the good faith argument provision of Section 57.105(2), Fla. Stat. to ensure citizens have access to the judicial branch without an unreasonable fear of the imposition of sanctions against them if their appeal does not prevail on the merits. See, Boca Burger, Inc. v. Forum, 912 So.2d 561, 570-71 (Fla. 2005)(a district court "should exercise great restraint in imposing appellate sanctions").

Sua sponte imposition of sanctions by appellate courts pursuant to Section 57.105, Fla. Stat. should be rare. Section 57.105 does not provide litigants and their attorneys with an opportunity to withdraw or appropriately correct their claim or defense as an means to avoid sua sponte imposed sanctions under Section 57.105. Such an opportunity exists under Section 57.105(4) when other parties seek Section 57.105 sanctions, but the statute is silent with regard to sua sponte court imposed sanctions. No reason exists to require a party seeking sanctions to give a 21 day notice to withdraw or collect a claim or defense, but not require similar notice by appellate courts before the court sua sponte imposes sanctions. Appellate courts should not sua sponte impose sanctions under Section 57.105 without litigants and attorneys having an opportunity to avoid the sanctions.

The dissenting opinion of Judge Van Nortwick correctly observed that "the sanction order creates precedent that will severely chill appellate advocacy, especially for non-profit environmental organizations...", and that "such a chilling effect will not only reduce the ability of citizens to challenge environmentally adverse real estate development, but may constitute a denial of the guarantee of access to courts provided in article I, section 21 of our constitution...".[1] Florida's constitutional due process guarantee prohibits statutes from imposing severely chilling sanctions when a less chilling alternative exists that achieve the same purpose and goal.

II. The imposition of sanctions below under Sections 57.105 and 120.595, Fla. Stat. was unconstitutional

The sanction orders below interpreted Section 57.105, Fla. Stat. and Section 120.595(5), Fla. Stat. in a manner that creates a precedent that is far stricter than

[1]The majority opinion held that the court had to unquestionably impose sanctions under Section 57.105 in the case below due to the separation of powers provision of Art II, § 3, Fla. Const. This holding is clearly erroneous. Article VI, Clause 2, of the U.S. Constitution makes it the duty of all Florida officials, including judicial officials, to perform every official act so as to not violate the supreme law of the land. Lieberman v. Marshall, 236 So.2d 120, 129 (Fla. 1970). See, Dockery v. Fla. Democratic Party, 799 So.2d 291, 294 (Fla. 2nd DCA 2001)(Florida law requires cases involving First Amendment issues apply the legal test of "actual malice" proven by "clear and convincing" evidence); Mile Marker, Inc. v. Peterson Publishing, L.L.C., 81 So.2d 841, 845 (Fla. 4th DCA 2002) (applied the actual malice and clear and convincing evidence standard).

the sanction standard of either Fla.R.App.P. 9.410[2] or Fla. Bar Rule 4-3.1.[3]

The majority opinion's sanctions standard equates standing with prevailing on the merits, a standard which has a chilling effect on appellate advocacy and unduly discourages appeals of administrative finals orders. Imposing sanctions under the majority opinion's standard will deny citizens their state and federal constitutional qualified privilege to petition the judicial branch of their government. Citizens access to courts will be unconstitutionally restricted by this new standard.

Right to Petition the Government/Access to Courts

The U.S. Supreme Court and this court have held that the filing a complaint in courts is a form of petitioning the government, a qualified privilege guaranteed by the right to petition clause of the First Amendment of the U.S. Constitution, and the right to petition clause in Art. 1, § 5 of the Fla. Const. McDonald v. Smith, 472 U.S. 479, 484 (1985)(qualified privilege to petition the government, privilege only overcome with proof of actual malice (i.e., knowingly false or reckless

[2] The Fla.R.App.P. 9.410 standard is "the filing of any proceeding, motion, brief, or other paper that is frivolous or in bad faith."

[3]The Fla. Bar Rule 4-3.1 standard is that "a good faith argument for an extension, modification, or reversal of existing law" is not frivolous or subject to sanctions "even though the lawyer believes that the client's position will not prevail."

disregard); Londono v. Turkey Creek, Inc., 609 So.2d 14, 18 (Fla. 1992)(Florida provides qualified privilege and right to petition the government, with a presumption of good faith, which is overcome only with proof of express malice).

The U.S. Supreme Court and Florida courts have held these right to petition clauses limit litigation sanctions to situations where it is demonstrated by clear and convincing evidence[4] that a litigant's claim was knowingly false or made with reckless disregard. Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 244, 91 L.Ed 2d 202, 106 S.Ct. 2505 (1986); Dockery v. Fla. Democratic Party, 799 So.2d 291, 294 (Fla. 2nd DCA 2001)(Florida law requires cases involving First Amendment issues apply the legal test of "actual malice" proven by "clear and convincing" evidence); Mile Marker, Inc. v. Peterson Publishing, L.L.C., 81 So.2d 841, 845 (Fla. 4th DCA 2002) (applied the actual malice and clear and convincing evidence standard).

Article VI, Clause 2, of the U.S. Constitution makes it the duty of all Florida officials, including judicial officials, to perform every official act so as to not violate the supreme law of the land. Lieberman v. Marshall, 236 So.2d 120, 129 (Fla. 1970). See, Dockery v. Fla. Democratic Party, 799 So.2d 291, 294 (Fla. 2nd

[4]Clear and convincing evidence is a higher standard than the preponderance of evidence.

DCA 2001)(Florida law requires cases involving First Amendment issues apply the legal test of "actual malice" proven by "clear and convincing" evidence); Mile Marker, Inc. v. Peterson Publishing, L.L.C., 81 So.2d 841, 845 (Fla. 4th DCA 2002) (applied the actual malice and clear and convincing evidence standard).

The two sanction orders below violate the qualified privilege of the right to petition clauses of the state and federal constitutions. Such violations are easily avoidable by judicial interpretation of the good faith argument provision of Section 57.105(2), Fla. Stat.

Virtually identical to the good faith argument language of Section 57.105(2), Fla. Bar Rule 4-3.1 provides that "a good faith argument for an extension, modification, or reversal of existing law" is not frivolous or subject to sanctions "even though the lawyer believes that the client's position will not prevail." The good faith argument language of both Section 57.105(2) and Fla. Bar Rule 4-3.1 establish the intent is not for sanctions simply for losing an appeal on the merits or on standing.

A reasonable judicial interpretation of Section 57.105 is that good faith arguments under Section 57.105(2) are arguments which are not knowingly false or made with reckless disregard of facts or the law. Such an interpretation complies with the constitutional limits of the right to petition clause of the First

Amendment of the U.S. Constitution, and the right to petition clause of Art. 1, §5 of the Fla. Const. See, Wendy's of N.E. Florida, Inc. v. Vandergriff, 768 So.2d 520, 524 (Fla. 1st DCA 2003).

The interpretation of Section 57.105, Fla. Stat. and Section 120.595(5), Fla. Stat. by the sanction orders below are unnecessarily in conflict with the state and federal constitutional limitations of the qualified right to petition the judicial branch of government, and must be reversed and vacated.

Art. I, § 9, Fla. Const. Guarantee of Due Process

The sanction orders below unconstitutionally deny the Petitioners their due process rights under Art. I, § 9, Fla. Const.[5] The due process rights of Art. I, § 9, Fla. Const. require courts to interpret Section 57.105 using the less chilling interpretation of the Section 57.105(2) good faith arguments subsection. Interpreting the Section 57.105(2) good faith argument criteria to be arguments which are not knowingly false or made with reckless disregard of facts or the law is a reasonable less chilling alternative. Another alternative interpretation is the Fla. Bar Rule 4-3.1 criteria of a "good faith argument for an extension, modification, or reversal of existing law" is not subject to sanctions "even though

[5]Judge Nortwick's dissent refers to this due process issue, making it an issue before this court.

the lawyer believes that the client's position will not prevail." See, Psychiatric Assocs. v. Siegal, 610 So.2d 419 (Fla. 1992), *receded from on other grounds in* Agency for Health Care Admin. v. Assoc. Indus. of Fla., Inc. , 678 So.2d 1239 (Fla. 1996) (the due process rights of the litigants were infringed upon by a statute that arbitrarily and capriciously applied a bond requirement).

The Florida due process clause requires Section 57.105 requires reversal and vacation of the majority opinion sanction orders because reasonable, constitutionally valid interpretations of Section 57.105, Fla. Stat. exist. [6]

Art. V, §§ 2 & 15, Fla. Const.

Art. V, §§ 2 & 15 of the Fla. Const. prohibit Florida courts from imposing litigation sanctions on citizens and attorneys when the citizens and attorneys have complied with both the practice and procedure rules adopted by this court, and with the Rules of Professional Conduct contained in Chapter 4 of the Rules Regulating the Florida Bar (Fla. Bar Rules), the exclusive regulations for the discipline of persons admitted to the Florida Bar.

Fla.R.App.P. 9.410 limits sanctions to "the filing of any proceeding, motion,

[6]By granting jurisdiction to review the two sanction decisions by the District Court, the court has the authority to address other issues properly raised and argued before the court. Boca Burger, Inc. v. Forum, 912 So.2d 561, 563(Fla. 2005). See, Art V, § 3(b)(7) all writs necessary jurisdiction of the court.

brief, or other paper that is frivolous or in bad faith." The standard is frivolous or bad faith, not failing to prevail on a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.

Fla. Bar Rule 4-3.1 provides that “a good faith argument for an extension, modification, or reversal of existing law” is not frivolous “even though the lawyer believes that the client's position will not prevail.” Litigants and their attorneys should not be sanctioned vigorous innovative argument.[7]

This separation of powers issue is intertwined and interwoven in the contested judicial application below of sanctions. The majority opinion cited Art. II, §3, Fla. Const., the separation of powers clause, thereby putting at issue the judicial branches authority pursuant to Art. V, §§ 2 & 15, Fla. Stat. to adopt court rules of practice and procedure, and to exclusively discipline attorneys.

Conclusion

Both sanction orders by the First District Court of Appeal should be reversed and vacated. The sanction orders are an abuse of discretion, and the majority opinion’s interpretation of Section 57.105, Fla. Stat. and Section

[7]The FWF has in the past been involved in vigorous innovative litigation, a example being this court judicially recognizing that Section 403.412, Fla. Stat. is a cause of action to enforce Florida’s environmental laws. Florida Wildlife Federation v. Dept. of Environmental Regulation, 390 So.2d 64 (Fla. 1980).

120.595(5), Fla. Stat. are unnecessarily in conflict with the state and federal constitutional limitations of the qualified right to petition the judicial branch of government.

Respectfully submitted,

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Certification of Compliance

I, Thomas W. Reese, hereby certify that this motion was prepared in Times New Roman, 14-point font, in compliance with Fla.R.App.P. 9.210(a)(2).

/S/ Thomas W. Reese

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail and electronic mail on the following individuals this 21st day of June, 2012.

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