IN THE SUPREME COURT OF FLORIDA

Case No. SC11-2455

District Court Case No. 1D09-4956
Division of Administrative Hearings Case Nos. 08-1144GM & 08-1465GM

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

vs.

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

RESPONDENT MARTIN COUNTY'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The district court issued three decisions in this case: the first dismissing Petitioners' appeal; the second imposing sanctions; and the third denying rehearing and rehearing *en banc* of the second, but *withdrawing the second decision* and substituting the third decision in its place. The latter two decisions are inaccurately described in the statement of the case and facts in Petitioners' brief. On page 2, the end of the last sentence of the first paragraph, describing the second decision, should read as follows:

> "... ordering payment of attorney's fees under 57.105, Fla. Stat., for the filing of an appeal for which the court found Appellants and their attorney knew or should have known standing did not exist." (New text underlined.)

In the next paragraph, Petitioners' description of the third decision (November 4, 2011) should be disregarded altogether. First, the district court did not "rule" *in that decision* that Petitioners' claim of appellate standing "lacked a basis in material facts or then-existing law." That ruling had been made already in the *first decision* (June 21, 2010), the unanimous and very brief opinion dismissing the appeal (which Petitioners never asked this Court to review). In the third decision (the only one for which review by this Court is now timely), the district court merely *explained* the basis for its first decision in far more detail than was originally provided. That explanation, contrary to Petitioners' attempt to re-write it in subsections (1) and (2) on page 2 of their brief, did not include the "findings on the merits below" and the "factual issues … decided below adverse to [Petitioners'] position" as the basis for the dismissal of their appeal.

> "Appellants' appeal was dismissed because they failed to assert that they are a 'party who is adversely affected by final agency action.' … To establish the foundation for *appellate* standing under section 120.68, it was incumbent upon Appellants, at the very least, **to present evidence below** of a reasonable possibility that the plan amendments, as interpreted, will lead to … harm that could **adversely affect <u>them</u>**." (Decision, 12; bold & underlined emphasis added.)

SUMMARY OF ARGUMENT

The district court's decision imposing sanctions on Petitioners and their attorney does not "expressly and directly" conflict with a prior decision of this Court or another district court "on the same question of law."[1] Neither of the two "species" of such "holding conflict" jurisdiction is present here.[2] The district court's decision simply involves a sound exercise of its discretion, imposing sanctions under section 57.105(1), Florida Statutes, because Petitioners and their attorney knew (or should have known) that the record below clearly showed they had not presented *any* evidence that their own interests would be "adversely affected" by the challenged amendments to the Martin County comprehensive plan, and thus Petitioners lacked standing to appeal the state agency's final order approving adoption of the amendments. *See* 120.68, Fla. Stat.

ARGUMENT

[1] *See* Fla Const., Art. V, § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iv).

[2] *See Wallace v. Dean*, 3 So.3d 1035, 1039 (Fla. 2009), ("(1) the *announcement* of a rule of law that conflicts with a rule previously announced by this Court or another district court; or (2) the *application* of a rule of law to produce a different result in a case that involves *substantially similar controlling facts* as a prior case disposed of by this Court or another district court."), (emphasis added).

I. THE DECISION UNDER REVIEW DOES NOT CONFLICT WITH THE CITED DECISIONS OF OTHER DISTRICT COURTS, NONE OF WHICH ADDRESS SANCTIONS UNDER SECTION 57.105(1) AND MOST OF WHICH DO NOT ADDRESS *APPELLATE* STANDING AT ALL, MUCH LESS UNDER SECTION 120.68, FLA. STAT.

Petitioners' first argument for holding conflict involves cases from other district courts that neither announced nor applied a rule of law concerning the imposition of sanctions under section 57.105(1), Florida Statutes. Indeed, the first argument is not really about the imposition of sanctions at all. It is actually a belated attack on the earlier dismissal of Petitioners' appeal for lack of standing, through criticism of the district court's further explanation of that ruling in the decision imposing sanctions.

The holding in the decision that Petitioners have asked this Court to review only concerns sanctions imposed under section 57.105(1), *not* the actual dismissal of the appeal. Dismissal for lack of standing under section 120.68, Florida Statutes**,** was the holding of the district court's unanimous *per curiam* decision issued on June 21, 2010, *which Petitioners never asked this Court to review.*

None of the four district court cases cited in Petitioners' first argument involved an imposition of sanctions. There is no way to read the decisions in those cases as either announcing or applying any rule of law concerning *sanctions* under section 57.105(1), and certainly not a rule of law that conflicts with the rules of law concerning sanctions that were applied by the district court in this case.

Even on the issue of standing, three of the four cited cases did not address

appellate standing at all.[3] They only addressed standing to *initiate* an administrative hearing under sections 120.569 and 120.57, Fla. Stat.[4] The rule of law applied in those cases (that the determination of a party's standing to initiate an administrative hearing must be based on the party's initial allegations of possible harm and evidence offered to prove such allegations, but not on the evidence or the lack of evidence on the merits) has no bearing whatsoever on this case. **Petitioners' standing to *initiate* the administrative proceedings below was *never* challenged, neither below nor on appeal.**

The fourth case cited by Petitioners, *Peace River/Manasota Regional Water Supp. Auth. v. IMC Phosphates Co.*, 18 So.3d 1079 (Fla. 2nd DCA 2009), also addressed the issue of standing to initiate an administrative hearing, *Id.* at 1082-1085, but did involve a *second issue* of appellate standing under section 120.68, *Id.* at 1085-1086. There, upon reviewing the record below, the Second District Court held that the appellant actually had presented evidence which "supported its position that it would be adversely affected *if* the permit was issued." *Id.*, (emphasis original). The court thus engaged, as it must in any *appeal*, in a "backward-looking" review of the record in order to resolve an issue of *appellate* standing.

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[3] *See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So.3d 1051 (Fla. 5th DCA 2011); *Palm Beach County Envtl. Coalition v. Fla. Dep't of Envtl. Prot.*, 14 So.3d 1076 (Fla. 4th DCA 2009); *Reily Enterprises, LLC v. Fla. Dep't of Envtl. Prot.*, 990 So.2d 1248 (Fla. 4th DCA 2008).

[4] Petitioners' standing below was actually predicated upon the even broader standing requirements of section 163.3184(1)(a) and (9)(a), Fla. Stat. (2007).

The rule of law applied in *Peace River/Manasota Regional W.S.A.* is entirely consistent with the rule of law applied here by the First District Court when deciding to dismiss Petitioners' appeal in 2010. Here, **upon reviewing the record below**, the district court concluded that Petitioners had failed to assert or prove that they or a substantial number of their members could be "adversely affected" by the challenged comprehensive plan amendments. *See Martin County Conservation Alliance v. Martin County*, 35 Fla. L. Weekly D1386 (Fla. 1st DCA June 21, 2010). That the two courts reached different results does not establish "holding conflict" between the decisions. The two cases simply did not involve "substantially similar *controlling facts*."

Petitioners' first argument fails to establish any basis for conflict jurisdiction.

II. THE DECISION UNDER REVIEW DOES NOT CONFLICT WITH THE CITED DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS CONCERNING INTERPRETATION OF LOCAL GOVERNMENT COMPREHENSIVE PLAN PROVISIONS

Petitioners' second argument for "holding conflict" also bears no relationship to the district court's decision imposing sanctions. This argument, too, is really just a belated attack on the earlier dismissal of the appeal for lack of standing, again through criticism of the more detailed explanation of the basis for that earlier decision in the district court's most recent decision imposing sanctions.

The district court's decision imposing sanctions clearly does not rest upon any "interpretation" of a provision of Martin County's comprehensive plan, either as an

issue of fact or as an issue of law. It rests upon **(1)** the court's review of the record below, including the evidence (or lack of it) and the administrative law judge's findings of fact as approved by the state agency, the former Department of Community Affairs, (Decision 14-16, & 20); **(2)** the parties' briefs on appeal, (Decision 12, 14, 19, & 21); **(3)** the parties' responses to the district court's order to show cause, (Decision 14-18); and **(4)** the current law concerning sanctions under section 57.105(1), Florida Statutes, (Decision 18-21). There were no "rulings" by the district court regarding "interpretation" of Martin County's comprehensive plan.

Petitioners' selected (and heavily edited) quotations of passages from the decision under review are misleading. The first two, (*see* Pets. Br. 6), are from the district court's recitation of the "Facts and Procedural History" of the case below, (Decision 7-11), and clearly are not "rulings" by the district court as Petitioners have asserted. The third, fourth, and fifth passages, (*see* Pets. Br. 7), are from the district court's "Analysis" of "Standing Under Section 120.68, Florida Statutes," (Decision 12-18), but have been lifted from three paragraphs addressing the *burden of proof* that Petitioners had to fulfill below in order to establish a factual record supporting their standing to appeal under that statute. They, too, do not constitute "rulings" on the "merits" of Petitioners' arguments on appeal. Indeed, the district court has *never* addressed the

merits of Petitioners' arguments, as Petitioners themselves have acknowledged.[5]

Assuming, *arguendo*, that the four cited cases do stand for the proposition that Petitioners have asserted, they are entirely irrelevant to this Court's consideration of the district court's decision concerning *sanctions*. None of the cases announce or apply any rule of law concerning sanctions under section 57.105(1), Fla. Stat.

Petitioners' second argument fails to establish any basis for conflict jurisdiction.

III. THE DECISION UNDER REVIEW DOES NOT CONFLICT WITH THE CITED DECISIONS OF THIS COURT OR THE SECOND DISTRICT COURT CONCERNING IMPOSITION OF SANCTIONS AGAINST A NON-PREVAILING PARTY[6]

The decision that Petitioners have asked this Court to review is far from being the "*automatic* imposition of sanctions for lack of standing" that Petitioners claim it to be. (Pets. Br. 9, emphasis added.) The decision to impose sanctions clearly resulted from a *thorough* review of the entire record below, leading to the district court finding that Petitioners and their attorney knew or should have known they had failed to

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[5] *See* Pets. Br. 1: "Petitioners appealed to the First District Court …, which dismissed the appeal *without reaching the merits*, …", (emphasis added).

[6] Respondent rejects Petitioners' use of the phrase "Failure on the Merits" in the title of their third argument for "holding conflict." (Pets. Br. 8.) As already stated (*see* II, *supra*), the district court never addressed the "merits" of Petitioners' arguments. Dismissal of Petitioners' appeal in June 2010 was based upon their failure to assert or prove below that "*their* interests or the interests of a substantial number of *their members*" would be "adversely affected" by the challenged enactments, as required for standing to appeal under section 120.68, Fla. Stat. The district court's decision imposing sanctions thus bears absolutely no relationship to any "failure on the merits" in this case.

produce *any* evidence that they *themselves* (or a substantial number of their members) would be "adversely affected" by the challenged comprehensive plan amendments, and that they thus lacked standing to appeal under section 120.68, Fla. Stat.

This decision does not conflict with any rule of law announced or applied in the three cases cited in Petitioners' third argument for holding conflict. Indeed, the decision is entirely consistent with the purpose of section 57.105(1): "to discourage baseless claims, stonewall defenses and **sham appeals** in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities." *Whitten v. Progressive Casualty Ins. Co.*, 410 So.2d 501, 505 (Fla. 1982).

In *Whitten*, this Court addressed the earlier version of section 57.105(1), prior to the 1999 amendments that substantially changed the standard for granting fees and greatly expanded the statute's potential use. *See Boca Burger, Inc. v. Forum*, 912 So.2d 561, 570 (Fla. 2005). *Accord*, *Connelly v. Old Bridge Village Co-op, Inc.*, 915 So.2d 652, 656 (Fla. 2nd DCA 2005); *Mullins v. Kennedy*, 847 So.2d 1151, 1154 (Fla. 5th DCA 2003). Yet even after the amendments, it is still true that "[m]erely losing … is not enough to invoke the operation of the statute," *Whitten*, 410 So.2d at 506.

The district court's decision does not conflict with that rule of law because its imposition of sanctions was not based on Petitioners "merely losing" through dismissal of their appeal for lack of standing. The district court acted only after careful study of the record below, consideration of the applicable law of appellate standing, and review

of Petitioners' and Respondents' responses to its show cause order. Only then did the district court make the requisite finding that Petitioners and their attorney (*all of whom participated in creating the record below*) knew or should have known they had failed to meet their burden of proving what they needed to establish to have standing.

This case is not in conflict with the decision in *Mason v. Highlands County*, 817 So.2d 922 (Fla. 2nd DCA 2002). There, the trial court dismissed Mason's complaint and granted the county's motion for attorney's fees, *but made no findings*. Here, however, the First District Court did **exactly** what the Second District Court had said was necessary in *Mason*, making the necessary findings required by section 57.105(1):[7]

> "Here, Appellants and their counsel, who have experience in this area of the law, ignored controlling case law and filed an appeal where no evidence was presented in the administrative forum that the challenged agency action adversely affected Appellants' interests, as required to establish appellate standing under section 120.68. … [N]o possible view of the evidence presented at the final hearing below would support a reasonable conclusion that Appellants had standing to appeal." (Decision 20.)

This case also is not in conflict with the decision in *Peyton v. Horner,* 920 So.2d 180 (Fla. 2nd DCA 2006). There, an imposition of sanctions *by the trial court* was reversed because the district court found, **upon reviewing the record below**, that an

[7] If this Court accepts jurisdiction on the basis of "holding conflict," the district court's findings concerning sanctions would be subject to an "abuse of discretion" standard of review. *See Boca Burger, Inc. v. Forum*, 912 So.2d 561, 573 (Fla. 2005). "If reasonable men could differ as to the propriety of the action taken by the … court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980).

assignment of rights to enforce deed restrictions on the defendants' property and other lots in the development "was not artfully worded" and "susceptible to two interpretations." *Id.* at 183. The district court then found that the issue on which defendants had prevailed "was not so cut and dried that either the [plaintiff] or its attorney knew or should have known that it was not supported by the material facts necessary to establish standing." *Id.* at 184. Here, the First District Court applied the same rule of law as the Second District Court had applied, but reached a different result due to the dissimilar factual circumstances. The district court did not impose sanctions "automatically" upon dismissal, but did so only after finding the record showed that the lack of evidence that Petitioners would be "adversely affected" was clear and unequivocal.

Petitioners' third argument fails to establish any basis for conflict jurisdiction.

Conclusion

The decision in question involves a well-founded and well-reasoned imposition of sanctions under section 57.105(1), Florida Statutes. It is not an "exceptional" ruling nor one likely to discourage future appeals.[8] Due to the absence of holding conflict, this Court should decline jurisdiction to review the district court's decision.

CERTIFICATE OF SERVICE

[8] "[A]llowing appellate courts to impose sanctions … will not chill representation, but instead will emphasize that counsels' obligations as officers of the court override their obligations to zealously represent their clients." *Boca Burger, Inc. v. Forum,* 912 So.2d at 569.

It is hereby certified by the undersigned attorney that a true and correct copy of this document has been served by both e-mail attachment and pre-paid first class United States mail to each of the persons named below this 3rd day of January, 2012.

CERTIFICATE OF COMPLIANCE

It is hereby certified by the undersigned attorney that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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