

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 1D22-1106
L.T. Case Number 2020 CA 000461

TERESA MOON-VILENO, an individual, and DEBORAH LYNN FELTY, an
individual,

Appellants,

v.

FLORIDA ASSOCIATION OF COURT CLERKS, INC., a Florida Not for
Profit Corporation, FACC SERVICES GROUP, LLC, d/b/a CIVITEK, a
Florida Limited Liability Company, and CIVITEK NATIONAL INC., a Florida
Profit Corporation,

Appellees.

ANSWER BRIEF OF APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
LEON COUNTY, FLORIDA

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RECEIVED, 10/13/2022 10:26:22 AM, Clerk, First District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

The Florida Legislature enacted Section 215.322 to “encourage state agencies, the judicial branch, and units of local government to make their goods, services and information more convenient to the public through the acceptance of payments by credit cards....” 215.322(1), Fla. Stat. Online credit card charges are processed by companies that facilitate the charge by the consumer to the credit card company and the disbursement of funds from the credit card company to the agency. [R. 318, ¶ 4]. Multiple private companies provide such processing services to Florida Court Clerks and other government agencies. [R. 320, ¶ 11].

Appellee Florida Association of Court Clerks, Inc. (“FACC”) is a private corporate association the membership of which is composed of Florida Court Clerks. [R. 10, ¶ 4; 14, ¶ 19; 117, ¶¶ 39, 40]. FACC created Appellee FACC Services Group, LLC d/b/a “Civitek” as a wholly owned subsidiary to provide technical services to state agencies in Florida and other states. [R. 318, ¶ 3]. Among those services is online credit card charge processing, which Civitek offers to Florida Court Clerks in competition with other companies. [R. 318, ¶¶ 4, 10, 11]. Civitek collects a convenience fee of between 2.5% and 3.5% of the amount charged. [R. 319, ¶ 8]. No portion of the convenience fees is received by any individual

Court Clerk. With the exception of court filing fees, all convenience fees collected by Civitek go to FACC, which uses all profit from the fees to provide educational and technical services to the Court Clerks. [R. 320, ¶ 9; 620 -621, 633, 751].¹

Appellants filed this action claiming that Appellees had monopolized the market for credit card charge processing and conspired with another company to fix prices for such services in violation of Florida's antitrust law. [R. 28-36]. The original complaint contained no count alleging a violation of Section 215.322. [R. 28-36]. After Appellees filed a motion for summary judgment, Appellants filed a motion for leave to file an amended complaint that added a claim that Appellees were charging excess convenience fees in violation of Section 215.322. [R. 1505-506; ¶¶ 135, 136, 138]. The trial court concluded that both the antitrust and 215.322 counts lacked substance and entered a summary final judgment. [R. 1526-1535]. Appellants timely filed this appeal in which they have abandoned the

¹ The amount of convenience fees for credit card charges to pay court filing fees is set by the eFiling Authority, a public entity established by interlocal agreement pursuant to Section 163.01, Florida Statutes. All profit from those convenience fees goes to the eFiling Authority, which uses them to pay the cost of administering e-filing services. [R. 319, ¶ 7].

antitrust claims and appeal only the portion of the judgment relating to the Section 215.322. [R. 1540].

SUMMARY OF ARGUMENT

There is no private cause of action to enforce Section 215.322.

Appellants have no standing to enforce Section 215.322, Florida Statutes, a regulatory statute that has no provision for a private cause of action. In the absence of an expression of legislative intent to create a private cause of action, none is presumed. Nothing in the language of Section 215.322 can be read to authorize private actions and the record is devoid of evidence of legislative history supporting such intent. Contrary to Appellants' arguments, consistent Florida case law, including decisions by the Supreme Court and this Court, makes abundantly clear that there is no exception for cases involving contract disputes or seeking declaratory judgments.

The limitation of the amount of convenience fees in Section 215.322 is not applicable to private companies such as Appellees.

The Legislature could have made Section 215.322, Florida Statutes, and the limitation on the amount of convenience fees in particular, applicable to all credit card charge processors, public and private. It did not. The statute by its clear language applies to "state agencies, the judicial branch, and units of local government." The Legislature did not even leave

the term “state agency” open to interpretation. It refers to “a state agency as defined in s. 216.011,” which in turn defines a “state agency” as “any official, officer, commission, board, authority, council, committee, or department of the executive branch of state government.” There is no room for shoehorning private entities into that definition.

Appellees are undeniably private companies. The Florida Association of Court Clerks, Inc. is a private voluntary association, the members of which are Florida Court Clerks. The fact that Court Clerks are members of FACC does not make it a “state agency” within the definition in Section 216.011. The Legislature could easily have expanded the application of the convenience fee limitation to cover private corporations in which public officers are members but it did not do so and this Court should not write such an expansion into the statute.

Appellants do not argue that Appellees are state agencies within the meaning of the statute. Instead, they rely on the generic rubric that one cannot do indirectly what can't be done directly. They fail, however, to demonstrate how Appellees have violated Section 215.322 either directly or indirectly. The cases cited by Appellants that give lip service to the rubric are demonstrably distinguishable from the case at bar.

No legislative purpose is apparent that would have motivated the Legislature to allow an unlimited number of private companies to charge an unrestricted convenience fee amount to be used for private gain but prohibit Appellees from realizing profits that are used exclusively for public purposes.

ARGUMENT

I. There Is No Private Cause of Action to Enforce Section 215.322, Florida Statutes.

It is an enduring principle of Florida jurisprudence that regulatory statutes are not enforceable by private plaintiffs in the absence of clear legislative intent to create a private cause of action. One of the most recent Supreme Court decisions on point is *QBE Ins. Corp. v. Chalfonte Condominium Apt. Ass., Inc.*, 94 So. 3d 541 (Fla. 2012). The case was filed in a U.S. District Court against an insurance company by an insured alleging the insurance company violated a Florida regulatory statute. The federal court certified a series of questions to the Florida Supreme Court, among them, “May an insured bring a claim against an insurance company for failure to comply with the language and type-size requirements established by Fla. Stat. § 627.701(4)(a)?” The Supreme Court answered the question in the negative, stating:

The seminal Florida case on whether a statutory cause of action exists without an express provision imposing civil liability is this Court's decision in *Murthy v. N. Sinha Corp*, 644 So. 2d 983 (Fla. 1991) Since *Murthy*, we have reaffirmed the principle that whether a statutory cause of action should be implied is a question of legislative intent. See *Horowitz*, 959 So.2d at 182; *Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 23 (Fla. 2004); *Villazon v. Prudential Health Care Plan, Inc.*, 843 So.2d 842, 852 (Fla. 2003) The primary guide to determining whether the Legislature intended to create a private cause of action is the "actual language used in the statute".

QBE, 94 So. 3d at 550, 551.

In *Murthy v. N. Sinha Corp.*, the case characterized by the Supreme Court as its "seminal" case on whether a private cause of action exists to enforce a statute, a complaint against a building contractor alleged construction defects and violation of a regulatory statute. The lower court certified the following question to the Supreme Court as being of great public importance:

Does Chapter 489, Florida Statutes (1991), the licensing and regulatory chapter governing construction contracting, create a private cause of action against the individual qualifier for a corporation acting as a general contractor?

Murthy, 644 So.2d at 984. The Supreme Court answered that there was no cause of action in the absence of evidence of a legislative intent to create one:

While chapter 489 provides administrative remedies against a qualifying agent it, it does not expressly provide for a civil cause of action.... Accordingly, we decline to infer any civil liability as there is no evidence in the language or the legislative history of chapter 489 of a legislative intent to create a private remedy against a qualifying agent.

Murthy, 644 So. 2d at 986.

Appellants filed this action seeking monetary, injunctive, and declaratory relief for alleged violation of Section 215.322, Florida Statutes, a regulatory statute that encourages state agencies to accept online credit card charges in payment for services, fines, and other obligations. The statute provides for implementation and enforcement by the Chief Financial Officer of Florida and contains no language indicating that the legislature intended that the statute be enforceable by a private action. Appellants cite no evidence of legislative intent to create a private right of action.

Appellants ignore the Supreme Court's opinions in *QBE* and *Murthy* and instead attempt to distinguish the Supreme Court's decision in only *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 852 (Fla. 2003), a case in which the Supreme Court cites its's earlier decision in *Murthy* and repeats the principles set forth in that decision. *Villazon* is not only materially indistinguishable from the case at bar, but fully supports the conclusion that there is no private cause of action available to Appellants.

The *Villazon* plaintiff sought damages based upon an alleged violation of a Florida statute regulating health maintenance organizations. The Supreme Court found there was no private cause of action provided by the statute, stating:

The Act does not specifically provide a private cause of action for damages based upon an alleged violation of its requirements.... There are other regulatory statutes in which the legislature has specifically created a private cause of action.... *Absent such expression of intent, a private cause of action is not implied.*

Villazon, 843 So 2d at 852. (emphasis added). Appellants attempt to distinguish *Villazon* from the case at bar stating that *Villazon* was a negligence case alleging violation of a non-delegable duty. Nothing in the *Villazon* opinion indicates those factors were relevant to the decision or that the private cause of action rule is limited to statutes involving negligence, non-delegable duty, or any other particular cause of action.

It isn't clear why Appellants focused on *Villazon* and ignored *QBE*, particularly considering that the Supreme Court in *QBE* cited *Villazon* to illustrate that, "Since *Murthy*, we have reaffirmed the principle that whether a statutory cause of action should be judicially implied is a question of legislative intent." *QBE*, 94 So. 3d 551. Appellants also ignore the fact that in the very next sentence following the citation to *Villazon*, the Supreme

Court reiterated the proposition that, “The primary guide in determining whether the Legislature intended to create a private cause of action is the “actual language of the statute.” *QBE*, 94 So. 3d at 551.

Appellants next ask this Court to fashion an exception to the private cause of action rule for cases seeking a declaratory judgment. Initial Brf at 27-29. They cite no authority for such an exception and fail to offer a justification for it. Such an exception would enable a plaintiff to render the rule a nullity and defeat the legislative will by simply asking for a declaratory judgment. Appellants also ignore the multiple cases in this and other courts, including the Florida Supreme Court, that have applied the private cause of action rule to cases seeking declaratory judgments. See, e.g., *QBE*, 94 So. 3d at 550-552 (seeking declaratory judgment re application of § 627.701, Fla. Stat.); *Collier v. State*, 943 So. 2d 945, 946 (4th DCA 2006) (seeking declaratory judgment re application of 18 U.S.C. § 2721); *Torrens v. Shaw*, 257 So. 3d 168, 170 (Fla. 1st DCA 2018) (seeking declaratory judgment re Ch. 106, Fla. Stat.); *Macneil v. Crestview Hosp. Corp.*, 292 So. 3d 840, 843 (Fla. 1st DCA 2020) (seeking declaratory judgment re § 627.736, Fla. Stat.) (“We do not read *City of Apalachicola* to stand for the broad proposition that an individual can sue for declaratory relief alleging a violation of any statute under which he has no private

cause of action to enforce its provisions.”); *Ramon v. Cach*, 183 So. 3d 1149, 1152 (Fla. 5th DCA 2015) (seeking declaratory judgment re application of § 559.715, Fla Stat.).

The trial court correctly found that there is no private cause of action to enforce Section 215.322, Florida Statutes, and its judgment should be affirmed on that basis alone.

II. The Limitation on Convenience Fees to the Actual Cost to a “State Agency” Does Not Apply to Private Corporations Such As Appellees.

Section 215.322 is unambiguous. The statute authorizes a “*state agency as defined in s. 216.011*” to accept credit cards, instructs the Chief Financial Officer to adopt rules governing the acceptance of credit card charges by “state agencies,” provides for “an agency or officer” to impose a convenience fee on such charges, and states that the amount of such fees may not exceed the total cost to the “state agency.” §§ 215.322(2), (3)(b), Fla. Stat. (emphasis added). The referenced statutory definition of “state agency” in Section 216.011 provides in pertinent part:

“State agency” or “agency” means any official, officer, Commission, board, authority, council, committee, or department of the executive branch of state government.”

§ 216.011(1) (qq), Fla. Stat. The definition by its clear language excludes private processing companies from the ambit of the Section 215.322 fee

limitation. No language in the statute applies the restriction on convenience fees to any entity other than a government body.

It is undisputed that Civitek is a private corporation that is wholly owned by FACC, also a private corporation. [R. 17, ¶¶ 38, 39; 318, ¶ 3]. Appellants do not claim that either Appellee is a state agency. Rather, they argue that the two entities are controlled by Florida Court Clerks, and base their case on the rubric that one cannot do indirectly what cannot be done directly. The flaw in the argument is that Appellees are not engaged either directly or indirectly in any conduct prohibited by Section 215.322 or any other law. The Court Clerks in their official capacities are independent public officers. Collectively, they exercise no governmental powers and are not a part of the Executive Branch of government. The fact that they voluntarily join together to conduct a private business through a private company doesn't convert them or the company into a state agency.

Appellants rely heavily upon *Lebron v. National Railroad Passenger Corp.*, 513 US. 374 (1995), in which the U.S. Supreme Court held that Amtrak was an agency or instrumentality of the United States for purposes of application of the First Amendment to regulation of advertising on Amtrak trains. The thrust of the holding was that the government cannot escape

the requirements of the First Amendment simply by operating a through a corporation of its own creation. The Court concluded:

We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the government for purposes of the First Amendment.

Lebron, 513 U.S. at 974. There is nothing comparable about Appellees. Unlike Amtrak, which was created by Congress, neither FACC nor Civitek was created by the Florida Legislature or any other government agency and no government agency retains authority to appoint their directors. Further, the gist of the *Lebron* holding was that Congress was not beyond reach of the First Amendment. Unlike *Lebron*, the instant case involves no constitutional issue. The Legislature is free to exclude private entities from the reach of Section 215.322 if it chooses to do so. As the Supreme Court held in *QBE* and *Murthy*, the only question in this case is what the Legislature intended.

The exclusion of private companies from the fee limitation was not a legislative oversight. Credit card charges to state agencies must be processed by third parties that facilitate the communication of the charge to the credit card issuer and the transfer of money from the issuer to the

agency. [R. 318, ¶ 4]. In the subsection immediately following the state agency fee limitation, the statute authorizes the Chief Financial Officer to “establish contracts with one or more financial institutions, credit card companies and other entities that may lawfully provide such services” and requires that a state agency use one of those contractors. § 215.322 (4), Fla. Stat.

There is no basis for assuming that the Legislature’s unexpressed purpose for the fee limitation was to prohibit private companies from making a profit. This would undoubtedly have driven processors from doing business in Florida, thus defeating the Legislature’s expressed purpose to “encourage state agencies, the judicial branch, and units of local government” to accept payments for goods and services by credit card. § 215.322(1), Fla. Stat.. Rather, the apparent purpose of the fee limitation is to protect consumers from being charged two convenience fees for the same transaction, one from the processor and another from the government agency. That purpose is met by placing a limitation to actual cost on the agency, whether the processor is Civitek or any other private processor, since the individual Court Clerk acting in an official capacity is prohibited from adding anything to the convenience fee charged by the processor.

The only difference between the convenience fees charged by Civitek and those charged by other processors is that profits realized from the fee charged by other processors goes to private interests whereas any profit realized by Civitek goes toward public purposes. No portion of the revenue received by Appellees from convenience fees is distributed to any Clerk in his or her individual capacity. [R. 14, ¶ 19; 320, ¶ 9]. All the money is ultimately received by FACC, which uses the money for Clerks' education and to develop and maintain software and other technology that is used to assist Court Clerks in the operation of their public offices. [R. 320, ¶ 9]. The public use of Civitek profits was noted by the trial court:

The undisputed evidence establishes that none of the money derived from the convenience fees at issue went to any court clerks either in their private or public capacities. Profits went to Defendants and were used for public purposes: training and education of clerks, creation and maintenance of Florida's online system for filing and record access and retrieval; and technical assistance to clerks. These are essential services that would have to be funded by additional court fees or tax dollars in the absence of the optional convenience fees.

[R. 1533]. It is difficult to contemplate what would have motivated the Legislature to allow an unlimited number of private companies to charge an unrestricted amount of convenience fees to be used for private gain but

prohibit Appellees from realizing a profit to be used exclusively for public benefit.

The interpretation Appellants urge upon this Court is not supported by the language of the statute, legislative history, or any reasonable presumption as to legislative motive. In the absence of such evidence, Appellants are reduced to urging the Court to write language into the statute that judicially expands the fee limitation to include private processing entities that have public officers as members. The generic rubric that is the sole foundation of Appellants' case is not a license for the Court to judicially amend an unambiguous statute.

CONCLUSION

The Court is respectfully urged to affirm the decision below.

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I hereby certify that a true and correct copy of the foregoing has been filed electronically via the Florida Courts E-Filing Portal on October 13, 2022.

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I hereby certify that this brief was prepared in Arial 14-point font and contains 3,688 words in compliance with Rules 9.045 and 9.210(a) of the Florida Rules of Appellate Procedure.

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