LAW OFFICES
COOPER, BYRNE & BLUE, PLLC

ATTORNEYS AND COUNSELORS

D. ANDREW BYRNE †
CHARLES L. COOPER, JR. ††**
WILLIAM W. BLUE
JUNE BYERS
JACKSON W. MAYNARD, JR.
THOMAS A. DAVID ††

† Also Admitted in Tennessee
†† Also Admitted in Georgia
* Admitted in Tennessee Only
** Board Certified in Tax Law

3520 THOMASVILLE ROAD, SUITE 200
TALLAHASSEE, FLORIDA 32309
(850) 553-4300
FAX: 553-9170

115 WEST BAY STREET
PERRY, FLORIDA 32347
(850) 584-3111
FAX: 584-8593

WEBSITE: http://www.cooperbyrne.com

JOHN K. BYRNE *
(1930-1994)

REPLY TO TALLAHASSEE

July 28, 2005

VIA FAX TRANSMISSION & U. S. MAIL

Herb Thiele, Esq.
Leon County Attorney's Office
Leon County Courthouse
Tallahassee, FL 32301

Patrick Kinni, Esq.
Leon County Attorney's Office
Leon County Courthouse
Tallahassee, FL 32301

RE: *Dobson v. Leon County*
Maloy v. Leon County

Dear Herb and Patrick:

I am writing to update you on the recent developments on the two cases referenced above.

On Monday, July 25, 2005, the Court held a hearing on Dobson's request for the Court to set the amount of fees that the Court earlier ruled it was going to award him, and the Court heard Maloy's motion for summary judgment on the issue of liability only. The Court did not enter an order on either case after either hearing, but took both matters under advisement. Although it is difficult to predict exactly what this judge is planning on doing from his bench comments, nevertheless, I believe he will enter orders consistent with my discussions below.

Maloy v. Leon County

This is the case in which Maloy seeks recovery of his legal fees defending himself in the ethics case. The ethics case was a broad-based charge that Maloy corruptly used his official positions to sexually harass female subordinates, and solicited and/or accepted sexual favors from female subordinates based on understanding that his vote or official action or judgment would be influenced thereby. Significantly, the charges involved behavior at DOT and Leon County, not just Leon County.

At the hearing, Maloy's lawyers argued that these charges arose out of ethics proceedings which by their very nature involve public officials only, that the charges concerned allegations of official misconduct, that he was cleared of these charges, and, therefore, under the clear wording of the policies he is entitled to reimbursement.

We argued alternatively that although ethics charges are by their very nature brought against public officials, that these charges can involve public as well as private conduct, and that Maloy's conduct was private. We gave the Court several examples of such conduct, including gifts and financial disclosures. I contrasted the Court's finding that Maloy's travel for FAC and submission of travel vouchers (which the Court found arose out of Maloy's duties as a commissioner), with Maloy's decision to conduct a private affair with Ophelia Morris and Denise Williams before, during and after they were employees for the County, which had nothing to do with his official duties and certainly did not serve a public purpose. I proffered the *Chavez* case which involved the Tampa city commissioner who won her ethics charge just as Maloy did, but was nevertheless denied fees on appeal because the underlying conduct (voting on an off-premise license for her liquor store business) was a purely private matter rather than public matter. The Judge commented during our hearing many times that he saw the Maloy case as vastly different from the Dobson case, and I believe he is inclined to rule consistent with the *Chavez* decision, which is, in fact, on point with our facts.

Although you have earlier received a copy of Minnick's brief in support of his motion for summary judgment, I am attaching for your review a copy of our brief in opposition thereto.

We have been disappointed by this Judge's bench comments before, but I believe from his comments that he is prepared to enter an order finding no liability on the part of the County as to the Maloy case, because Maloy did not meet the two part test of the policies. He has asked both sides to draft proposed orders within ten (10) business days of the hearing.

After his comments, the Judge made it clear that he was intrigued by the sovereign immunity argument we raised. Recall that he agreed with us that sovereign immunity barred the common law claims and threw it out, but disagreed based on the policies finding them to be contracts which waive sovereign immunity as a matter of law. He said that it will be interesting to see what the Supreme Court of Florida does with the sovereign immunity argument and hopes that it clears things up.

Dobson v. Leon County

In the Dobson case, Dobson sought a total of $386,201.33 representing his fees and prejudgment interest thereon. The Court was required to go through an analysis of a reasonable hourly rate, plus time expended and the Court had affidavits from Dobson's experts as well as ours and, of course, the Judge's own discretion to consider. After reviewing the affidavits and "balancing" the relative opinions, the Judge announced that he felt that he was constrained by the law to award Dobson the entire amount requested. He also ruled, however, that we were entitled to a credit for the settlement amount received from FAC. This led to an argument as to whether the amount was $100,000 or $150,000. In the settlement agreement signed by FAC, $100,000 of the settlement was allocated to Dobson and $50,000 to his lawyer. The Judge was inclined to rule that we were only entitled to a $100,000.00 credit, but he wanted to consider the matter further. As to prejudgment interest in the amount of approximately $47,000.00, the Court agreed with me that prejudgment interest was not awardable because the amount was not liquidated until the date of the

hearing. Dobson argued that he was entitled to this and wanted to submit further materials to the Court for its consideration. The Judge indicated that he thought the case was going to be decided on appeal anyway on the sovereign immunity issue and that he was "giving both sides something to argue about before the appellate court." He invited both sides to submit proposed orders and he would sign one of them as in the case of the Maloy decision. I believe that the Judge will enter an order awarding Dobson either $239,000 or $192,000, depending on how he rules on either the prejudgment interest and the credit issue.

Pending appeals

Currently pending before the First DCA is our appeal of the dismissal of DOT from the Dobson case. We have submitted our initial brief, DOT has responded, and we have a short reply due within twenty (20) days. The issue on that appeal is whether the court erred in dismissing DOT as a matter of law rather than factually determining whether Maloy qualified as a public official at DOT.

On the part of the case against Dobson, both Dobson and the County appealed the Court's earlier ruling on liability. The First DCA recently dismissed these appeals finding that they were not final orders. This was no surprise to either side, but it was a close enough call that both sides appealed early to make certain that the appeal rights were not being waived. Once the Judge enters his final order (presumably in 10 days) that order will be a final order and appealable on the issues of liability and the amount awarded. I believe we have a weak, but not baseless, appeal as to the *amount* awarded, but an excellent chance of prevailing on the issue of liability because of the Judge's erroneous finding that the policies in question were "contracts." The Supreme Court has found that only express contracts signed by the parties will waive sovereign immunity, and these policies simply do not rise to that level.

As to the Maloy case, if the Judge enters an order denying Maloy's motion for summary judgment, the Court will likely enter an order granting judgment in our favor as there will be no other issues to resolve. That order will then be appealable on the issue of liability by Maloy. If he rules against us, there will be another hearing as to amount, as in the case of Dobson.

Please call me if you have any questions and I will copy you on our proposed order, as well as the order that the Judge ultimately enters.

Very truly yours,

D. Andrew Byrne, Esq.

DAB/sg
Attachments