IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,290

3rd DCA Case #84-748

SOUTHERN RECORDS & TAPE SERVICE, et al.,

Petitioners,

vs.

THE HONORABLE MURRAY GOLDMAN, etc.,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

In this brief, Respondent will be referred to as the Metropolitan Dade County Fair Housing and Employment Appeals Board or as "the Board". Petitioners will be referred to collectively as "Southern Records".

References to the appendix to this brief will be designated "App." followed by page number.

All citations to Florida Statutes, unless otherwise indicated, are to the 1983 codification, since the Metropolitan Dade County Fair Housing and Employment Appeals Board filed its petition for rule nisi to enforce the Board's final orders in 1983. All emphasis is supplied by counsel unless otherwise indicated.

SUMMARY OF ARGUMENT

The Third District correctly denied the writ of prohibition. The writ was properly denied because the pleading filed in circuit court seeks a judgment providing peculiarly equitable mandatory injunctive relief and restitution exceeding $11,000.

Moreover, prohibition does not lie where, as here, the claim is one of erroneous exercise of jurisdiction, and not of usurpation of jurisdiction of another entity. Erroneous exercise of jurisdiction may be cured on appeal after final judgment and prohibition is not a substitute for such plenary review.

The Metropolitan Dade County Fair Housing and Employment Appeals Board ("the Board") is not a court but an administrative agency properly vested with quasi-judicial powers under article V and the Dade County home rule amendment to the State Constitution.

This is not a proceeding to determine whether a penal ordinance has been violated and Southern Records is not entitled to a second trial de novo. The within cause seeks enforcement of final orders of the Board entered after a de novo proceeding where the parties were accorded due process. The final orders were not appealed to the circuit court. Such orders are res judicata and may not be collaterally attacked in this enforcement proceeding.

The decision below and the Fourth District decision in Winn-Dixie v. Ferris, 408 So.2d 650 (Fla. 4th DCA 1981), rev. den., 419 So.2d 1197 (Fla. 1982) are legally and factually distinguishable and therefore are not in express and direct conflict. This appeal should be dismissed or the Third District decision denying prohibition affirmed.

STATEMENT OF THE FACTS AND CASE

Petitioners (hereinafter referred to collectively as Southern Records) have improperly supplemented their factual statement with matters which were not before the trial court or the district court of appeal in this proceeding. The most prominent example is the very first sentence of Petitioners' Statement of the Case and Facts: "A charge of discrimination was filed by one Emerita E. Abreu with the Equal Employment Opportunity Commission on August 21, 1979, alleging discrimination in employment based upon her sex." Such matters are plainly dehors the record on review, and Southern Records may not properly ask this Honorable Court to consider them in this appeal. Respondent Metropolitan Dade County Fair Housing and Employment Appeals Board ("the Board") therefore submits the following Statement of the Facts and Case.

A. Statement of the Facts

Emerita Abreu was employed by Southern Records as a receptionist from November 29, 1977 (App.4, ¶1). Mrs. Abreu subsequently became pregnant and informed Southern Records of her pregnancy and inquired about the availability of pregnancy benefits. Id., ¶6. Southern Records thereupon dismissed Mrs. Abreu from employment during August 1979, id., ¶1, in order to avoid providing medical benefits for Mrs. Abreu's pregnancy and delivery. Id., ¶7.

B. Statement of the Case

1. Administrative Investigation and Findings.

Mrs. Abreu filed a discrimination charge with the Metropolitan Dade County Fair Housing and Employment

Appeals Board ("the Board") alleging that she was discharged from employment by Southern Records due to her pregnancy. Id., ¶3. The staff of the Board investigated the charge and found that Southern Records had discriminated against Mrs. Abreu.

2. Quasi-Judicial De Novo Proceeding.

Unsatisfied with the staff's preliminary finding of probable cause and recommendation of restitution, Southern Records lodged a de novo "appeal" to the independent quasi-judicial arm of the Board. Mrs. Abreu and Southern Records appeared personally and through able trial counsel. Live testimony, documentary evidence and investigative findings of the Board's Executive Director were submitted in evidence. Id. at 5. After a two-day full-blown trial de novo, the Board found that Southern Records had discriminated against Mrs. Abreu in violation of Chapter 11A, Code of Metropolitan Dade County, and ordered restitution. Id.

The Board determined that by terminating Mrs. Abreu's employment to avoid providing maternity benefits, Southern Records had discriminated against Mrs. Abreu on the basis of sex, thereby violating her civil rights under the County anti-discrimination ordinance. Id. at 4, ¶¶6-8. The Fair Housing and Employment Appeals Board ordered Southern Records to make restitution to Mrs. Abreu, as follows:

a) $4,727.00 in backpay, after mitigation;

b) $2,000.00 for medical expenses of pregnancy and delivery by Caesarean section;

c) $807.24 interest.

Id. at 5, ¶¶1-3. The Fair Housing and Employment Appeals Board affirmatively ordered expunction from the records of Mrs. Abreu's employment of any reference to the discrimination charge, id., ¶4, compliance by Southern Records with the employment discrimination provisions it had violated, id., ¶5, and payment of reasonable attorney's fees incurred by Mrs. Abreu. Id. at 3.

Southern Records disdained to comply with or appeal the Fair Housing and Employment Appeals Board's orders providing relief to Mrs. Abreu, and the Board's orders became final when thirty days expired and no notice of appeal had been filed. Id. at 2, ¶7. It became apparent that Mrs. Abreu's entreaties to Southern Records to comply with the Board's final orders had fallen on deaf ears. Id. at 6.

3. Circuit Court Petition for Enforcement.

The Fair Housing and Employment Appeals Board filed a petition for rule nisi, id. at 1-6, in circuit court to enforce it own final orders. Id. at 3-5. The Board prayed for a writ of execution in the sum of $11,117.99 to enforce the monetary relief due Mrs. Abreu, and for mandatory equitable relief to enforce the records expunction and health insurance coverage provisions of the Board's final orders. Id. at 5, ¶¶4-5. Southern Records sought dismissal of the Board's petition. Id. at 7-8. The motion to dismiss asserted essentially that the circuit court lacked jurisdiction over the subject matter of the Board's petition, id. at 7, ¶1, and that the petition for rule nisi failed to state a cause of action. Id., ¶¶2, 4. The circuit court denied Southern Records' motion to dismiss. Id. at 9.

4. Prohibition Proceeding.

Southern Records petitioned the Third District Court of Appeal for a writ of prohibition, contending that the petition below embodied an action to enforce a county ordinance, and that the circuit court had no jurisdiction over it. (Br.3). The Third District expressly declined to reach the merits of Southern Records' petition for prohibition, stating that challenges to circuit court jurisdiction can be addressed adequately by plenary appeal after final judgment. The district court held that a petition involving an amount exceeding $11,000 and justifying equitable relief preliminarily placed the matter within the jurisdiction of the circuit court, and certified express and direct conflict with Winn-Dixie Stores, Inc. v. Ferris, 408 So.2d 650 (Fla. 4th DCA 1981), rev. den., 419 So.2d 1197 (Fla. 1982).

Based on the certification of express and direct conflict, this appeal ensued.

5. Standard of Review.

Matters certified to this Honorable Court as creating conflict between the decisions of one district court of appeal and another come to this Court for discretionary review. Art. V, §3(b)(4), Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(vi). In cases invoking the discretionary jurisdiction of the reviewing court, the standard of review is whether the lower tribunal departed from the essential requirements of law. Florida Motor Lines, Inc. v. State Railroad Commission, 101 Fla. 1018, 132 So. 851 (1931).

ARGUMENT

I

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DECLINING TO PROHIBIT THE CIRCUIT COURT FROM EXERCISING JURISDICTION OVER THE WITHIN CAUSE DOES NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW WHERE THE PLEADINGS SEEK IN EXCESS OF $11,000 AND EQUITABLE RELIEF, PETITIONER HAS AN ADEQUATE REMEDY BY APPEAL AFTER FINAL JUDGMENT, AND THE ACTION IS BROUGHT BY A CONSTITUTIONALLY-AUTHORIZED ADMINISTRATIVE AGENCY TO ENFORCE THE VALID FINAL ORDERS OF ITS QUASI-JUDICIAL BOARD WHICH ARE RES JUDICATA

A. The Decision of the Third District Court of Appeal Declining to Prohibit the Circuit Court from Exercising Judisdiction over the Within Cause Does Not Depart from the Essential Requirements of Law Where the Pleadings Seek in Excess of $11,000 and Equitable Relief.

As contended by Southern Records (Br.9), the action brought in the circuit court below is indeed a petition to enforce final orders of the Metropolitan Dade County Fair Housing and Employment Appeals Board ("the Board"). The portion of Southern Records' motion to dismiss which served as the basis of its petition for writ of prohibition is that the circuit court lacks jurisdiction pursuant to art. V, §§ 5,6 and 20, Fla.Const., and §§26.012(2)(a) and 34.01(1)(b), Fla.Stat., over the subject matter of the action below. App. at 7, ¶1.

Jurisdiction of the circuit court is governed by §26.012, Fla. Stat.[1] Circuit courts have exclusive

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[1] Sec. 26.012 provides in pertinent part:

> 26.012 Jurisdiction of circuit court.--
> (1) Circuit courts shall have jurisdiction of appeals from county
> (Cont'd)

original jurisdiction in all actions at law involving a claim for more than $5,000, §§26.012(2)(a) and 34.01(c)(2), Fla. Stat., and in all cases in equity. Sec. 26.012(2)(c), Fla. Stat. Circuit courts have jurisdiction to issue injunctions. Sec. 26.012(3), Fla. Stat. Circuit court jurisdiction is invoked by good faith allegations in the pleadings. See Gant v. Lucy Ho's Bamboo Garden, Inc., 460 So.2d 499 (Fla. 1st DCA 1984); Zuckerman v. Professional Writers of Florida, Inc., 398 So.2d 870 (Fla. 4th DCA), rev.den., 411 So.2d 385 (Fla. 1981); Festa v. Britton, 372 So.2d 1168 (Fla. 3d DCA 1979).

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[1](Cont'd)

> courts except appeals of county court orders or judgments declaring invalid a state statute or a provision of the State Constitution. Circuit courts shall have jurisdiction of appeals from final administrative orders of local government code enforcement boards.
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> (2) They shall have exclusive original jurisdiction:
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> (a) In all actions at law not cognizable by the county courts;
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> * * *
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> (c) In all cases in equity including all cases relating to juveniles except traffic offenses as provided in chapters 39 and 316;
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> * * *
>
> (3) The circuit court may issue injunctions.
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> * * *

In the case under consideration, the Third District has recognized that the Metropolitan Dade County Fair Housing and Employment Appeals Board seeks enforcement of final orders which form the basis of its allegations that the amount involved exceeds $11,000 and justifies equitable relief. Southern Records and Tape Service v. Goldman, 458 So.2d 325, 327 (Fla. 3d DCA 1984). These allegations plainly show that the cause is within the equity jurisdiction reserved to the circuit court, §26.012(2)(c), and beyond the jurisdictional limits of the county court. Sec. 34.01(1)(c)(2), Fla. Stat.

It might be argued that technically there is no "matter in controversy" exceeding $5,000 herein, since the fact that Southern Records discriminated against Mrs. Abreu and the measure of restitution therefor have been conclusively determined by orders of the Fair Housing Board which have become final. Because Southern Records failed to appeal the Board's orders, the findings and conclusions set forth in the orders are administrative res judicata and can no longer be controverted. The argument that the $11,000 order sought to be enforced does not embody a "matter in controversy" exceeding $5,000 misses the point: the county court lacks jurisdiction to enforce administrative orders providing more than $5,000 in relief, since a judgment entered for an amount in excess of the amount over which the court has jurisdiction is void. Louisville & N.R. Co. v. Sutton, 54 Fla. 247, 44 So. 946, 948 (1907). A fortiori, a county court judgment in the sum of $6,000.00 (let alone $11,000 as herein) will be reversed on appeal. First National Bank in Fort Lauderdale v. Moor, 234 So.2d 402 (Fla. 4th DCA 1970).

It is a fundamental doctrine that a court which is competent to and does render a judgment is competent to enforce it. Florida Guaranteed Securities v. McAllister, 47 F.2d 762, 764 (S.D. Fla. 1931). A necessary corollary is that a court is not competent to render a judgment which it is not competent to enforce. A court has the power to enforce its own judgments, so that there is no necessity for an independent suit to reach property which legally should be applied to the satisfaction of the judgment. Id. at 765. The same principle applies to mandating affirmative conduct by a party. Hence, an action seeking "a Writ of Execution or such other process as may be necessary to enforce" (App. at 2, prayer for relief) orders providing $11,000 in monetary relief, records expunction, and a showing of specified insurance coverage is plainly within the legal and equitable jurisdiction of the circuit court.

B. The Decision of the Third District Court of Appeal Declining to Prohibit the Circuit Court from Exercising Jurisdiction over the Within Cause Does Not Depart from the Essential Requirements of Law Where Southern Records has an Adequate Remedy By Appeal After Final Judgment.

In the case under consideration, Southern Records disdained to appeal the administrative orders here sought to be enforced, as permitted by §11A-9 of the County Code. App. at 2, ¶¶4, 7. Prohibition is available only where no other adequate remedy, such as appeal, is available. English v. McCrary, 348 So.2d 293, 297 (Fla.1977). The appellate courts of this state are not at liberty to employ an extraordinary remedy to assist a litigant who has foregone an ordinary one which would have served

adequately. Shevin ex rel. State v. Public Service Commission, 333 So.2d 9, 12 (Fla. 1976). Hence prohibition is not available to Southern Records since it forewent its opportunity to appeal the Board's final orders. App. at 2, ¶4.

Moreover, where, as here, the good faith allegations in the pleadings place the matter within the monetary limits and the equity jurisdiction of the circuit court, erroneous exercise of such jurisdiction may be redressed on final appeal. A writ of prohibition should issue only under circumstances where the ordinary remedies are inadequate to the ends of justice; hence, it will not lie to arrest proceedings for errors which may be corrected on appeal. E.g., Eberhardt v. Barker, 104 Fla. 535, 140 So. 633 (1932).

Courts are admonished not to "permit a writ which proceeds upon the ground of an excess or usurpation of jurisdiction to become an instrument itself of usurpation, or to be confounded with the writ of error, which proceeds upon the ground of error in the exercise of a jurisdiction which is conceded." State ex rel. Rheinauer v. Malone, 40 Fla. 129, 132-33, 23 So. 575, 576 (1898).

The purpose of prohibition is for a superior court to prevent an inferior court from exceeding its jurisdiction or usurping jurisdiction over matters not within its jurisdiction. English v. McCrary, 348 So.2d 293 (Fla. 1977). In determining whether to grant the writ, "a clear distinction is drawn between assumption of jurisdiction to which the court has no legal claim and erroneous exercise of jurisdiction with which it is invested." Id. at 298.

Prohibition may be granted only when it is shown that the lower tribunal is without jurisdiction or is attempting to act in excess of jurisdiction. Id. at 296. The writ does not lie to prevent the mere erroneous exercise of jurisdiction by an inferior tribunal. Burkhart v. Circuit Court of Eleventh Judicial Circuit, 146 Fla. 457, 1 So.2d 872 (1941). Therefore, a writ of prohibition will lie to prevent an inferior tribunal from acting in excess of its jurisdiction, but will not be available to prevent an erroneous exercise of that jurisdiction.

Prohibition will not be allowed to take the place of an appeal. In all cases, therefore, where the party has ample remedy by appeal from the order or judgment of the inferior court, prohibition will not lie. Thus, where the defendant in an action instituted in an inferior court pleads to the jurisdiction of the court and his plea is overruled, no sufficient cause is presented for granting a prohibition, since ample remedy may be had by an appeal from the final judgment in the case. Sherlock v. City of Jacksonville, 17 Fla. 93, 97 (1879).

Assuming with Southern Records that pleadings seeking $11,000 and equitable relief do not place this cause within circuit court jurisdiction, plenary appeal after final judgment is the appropriate means to review such an assertedly erroneous exercise of jurisdiction. Therefore, even assuming arguendo that the circuit court lacks jurisdiction over the within cause, the Third District decision denying prohibition does not depart from the essential requirements of law and should be affirmed.

C. The Decision of the Third District Court of Appeal Declining to Prohibit the Circuit Court from Exercising Judisdiction over the Within Cause Does Not Depart from the Essential Requirements of Law Where the Action Is Brought by a Constitutionally-Authorized Agency to Enforce the Valid Final Orders of its Quasi-Judicial Board which are Res Judicata.

Following denial (App. at 9) of its motion to dismiss, id. at 7-8, Southern Records filed its petition to the Third District Court of Appeal for a writ of prohibition to the circuit court. The district court of appeal found the Fair Housing and Employment Appeals Board's allegations seeking $11,000 and equitable relief sufficient to invoke circuit court jurisdiction. Southern Records, supra, 458 So.2d at 327. In so doing, the district court exercised the judicial restraint required in prohibition proceedings. The district court said:

> We deem it unnecessary to reach the merits of the respective claims; the issue may properly be addressed on appeal.

Id. at 326.

The propriety of such restraint is confirmed by a recent comment by this Honorable Court in a prohibition proceeding:

> At the outset, we reassert that our duty in this cause is to determine whether the circuit court has the jurisdiction. We do not propose to address the merits of the case in the process.

Moffitt v. Willis, 459 So.2d 1018, 1021 (Fla. 1984) (emphasis in original).

Thus, the only question before the trial court below was whether the circuit court has jurisdiction to entertain

a petition to enforce orders of a county quasi-judicial administrative board once such orders have become final and the time for perfecting an appeal has expired. The record on appeal is devoid of any challenge to the power of a county to create a civil rights board with authority to hear complaints brought by employees against their private sector employers.

This issue surfaced initially in Judge Barkdull's dissent sub judice. 458 So.2d at 327. Judge Barkdull specified that his dissent was based not only on Winn-Dixie, but also on the issue of whether the Board of County Commissioners of Dade County unlawfully attempted to empower the Fair Housing and Employment Appeals Board to exercise what Judge Barkdull deemed exclusively judicial prerogatives. Id. The issue raised in dissent is by its own terms beyond the scope of the issues considered by the Fourth District panel in Winn-Dixie. Consequently, in the present posture of this case, the issue injected by Judge Barkdull cannot form the basis for conflict jurisdiction in this Honorable Court. Consideration of an issue not raised by the pleadings or otherwise presented to the trial court for resolution denies fundamental due process to the party defending against the tardily raised issue, see, e.g., McCaleb v. Mathis, 459 So.2d 1162, 1163 (Fla. 2d DCA 1984), and denies the trial court the opportunity to pass upon the question.

Consequently, the question of whether the Dade County Board of County Commissioners is empowered to create an agency to enforce a county civil rights ordinance and to entertain charges of discrimination is not ripe for decision

in the present posture of this appeal. Such a question should not be entertained initially by this Honorable Court where, as here, the question has not been submitted to the trial court for adjudication and the district court of appeal for review. Should this Court nonetheless desire to address the merits of this issue, Dade County welcomes this opportunity to show this Court that the circuit court does indeed have jurisdiction over the enforcement action below.

1. The Fair Housing and Employment Appeals Board is a Constitutionally-Authorized Administrative Agency of Metropolitan Dade County.

On November 6, 1956, the Dade County Home Rule Amendment (art.VIII, §11, Fla.Const. (1885)[2] was adopted by the people of the State of Florida. Subsections (1)(b) and (c) of that Amendment authorize the Board of County Commissioners to be empowered to pass ordinances relating to the affairs, property and government of Dade County, to provide suitable penalties for the violation thereof and to create authorities, boards or other governmental units whose jurisdiction lies wholly within Dade County. Pursuant to the constitutional authority conferred by the Dade County Home Rule Amendment, the Board of County Commissioners has been expressly empowered to

> [a]dopt such ordinances and resolutions as may be required in the exercise of its powers, and prescribe fines and penalties for the violation of ordinances,

Home Rule Charter, §1.01(A)(22), and to create and prescribe the quasi-judicial duties of such boards as it may deem necessary. Id. at §4.08(A).

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[2] Carried forward by art.VIII, §6, Fla.Const. (1968).

Under the foregoing provisions, the Dade County Board of County Commissioners exercises the powers formerly vested in the state legislature with respect to the affairs, property and government of Dade County and all the municipalities within its territorial limits. State v. Dade County, 142 So.2d 79, 85 (Fla. 1962); Chase v. Cowart, 102 So.2d 147 (Fla. 1958). Art. V, §1, Fla.Const. (1972), provides:

> Courts.--The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality. The legislature shall, by general law, divide the state into appellate court districts and judicial circuits following county lines. Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices.

On June 18, 1969, consistent with the above-described home rule powers and art.V, §1 constitutional authority, the Dade County Board of County Commissioners adopted a sweeping and progressive civil rights ordinance. The anti-discrimination ordinance was amended in 1975. Ordinance No. 75-46, Metropolitan Dade County. As amended, the ordinance prohibits discrimination in housing and employment on the basis of race, color, religion, ancestry, national origin, age (if 18 or older), physical handicap, marital status, place of birth or sex. Sec. 11A-1, Code of Metropolitan Dade County.

Dade County has not violated the art.V, §1 constitutional prohibition against creating a court. The Fair Housing and Employment Appeals Board is not a court, but an administrative body with quasi-judicial powers

within the meaning of art.V, §1, Fla.Const., and §4.08(A) of the Dade County Home Rule Charter. The Board has discrete administrative and quasi-judicial functions, and does not attempt to exercise any exclusvely judicial prerogatives. See footnote 3, infra. Charges of discrimination are received, processed and investigated by trained professional staff members who serve under a full-time Executive Director whose duties and powers are prescribed by ordinance. Sec. 11A-6, Code of Metropolitan Dade County.

If the staff is unable to conciliate between employee and employer after service of a complaint upon the employer, §11A-8(b), and complete investigation of the employee's allegations, §11A-8(c), the Executive Director makes factual findings and recommendations and determines whether there is probable cause to believe that the County's anti-discrimination ordinance has been violated. Sec. 11A-8(f), Code of Metropolitan Dade County.

An employee or employer aggrieved by the staff finding and recommendation may appeal de novo to a quasi-judicial panel of the nine-member volunteer lay Board. Sec. 11A-8(h). This procedure was followed by Southern Records. App. at 4.

In Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla.1973), this Court quoted the definition of the term "quasi-judicial" as follows:

> 'A term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.' Black's Law Dictionary (Fourth Edition, p. 1411)

278 So.2d at 263. The Canney court stated that the characterization of a board as "quasi-judicial" does not make the body into a judicial body. Ibid. "A board exercising quasi-judicial functions is not a part of the judicial branch of government." Ibid.

The Court said of the School Board that the "correct understanding of the terminology 'quasi-judicial' means only that the ... Board is acting under certain constitutional strictures which have been enforced upon all administrative boards and not that the ... Board has become a part of the judicial branch." Ibid.

Herein, the Dade County Fair Housing and Employment Appeals Board is no more a court than was the Alachua County School Board in Canney. Southern Records' characterization of the Board as a court does not make it a court. The Board has not attempted to arrogate to itself any exclusively judicial function. To the contrary, the Dade County Board of County Commissioners has scrupulously observed the article V Constitutional prohibition against creating a court.[3]

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[3] The Board of County Commissioners has specified that the exclusively judicial functions related to enforcement of the County's civil rights ordinance, codified as Chapter 11A of the County Code, may not be exercised by the Fair Housing and Employment Appeals Board, but must be the subject matter of judicial proceedings in a court of competent jurisdiction. See, e.g., §11A-7(f)(i), Code of Metropolitan Dade County (imposition of (Cont'd)

It is apparent from the foregoing that the Metropolitan Dade County Fair Housing and Employment Appeals Board is a duly-authorized administrative agency of Dade County with constitutionally-authorized quasi-judicial power in matters connected with anti-discrimination functions in Dade County. See also §760.06(3), Fla.Stat., Human Rights Act of 1977.

2. The Within Cause Is Not an Action to Prosecute the Violation of a Penal County Ordinance Within the Meaning of §34.01(1)(b), Fla.Stat., But Is an Enforcement Action and Does Not Violate the Constitutional Right of Access to Courts.

Sec. 34.01(1)(b), Fla.Stat., provides that the county court shall have jurisdiction over all "violations" of county ordinances. "Violations" means infractions of penal provisions. This conclusion is required by §125.69, Fla.Stat., which provides:

> Penalties.-- Violations of county ordinances shall be prosecuted in the same manner as misdemeanors are prosecuted. Such violations shall be prosecuted in the name of the state in a court having jurisdiction of misdemeanors by the prosecuting attorney thereof and upon conviction shall be punished by a fine not to exceed $500 or by imprisonment in the county jail not to exceed 60 days or by both such fine and imprisonment.

See also art.VIII, §1(j), Fla.Const., "VIOLATION OF ORDINANCES. Persons violating county ordinances shall be prosecuted

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[3](Cont'd)
penalties for violation of ordinance); §11A-7(f)(iv) (application for injunctive relief to preserve the status quo or prevent irraparable harm); §11A-13.1 (same); §11-8(c)(5)(subpoena enforcement); §11A-8(c)(6) (imposition of penalties for disobeying subpoena or tampering with evidence); §11A-8(i)(enforcement of ordinance where respondent fails to request hearing before Board); §11-A-8 (k)(action for enforcement where respondent fails to comply with Board's final orders after hearing. (as herein)); §11A-9 appeal of final order to circuit court).

and punished as provided by law." Moreover, no administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law. Art.I, §18, Fla.Const.

Thus, only the courts may adjudicate violations of penal ordinances, except as otherwise provided by general law. Id. Such violations are tried nonjury, State v. Webb, 335 So.2d 826 (Fla. 1976); City of Tampa v. Ippolito, 360 So.2d 1316 (Fla. 2d DCA 1978), in county court. Sec.34.01(1)(b).

The Fair Housing and Employment Appeals Board petition for rule nisi below did not initiate an action to prosecute a "violation of municipal and county ordinances" within the meaning of §34.01(1)(b), Fla.Stat. The purpose of the action below is to enforce final orders of a duly-authorized constitutional home rule county quasi-judicial administrative board involving an award exceeding $11,000 and requiring certain affirmative acts to be done by Southern Records to demonstrate compliance with the County's anti-discrimination ordinance. The Board invokes the equitable power of the circuit court to enter a final judgment providing a mandatory injunction under §26.012(2)(c), Fla.Stat., to secure such relief.

Moreover, even assuming with Southern Records that the underlying discrimination charge is a triable "violation", Southern Records cannot demonstrate abrogation of a constitutional right to access to the courts under art.I, §21, Fla. Const. This provision in the Declaration of Rights has been interpreted by this Court to apply only in those instances where a right of access to the courts for redress of a

particular injury has been provided by statutory law predating the adoption of the Declaration of Rights in the Florida Constitution, or where such right has become a part of the common law of the state pursuant to §2.01, Fla.Stat. Kluger v. White, 281 So.2d 1 (Fla. 1973). The constitutional provision was never intended to create new causes of action, but to guarantee pre-existing rights. Kirkpatrick v. Parker, 136 Fla. 689, 187 So. 620 (1939).

Statutory protection from discrimination in employment on the basis of sex originates with Title VII of the Civil Rights Act of 1964, codified as 42 U.S.C. §2000e et seq. Hence, the time sequence here involved demonstrates that the access to the courts provision in the Florida Constitution (which dates back to 1885) does not apply to a purported cause of action with respect to a complaint of civil rights violation.

3. Having Received the Entire Panoply of Due Process Rights, Southern Records Is Not Entitled to a Third De Novo Proceeding, But Is Conclusively Bound by the Board's Final Orders.

After a complete investigation, the Executive Director of the Fair Housing and Employment staff found cause to believe that Southern Records had violated the anti-discrimination ordinance by terminating the relator's employment because of her pregnancy. The finding and recommendation of back-pay were not conclusive on the Board, however, in the de novo proceeding, and were accorded no presumption of correctness. The burden of going forward and burden of proof remained on the employee as charging party.

After due notice and a month-long continuance requested by Southern Records, a formal evidentiary hearing was had.

The de novo hearing on the merits of the employee's charge of discrimination lasted two full days, although no time limitation was imposed by the Board. Three additional continuances were granted Southern Records between the first day of trial on February 17, 1982 and the second day, December 15, 1982.

At hearing, at least five factual witnesses were formally examined and cross-examined. Testimony was taken and documents received in evidence in accordance with a formal written set of hearing procedures approved by the Dade County Board of County Commissioners. The hearing procedures are modeled after and identical in many respects to the Florida Administrative Procedures Act, Ch.120, Fla.Stat. (For example, the standard for admissibility of evidence is the APA standard. See §120.58(1)(a), Fla.Stat.). Subpoena power to compel testimony and production of documents, both for discovery and final hearing, was available to Southern Records. Sec.11A-8(c)1-6, Code of Metropolitan Dade County.

The nine-member quasi-judicial Board deliberated "in the sunshine" as prescribed by §286.011, Fla.Stat., and their deliberations were recorded stenographically by a court reporter, as was the entire proceeding before the Board. Two hearings were had on the award of attorney's fees; three expert witnesses testified and were subject to cross-examination.

Thus, Southern Records has benefited from the full panoply of due process protections which may be afforded a litigant in quasi-judicial administrative proceedings. Southern Records was afforded an opportunity to respond to

a written charge of discrimination and a full staff investigation prior to the finding by the agency Executive Director of sex discrimination in employment in violation of §11A-22(a) of the County's Fair Housing and Employment Ordinance and recommendation that the employee be made whole. Next, Southern Records requested and received a full-blown trial-type evidentiary hearing de novo in which, as respondent, it bore no burden of proof.

Southern Records has had the de novo proceeding which due process demands. The Florida Constitution and statutes do not entitle Southern Records to a third "bite of the apple."

Southern Records' claim (Br.15) that any Board action must include a trial de novo is negatived by §26.012(1), Fla.Stat., which expressly authorizes direct circuit court review of "appeals" from final administrative orders of local government code enforcement boards. There is no requirement for a de novo judicial proceeding after a de novo quasi-judicial proceeding. Moreover, the delegation of adjudicative functions to an administrative agency with special expertise in the subject matter, with the right of judicial review retained, does not violate the constitutional separation of powers principle. Beall Construction Co. v. Occupational Safety and Health Review Commission, 507 F.2d 1041, 1045 (8th Cir. 1974).

Substantive law determines whether a litigant's single authorized trial de novo is before a judicial or quasi-judicial tribunal. See 1 Fla.Jur. 2d, Administrative Law §15. For example, in the case of Mayo v. Market Fruit Co. of Sanford, 40 So.2d 555 (Fla.1949)(en banc) a fruit

grower filed a formal complaint with the Commissioner of Agriculture against the Market Fruit Company. After a hearing as prescribed by law, the Commissioner ordered the producer to pay the complainant $7,000 to make the latter whole for damages suffered as a result of the respondent's statutory violation. Southern Records claims that this Court affirmed the award on the basis that the respondent was entitled to a de novo jury trial in the enforcement proceeding. This is untrue. Sec. 596.13, Fla.Stat. (1941) expressly provided for a successful petitioner in the administrative procedure followed in Mayo to bring suit for enforcement in a civil court of competent jurisdiction in the event of the respondent's noncompliance with the Commissioner's order. In such an action for enforcement, the findings and order of the Commissioner from the quasi-judicial administrative proceeding were to be deemed by the enforcing court "prima facie evidence of the facts stated therein." Sec. 596.13, Fla.Stat. (1941). Hence, the plain language of the statute under which the Mayo proceeding was brought negates Southern Records' contention (Br.14-15) that this Court found the $7,000 award to be permissible because a trial by jury de novo was the only means for obtaining the damages sought.

Since entry and execution of judgment is a power residing solely in the judiciary, Southern Records is correct in asserting that the private complainant in Mayo could not enforce without judicial intervention the $7,000 award entered by the Commissioner. That judgment may be executed only by the courts is the very reason that the Fair Housing and Employment Appeals Board has filed its

petition below seeking enforcement of its own administrative final order. This is also the reason that a successful complainant before the Industrial Claims Commission must file a petition for rule nisi to enforce a Workers' Compensation claim against an intransigent employer. See Workers' Compensation Law, §440.24(1), Fla.Stat.

Approval by this Court of the $7,000 award in Mayo was grounded upon the protections which inhere when the court rather than an administrative agency wields the power of enforcement. In Mayo, the matter was placed before the circuit court on petition for certiorari. 40 So.2d at 556. On certiorari review of the final order of an administrative agency, the court reviews the record made below to determine whether there is any substantial competent evidence to support the agency findings and to ensure that there has been no departure from the essential requirements of law. City of Deerfield v. Vaillant, 419 So.2d 624 (Fla. 1982). Certiorari review was as available to Southern Records as it was to the Market Fruit Company of Sanford in the Mayo case. Market Fruit Company was successful in challenging one aspect of the Commissioner's computation of the damages award, although this Court affirmed the final order requiring that damages be paid. Southern Records, by disdaining to petition the circuit court for review, §11A-9, Code of Metropolitan Dade County, Fla.R.App.P. 9.030(c)(1)(C), waived its entitlement to have the Fair Housing and Employment Board's final orders reviewed. (While such review is procedurally by direct appeal, the standard of review is classic certiorari, De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957), just as in Mayo, 40 So.2d at 556.)

Mayo further stands for the proposition that an administrative entity may order restitution as between private litigants, since such an award is subject to judicial review for compliance with the essential requirements of law, thereby fully protecting the constitutional rights of the adversary parties. 40 So.2d at 558. Cf. Judge Barkdull's dissent herein 458 So.2d at 327. See also Scholastic Systems, Inc. v. LeLoup, 307 So.2d 166 (Fla. 1974), where the petitioner claimed its constitutional rights were violated by an Industrial Claims Commission monetary award in the absence of a right of direct appeal to the courts. This Court said: "A party is afforded his 'day in court' with respect to administrative decisions when he has a right to a hearing and has the right of an appeal to a judicial tribunal of the action of an administrative body." Id. at 169.

Were this not so, thousands of municipal and county boards throughout the state would cease to function to adjust differences between private citizens. Zoning boards, for example, have for decades "adjudicated" the rights of persons to construct, modify or cause to have removed structures which encroach upon the property or otherwise violate the rights of neighbors. If the Third District dissent herein accurately reflected Florida law, the floodgates would be open to require the courts to settle myriad disputes which are now finally resolved administratively in every facet of daily life with which local agencies are involved.

Indeed, this Court long ago recognized the fact that in the complex society in which we live, the orderly

administration of the affairs of the people requires such administrative agencies to act in lieu of the courts in matters within the agencies' purview. Odham v. Foremost Dairies, Inc., 128 So.2d 586, 592-93 (Fla.1961). This Court has even referred to the "administrative department" as the fourth branch of government. State ex rel. Olden v. Rose, 123 Fla. 544, 167 So. 21, 22 (1936); State ex rel. Taylor v. City of Jacksonville, 101 Fla. 1241, 133 So. 114, 115 (1931) (en banc).

The inescapable inference from Southern Records' position is that each time a party is dissatisfied with the result of a de novo quasi-judicial proceeding to determine whether a county ordinance has been violated, the party may choose between a judicial appeal and a judicial de novo proceeding to rehear the very violation just determined.

It requires little imagination to predict what the increased burden would be on the judiciary if this Court were to accept Southern Records' position. The entire notion of a second de novo proceeding flies in the face of a huge body of statutory and case law limiting the scope of review of local and state quasi-judicial administrative action. See, e.g., cases decided under §120.68, Fla.Stat.

The underlying violation of Dade County's civil rights ordinance has been fully litigated. Southern Records failed to avail itself of the opportunity for appellate review pursuant to §11A-9, Code of Metropolitan Dade County, and Fla.R.App.P. 9.030(c)(1)(C). All matters embodied in the Fair Housing and Employment Appeals Board's final orders are finally concluded, and this Court should

enforce repose under the doctrine of administrative res judicata. Metropolitan Dade County Board of County Commissioners v. Rockmatt Corp., 231 So.2d 41 (Fla. 3d DCA 1970). The final orders of the Board may not be collaterally attacked in this proceeding. Rubin v. Sanford, 168 So.2d 774 (Fla. 3d DCA 1964), cert. den., 180 So.2d 331 (Fla. 1965).

ARGUMENT

II

THIS HONORABLE COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION HEREIN BECAUSE THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL ERRONEOUSLY CERTIFIED ITS DECISION AS IN DIRECT CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN WINN-DIXIE AND THE ISSUE SUB JUDICE IS NOT RIPE FOR REVIEW BY THIS COURT

A. The Decisions in Southern Records and Winn-Dixie Are Not in Direct Conflict on the Issue of Availability of Other Legal Remedies.

The Third District has certified "this question" to be "in express and direct conflict with Winn-Dixie Stores, Inc. v. Ferris, 408 So.2d 650 (Fla. 4th DCA 1981), review denied, 419 So.2d 1197 (Fla. 1982)." 458 So.2d at 327. "[T]his question" apparently is "[w]hether, as argued by [Southern Records], other remedies foreclosing equitable relief are available to Abreu [the discharged employee], is a question to be determined by the trial court." Id.

The Fourth District determined that the petition assertedly for injunctive relief in the lower tribunal was precluded because of the existence of adequate legal remedies.

> The Petition sought confirmation and enforcement of an order rather than injunctive relief based upon the inadequacy of other legal remedies. Mr. Paige clearly has remedies available. He has proceeded before the EEOC and presently has pending an action in Federal District Court under Title VII of the 1964 Civil Rights Act. He further had an action available to him pursuant to Section 23.167(12), Florida Statutes (1979).

Winn-Dixie, supra, 408 So.2d 652-53. The Fourth District found that the Broward County Human Rights Board had failed to plead properly for equitable relief. Id., 408

So.2d at 652. The district court then concluded that the court below lacked jurisdiction over the subject matter. 408 So.2d at 653. Sub judice, no mention was made in the lower tribunal of any other remedy. See Southern Records' motion to dismiss, App. at 7-8, which is wholly devoid of any assertion that Mrs. Abreu has an adequate remedy at law. It is only at the present final stage of the prohibition proceeding before this Honorable Court that Southern Records seeks -- in patent violation of the applicable rules of procedure -- to argue the availability to Mrs. Abreu of another remedy. See Appendix to Brief of Petitioner at 1-4.

Moreover, the Fourth District failed to explain precisely how the adequacy of a remedy at law could properly be adjudicated on a motion to dismiss so as to justify issuance of a writ prohibiting the circuit court from taking equity jurisdiction over a particular subject matter. The question of the adequacy vel non of legal remedies is properly determined by factual proofs submitted to the trial court in support of the defense of failure to state a cause of action sounding in equity or to prove entitlement to equitable relief on the merits. Such matters do not form the basis of dismissal for lack of subject matter jurisdiction. Cf. Winn-Dixie, where the defendant obtained a writ of prohibition without filing a pleading, prevailing in the district court on the basis of "various motions attacking the jurisdiction of the circuit court over the subject matter of the litigation." 408 So.2d at 651.

In diametric opposition to the foregoing analysis by the Fourth District, the Third District expressly (and properly) eschewed to resolve the merits of the parties' claims within the instant prohibition proceeding, and stated that the issue whether "other remedies foreclosing equitable relief are available to Abreu, is a question to be determined by the trial court." 458 So.2d at 327.

The Winn-Dixie court gave no indication that it was informed of federal policy concerning efforts to secure compliance with Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. In Alexander v. Gardner-Denver Co., 415 U.S. 36, 45, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), the United States Supreme Court said that Congress provided "parallel or overlapping remedies against discrimination" and provided for "consideration of employment-discrimination claims in several forums... . And, in general, submission of a claim to one forum does not preclude a later submission to another... . Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. Id. at 47-49.

Additionally, Winn-Dixie does not discuss whether the Broward Human Rights Board is an EEOC deferral agency under section 706 of the federal Civil Rights Act of 1964. From the Fourth District account, it appears that the discrimination charge against Winn-Dixie was pursued administratively through both federal and local anti-discrimination agencies. It appears that the discrimination charge sub judice may have been filed

initially with EEOC (see Southern Records' Br., App. at 1-4) and deferred (pursuant to contractual arrangement) to the Metropolitan Dade County Fair Housing and Employment Appeals Board, an authorized section 706 deferral agency. See also §760.06(11), Fla.Stat.(1983), §23.166(11), Fla.Stat.(1981). If this is true, a different analysis may apply to the facts herein than was applied by the Winn-Dixie court, since it is the intent of 42 U.S.C. §2000e-5 to give state and local civil rights agencies an opportunity to resolve problems of employment discrimination and thereby make resort to federal relief unnecessary. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed. 2d 609 (1979). In the absence of appropriate responsive pleadings and a factual record, it is impossible to determine whether an adequate remedy at law exists which would foreclose the relief sought in the trial court.

As a matter of law an adequate legal remedy is one which defeats by its existence the jurisdiction of equity, being a remedy which is plain, clear, and certain, prompt or speedy, sufficient, full, or complete and efficient to the attainment of the ends of justice. 27 Am.Jur. 2d Equity §94. An action at law is not adequate where the case requires preventative relief, such as the avoidance of a multiplicity of suits or the prevention of repeated of continuing wrongs, City of Jacksonville v. Giller, 102 Fla. 92, 135 So. 549 (1931), and, indeed, where peculiarly equitable relief is required, any remedy at law is inadequate Pepple v. Rogers, 104 Fla. 462, 140 So. 205 (1932). Therefore, where as here, preventative relief is sought in

the form of compliance with insurance provisions (App. at 1,¶2(e)) and the peculiarly equitable relief of expunction of offending personnel records (App. at 1, ¶2(d)), there is plainly no adequate remedy at law. See City of Jacksonville v. Giller and Pepple v. Rogers, supra. Herein, the relator's adequate remedy at law is the very administrative proceeding whose final orders are here sought to be enforced.

B. The Decisions in Southern Records and Winn-Dixie Are Not in Direct Conflict on the Issue of Whether the Pleadings Properly Place the Cause Within Circuit Court Jurisdiction.

Circuit court jurisdiction is invoked by good faith allegations in the pleadings. See Zuckerman v. Professional Writers of Florida, Inc., 398 So.2d 870 (Fla. 4th DCA), rev. den., 411 So.2d 385 (Fla. 1981); Festa v. Britton, 372 So.2d 1168 (Fla. 3d DCA 1979). Jurisdictional allegations in Southern Records and Winn-Dixie are plainly distinguishable:

	Southern Records		Winn-Dixie
a.	"the amount involved exceeds $11,000", 458 So.2d at 327	a.	no monetary claim, 408 So.2d 650-53
b.	"its allegations... justif[y] equitable relief", 458 So.2d at 327	b.	"[T]he pleading filed belies the argument" that the petition was for injunction of a public nuisance or "simply a suit for injunction under the general equitable jurisdiction of the Circuit Court." 408 So.2d at 652
c.	"filed a petition in the circuit court for enforcement of its orders", 458 So.2d at 326	c.	The ordinance provided for "de novo" judicial proceedings. 408 So.2d at 650 n.1

The above-quoted findings of the Third District regarding the matters before the trial court sub judice are in stark contrast to the corresponding findings of the Fourth District in Winn-Dixie. The Third District clearly stated that allegations in the pleading filed in the lower tribunal involved an amount in excess of $11,000 and justified equitable relief. Southern Records, 458 So.2d 327. No such statement is present in the Winn-Dixie opinion.

C. The Decisions in Southern Records and Winn-Dixie Are Not in Direct Conflict on the Merits of the Ultimate Issue Placed Before the District Courts.

The Winn-Dixie court reached the merits of the adversary parties' jurisdictional arguments. The court considered and adjudicated all the defenses asserted by Winn-Dixie, although the employer had raised its objections only by motion, and had filed no pleading. See 408 So.2d at 651. The district court concluded "that the court below lacked jurisdiction over the subject matter." 408 So.2d at 653.

The Third District never reached the issue of subject matter jurisdiction. The Southern Records majority expressly found it inappropriate to determine the ultimate issue of subject matter jurisdiction in the prohibition proceeding. It said:

> We deem it unnecessary to reach the merits of the respective claims; the issue may properly be addressed on appeal [from the final judgment in the case].

458 So.2d at 326.

Plainly, Southern Records and Winn-Dixie are not conflicting decisions on the issue of whether the circuit court has subject matter jurisdiction in the matters under

consideration. The Third District majority declined to reach the issue of subject matter jurisdiction, citing the availability of plenary appeal. The Fourth District decided the jurisdictional issue and prohibited the circuit judge from proceeding to the merits of the parties' claims.

Since the "question" of jurisdiction, vel non, was not answered by the Third District, no conflict on the jurisdictional question is properly before this Court in the present posture of this case. Moreover, it appears that the decision in Winn-Dixie prohibiting the circuit court from taking jurisdiction may have been correct on the facts and law reviewed by the Fourth District; it is abundantly clear that the circuit court has jurisdiction of the within cause on the facts and law of the instant cause. See Point I, ante.

CONCLUSION

Based on the foregoing argument and authority, this Honorable Court should either dismiss the appeal for lack of express and direct conflict or affirm the decision of the Third District below so as to permit the circuit court to reach the merits of the parties' respective positions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was hand-delivered to The Honorable Murray Goldman, Circuit Court Judge, Room 817, Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130, and mailed to STEVEN R. BERGER, P.A. and HOFRICHTER & QUIAT, P.A., Attorneys for Petitioners, Suite B-5, 8525 S.W. 92nd Street, Miami, FL 33156; Keith Chasin, Esq., 8585 Sunset Drive, Suite 75, Miami, FL 33143, on this 10th day of May, 1985,

Daniel A. Weiss

Assistant County Attorney