IN THE SUPREME COURT
OF THE STATE OF FLORIDA

ROY LEE HULLINGER,

Petitioner,

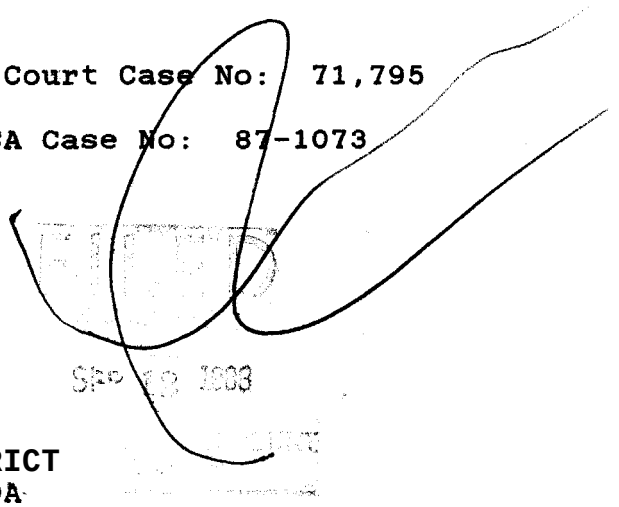
vs

RYDER TRUCK RENTAL, INC.,
a Florida corporation,

Respondent.
_____/

Supreme Court Case No: 71,795

Fifth DCA Case No: 87-1073



APPEAL FROM THE FIFTH DISTRICT
COURT OF APPEALS OF FLORIDA

REPLY BRIEF OF PETITIONER/APPELLANT

Glen D. Wieland, Esquire
KELAHER & WIELAND, P.A.
20 N. Orange Ave., Ste. 1307
Post Office Box 944
Orlando, Florida 32802
(305) 841-7698
ATTORNEY FOR APPELLANT

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CITATIONS OF AUTHORITY

Other Authority

SUMMARY OF ARGUMENT

There are two basic issues on appeal: the Appellant's entitlement to jury trial and which statute of limitations is applicable to the instant action. The Appellee has seemingly raised a multitude of sub-issues before this Court, some of which were not ever addressed by the trial court, and not specifically raised as points on appeal. It is the position of the Appellant that if the trial court never addressed certain issues and the Appellee has not specifically raised certain issues as points on appeal, then it is improper to argue those points at this time. In the initial pleadings, the Plaintiff (Appellant herein) requested non-economic damages; this matter was not ruled upon by the trial court, and at the District Court level the entitlement of the Appellant to general damages was never raised as a specific point on appeal, hence to use this as a basis for a jury trial argument is inappropriate.

Additionally, Article I Section 22 of the Florida Constitution (1968) states that the right to trial by jury shall remain inviolate. The mere statement that Section 760.10, Florida Statutes, does not specifically provide for a jury trial is a thoroughly unconvincing argument. Due to the mandate for jury trial by our own constitution, absent specific wording in the statute denying a jury trial and providing alternative relief, the right to jury trial must remain inviolate. Even if the statute contained a denial of the right to jury trial, it would have to

express a compelling need or circumstance for such denial.

It is clear the Appellant is entitled to a jury trial pursuant to Florida constitutional provisions, and in the absence of clear and convincing statutory or common law to the contrary, it would be error to deny him this inherent right.

With regard to the issue of the statute of limitations, the Appellee is certainly clutching at straws to support the erroneous finding of the trial court. The statute which the Appellee contends to be applicable is Section 95.11(4)(c); unfortunately, this statute is to be applied to actions for "back wages". In the instant case, the Appellant is not seeking "back" wages, but prospective wages. Back wages would clearly indicate wages to which a party is entitled but which have not been paid. At the time of the accrual of the Plaintiff's cause of action, which was at the time of wrongful discharge, there were no "back wages" owing. This action is one for prospective wage loss for wrongful discharge, from the date of the discharge forward, not for past wages earned but not paid. Consequently, the "back wages" statute of limitation, Section 95.11(4)(c), in inapplicable. As such, for statutory violation, the limitation period as proscribed by Section 95.11(3)(f), Florida Statutes would be controlling and the instant action would have been timely filed.

POINT ~~ONE~~

THE RIGHT TO TRIAL BY JURY REMAINS INVIOLATE IN THE ABSENCE OF MANDATORY REQUIREMENTS TO THE CONTRARY

Article I, Section 22 of the Florida Constitution (1969) guarantees this right to trial by jury, and nothing contained in the Answer Brief of the Appellee sufficiently refutes this constitutional mandate. Subparagraph A of Appellee's response goes into fortuitous detail about the administrative remedies afforded a putative victim of age discrimination, but fails to illustrate sufficiently the legal redress to which the Appellant herein is certainly entitled. The Appellee's argument, very simply stated, is that due to the statutory provision for administrative relief as an alternative to litigation, and because one cannot have an administrative jury trial, one should not be afforded a jury trial in litigation. This reasoning is difficult to follow: and certainly impossible to perceive as a basis for departing from the requirements of Article I, Section 22 of our state constitution.

In subparagraph B of Appellee's Point One argument, the argument is ventured that the wording of the statute says a Court must issue an "order", and since a jury cannot do so, there must not be envisioned the right to trial by jury. This logic is equally suspect, for no jury under our system can issue an "order"; this can only be done by a court. Hence, if one were to follow the argument set forth by Appellee, then there would never be the right to a jury trial since no jury could ever issue an "order". As this Court is well aware, the jury sits as the finder

of fact and the Court applies those findings of fact to a judgment or, in other terms, an "order". Anyone familiar with our legal system certainly must be cognizant of the fact it is the purpose of the jury to make findings of fact which are then converted to "orders" by the trial judge, or "court". As stated in Hollywood, Inc. v. City of Hollywood, 321 So.2d 65 (Fla. 1975), any question regarding the right to a trial by jury should be resolved in favor of granting such a trial.

With regard to subparagraph c of Point One of Appellee's argument, the Appellee is attempting to raise issues on appeal not before this Court, more specifically, which damages are specifically compensable. While the Appellant clearly and certainly has spoken to the humiliation and embarrassment as elements of damages, the Appellee has not before this time challenged the compensability aspect of these damages.

The law in Florida is clear that one cannot raise certain issues for the first time on appeal. Ballen v. Plaza Del Prado Condominium Association, 319 So.2d 90 (Fla. 3d DCA 1975). Further, even this present reviewing Court, upon review of a Circuit Court order, should not consider any matters and questions not specifically raised as issues before the lower court and presented as points on appeal to this Supreme Court. Jacques v. Wellington Corp., 134 Fla. 211, 183 So. 718 (Fla. 1938). Consequently, the only issues before this Court would be the right to jury trial and the application of the statute of limitations. Whether or not noneconomic damages are compensable is an issue not properly preserved nor presented to this Court, and as such the

Appellee is inappropriately arguing extraneous matters to this Court.

The Appellant would assert the United States Supreme Court case of Lorillard v. Pons, 434 U.S. 575, 55 L.Ed.2d 40, 98 S.Ct. *866* (1978), is controlling and the legal remedies available to the Plaintiff, and not merely equitable remedies, include the right to trial by jury of all factual issues, which would include both liability and damages. In the face of the Supreme Court's Lorillard decision and the Florida Constitution's declaration that trial by jury shall remain inviolate, the Appellee's arguments fall far short of its requisite burden of proof.

POINT TWO

WHERE THE APPELLANT SEEKS LEGAL REMEDIES AND RELIEF FOR A STATUTORY VIOLATION THE APPLICABLE STATUTE OF LIMITATIONS WOULD CLEARLY BE SEC. 95.11(3)(f), F.S.

It is patently clear that Section 95.11(3)(f), F.S., would be controlling for a statutory violation, as it is based upon "statutory liability". Again, the Appellee attempts to raise specific points on appeal for the first time, which is clearly improper. See Ballen, supra, and Jacques, supra. Prior to this appeal, the Appellee never raised as points on appeal the entitlement to noneconomic damages; to do so now is inappropriate. While the Appellee may argue the question of entitlement may have been argued previously, nevertheless the issue of whether noneconomic damages are awardable is not a specific issue preserved on appeal for this Court's review. Simply because it behooves the Appellant to argue general damage entitlement in order to address the issues of jury trial and statute of limitations, this in and of itself does not give the Appellee an excuse for failing to specifically raise this entitlement as a point on appeal.

It would appear as though the Appellee is advocating its position to this Court quite vocally that the two year statute of limitations for "back wages" is the applicable statute (Section 95.11(4)(c), F.S.). The position of the Appellant is quite basal in nature: the Appellant is not seeking "back wages", but rather, **prospective** or future wages. Hence, the Appellee is quite mistaken or patently incorrect in its assertions of the applicable statute of limitations.

Section 95.11(4)(c), F.S., imposes a two year statute of limitations for "back wages". By its definition, "back wages" would be wages either previously earned and not paid or a similar factual scenario. However, the Plaintiff is not seeking "back wages" from today's date backward, but rather the loss of **prospective wages** from the date of termination forward, not to mention the noneconomic damages. A cause of action does not accrue, and hence the statute of limitations does not begin to run, until such time as the Plaintiff has been placed on notice of the invasion of a legal right. Buck v. Mouradian, 100 So.2d 70 (Fla. 1958). In the cause sub judice, the Plaintiff (Appellant/ Petitioner) was placed on notice of the invasion of his legal right to work by the Defendant (Appellee/Respondent) when he was fired from his job and he was given as an excuse for his firing his advanced age. **Hence, at that time his cause *of* action accrued for prospective wage loss, inter alia.** Due **to** the fact this was an action for **prospective** wage loss, as opposed to "back wages", the two year statute is totally inapplicable.

The mere fact the Plaintiff did not immediately file his lawsuit for **prospective** wage loss does not make his claim one for "back wages", but in fact is quite contrary. The purpose of a statute of limitations is to allow a person time to pursue his remedy. Regardless of when the Plaintiff elected to file his lawsuit, the lawsuit nonetheless is for **prospective** wage loss from the date of the unlawful termination forward. The Plaintiff certainly must file a lawsuit for "back wages" within two year, but has four (4) years in which to file an action for **prospective** wage losses. This the Plaintiff did.

The Appellant is not seeking "back wages", but a loss of future wages and earning capacity, not to mention other noneconomic damages; his cause of action for future wages and loss of earning capacity did not accrue until he was wrongfully discharged from the employ of the Appellee. Since the action was one for future wage loss, inter alia, the Appellant could file at any time within four (4) years of this wrongful termination an action for prospective wage loss without it being construed "back wages". The Appellee cannot contend the Appellant should have filed an action for "back wages" within two (2) years of date of termination since at the time of termination there were no "back wages" due and owing. The Appellant has filed his action for future wage loss well within the four year statute of Section 95.11(3)(f). Since the Appellant timely met this deadline, the lower court was in error in dismissing this claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the Reply Brief of Petitioner/Appellant has been furnished to Anne C. Conway, Esquire, Post Office Box 1171, Orlando, Florida 32802, by U.S. Mail Delivery, this 6th day of September, 1988.

Glen D. Wieland, Esquire