IN THE SUPREME COURT

STATE OF FLORIDA

BROWARD COUNTY,

Petitioner/Appellant,

v.

KEITH FINLAYSON, ~~et al.~~,

Respondent/Appellee.

CASE NO. 73,475

JURISDICTIONAL BRIEF OF APPELLANT/PETITIONER BROWARD COUNTY, FLORIDA

APPEAL FROM A FINAL ORDER
OF THE FOURTH DISTRICT COURT OF
APPEAL WHICH EXPRESSLY AND DIRECTLY
CONFLICTS WITH SIGMAN v. CITY OF MIAMI,
500 So.2d 693 (Fla. 3d DCA 1987)

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STATEMENT OF THE CASE AND THE FACTS

This case involves affirmance of a judgment for in excess of one and one-half million dollars against the Petitioner, Broward County, Florida (hereinafter "the County") in favor of a class of approximately 125 Emergency Medical Technicians (EMT's) employed by the County. [Opinion and order denying clarification and/or certification of conflict at Appendix A]. The judgment covered allegedly unpaid overtime wages ($740,151.65); prejudgment interest calculated from 1978 ($534,739.74); **"lodestar"** attorney's fees ($101,910.20) and a "contingency risk enhancement'' ($139,323.51).[1/] A brief review of the facts below is necessary in order to fully understand the jurisdictional conflict presented by this case.

The EMT's first asserted their overtime claim in **a** civil service grievance filed with the County on June 17, 1980 seeking back pay for a period from 1973 through September 30, 1979. The grievance was denied as untimely. The EMT's then sued in circuit court on July 21, 1980, seeking **a** declaration of their rights to overtime under the County's civil service ordinances and damages for alleged breach of employment contract based upon such ordinances. The class complaint did not request an award of prejudgment interest. [Complaint at Appendix B].

The EMT's claimed that although their normal scheduled work week averaged fifty-six (56) hours per week (24 hours on duty/48

1/ References to the Record on Appeal before the Fourth District will be designated as [R-page number]. References to the Appendix submitted herewith will be designated as [Appendix-__].

hours off duty) and although they had been paid overtime for hours in excess of fifty-six (56), they were nonetheless entitled to overtime for all hours over forty (40) in any work week. The EMT's based their claim on County civil service ordinances and Administrative Order No. 419 (effective 3/19/79) which provided in pertinent part as follows:

> Overtime is work beyond the normal hours of any scheduled work week. After 40 hours actually worked, employee will be paid at the rate of time and one-half. [Order No. 419 at Appendix B, Exhibit B].

In May, 1984 the trial court concluded that the first sentence of Administrative Order No. 419 was controlling and that the EMT's were entitled to no additional overtime because fifty-six (56) hours was their normal scheduled work week. [R-711-723]. In Finlayson v. Broward County, 471 So.2d 67 (Fla. 4th DCA 1985) (Finlayson I) the Fourth District reversed, concluding that the second sentence of Order No. 419 controlled and that the EMT's were entitled to overtime pay for all hours in excess of forty (40) in any work week. [True copy of opinion attached as Appendix Cl.

Upon remand to the trial court, summary judgment was entered in favor of the EMT's on the County's liability for overtime pay. The cause then proceeded to an abbreviated jury trial on October 27, 1986 to determine the amount of overtime due. At trial the County was prohibited from presenting evidence showing that the EMT's had voluntarily continued the prior overtime practice (i.e., overtime only after all 56 scheduled hours had been worked) in their first collective bargaining agreement with the County which took effect

October 1, 1979. [Pertinent excerpts of collective bargaining agreement at Appendix B, Exhibit A to Complaint; see also R-66-68]. The jury rendered a special verdict holding that the annual salary received by EMT's constituted payment for only forty (40) hours per week, thus entitling each EMT to an additional sixteen (16) hours pay at the full time and one-half overtime rate for each week between July 16, 1978 through September 30, 1979.

In December, 1986 the EMT's moved for final judgment on the verdict asserting for the first time their alleged entitlement to prejudgment interest on the unpaid overtime dating back to 1978. The County opposed the demand on the grounds that it was immune from prejudgment interest under Flack v. Graham, 461 So.2d 82 (Fla. 1984) and Sigman v. City of Miami, 500 So.2d 693 (Fla. 3d DCA 1987) (Sigman II); that prejudgment interest had not been requested in the complaint and because any such interest, even if proper, could only be assessed from the June 17, 1980 date upon which the EMT's first demanded overtime pay by filing the civil service grievance attached to their complaint, [R-1000-1006, Complaint at Appendix B, Exhibit C]. The trial court acknowledged the apparent conflict between Sigman II and Broward County v. Sattler, 400 So.2d 1031 (Fla. 4th DCA 1981) but followed Sattler and awarded prejudgment interest computed from 1978. The Fourth District affirmed the trial court in all respects and acknowledged conflict with Sigman II on the question of prejudgment interest, stating as follows:

> "We recognize that our conclusion may well be in conflict with Sigman v. City of Miami, 500 So.2d 693 (Fla. 3d DCA 1987). To the extent that it is, 'we must respectfully disagree with our sister court." [Appendix A, p. 3].

ISSUE PRESENTED

WHETHER THE COURT SHOULD ACCEPT JURISDICTION OVER THIS CAUSE BASED UPON EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND SIGMAN II REGARDING THE CIRCUMSTANCES UNDER WHICH A GOVERNMENTAL UNIT CAN PROPERLY BE FOUND TO HAVE IMPLIEDLY WAIVED ITS IMMUNITY FROM PREJUDGMENT INTEREST ON BACK PAY CLAIMS.

SUMMARY OF ARGUMENT

The Fourth District ruled below that the County impliedly waived its sovereign immunity from prejudgment interest on public employee back pay claims simply because it has the statutory authority to employ employees and to sue or be sued. The decision expressly and directly conflicts with Sigman II, in which no waiver of immunity was implied on a back pay claim despite the fact that the public employer in that case had the same statutory authorities. The Fourth District's ruling also conflicts with the public policy expressed by this Court in Flack because it fails to acknowledge that back pay suits based upon civil service ordinances are significantly different from other legal actions on contracts to which a government entity may be a party. Neither the nature of civil service back pay claims nor the object to be served by permitting such suits warrants wholesale application of implied waivers of a public employer's immunity from prejudgment interest on back pay awards. Accordingly, this Court should accept jurisdiction over this case to resolve the conflict between the Districts by adopting a uniform rule of law governing implied waivers of sovereign immunity from prejudgment interest on public employee back pay awards.

ARGUMENT AND CITATION OF AUTHORITY

THIS COURT SHOULD ACCEPT JURISDICTION OVER THIS CASE TO RESOLVE THE EXPRESS AND DIRECT CONFLICT BETWEEN THE THIRD AND FOURTH DISTRICTS ON THE ISSUE OF IMPLIED WAIVER OF A PUBLIC EMPLOYER'S IMMUNITY FROM PREJUDGMENT INTEREST ON PUBLIC EMPLOYEE BACK PAY CLAIMS.

The County herein seeks to invoke the discretionary jurisdiction of this Court under Article V, Section (3)(b)(3) Florida Constitution (as amended 1980) to review and resolve an express and direct conflict between the Third and Fourth District Courts of Appeal. The precise issue in conflict is whether a governmental entity can be held liable for prejudgment interest on back wage claims by public employees in which violations of civil service ordinances are asserted as a breach of employment contract. The Fourth District held below that the mere existence of general statutory authority for the County to employ employees and to sue or be sued constituted an implied waiver of its sovereign immunity from prejudgment interest on wage claims. In so ruling, the Fourth District expressly recognized that its decision "may be" in conflict with Sigman 11.

In Sigman 11, the Third District ruled that under the public policy expressed by this Court in Flack, supra, a city was immune from prejudgment interest on a back wage claim by a public employee in the absence of an express or implied statutory waiver. The District Court rejected the trial court's reliance upon Section 295.14, Florida Statutes (1985) as an implied waiver because the statute did not apply to municipalities and, finding no other statutory basis for waiver, reversed an award of prejudgment intererst.

The impact of this conflict upon Florida public employers is that those within the boundaries of the Fourth District will uniformly be held to have waived sovereign immunity from prejudgment interest on public employee wage claims simply because they are authorized to sue and be sued and to employ employees. Public employers within the Third District continue to enjoy sovereign immunity from such liability irrespective of the fact that they possess the same general authority to employ employees and to sue or be sued as those in the Fourth District. The conflict between the two districts is clear and presents precisely the type of situation in which this Court should step in to ensure uniform application of the law throughout the State of Florida.

The EMT's argue that Sigman II involved only a non-contractual statutory claim and is not in direct conflict. A brief comparison of the facts shows that this argument is incorrect. Both Finlayson I and City of Miami v. Sigman, 448 So.2d **533** (Fla. 3d DCA 1984) (Sigman I) involved public employee back wage claims based upon alleged violations of local civil service ordinances.[2/] In Sigman I, the trial court's grant of relief to an employee seeking a retroactive promotion and back pay was reversed based upon the employee's failure to exhaust administrative veterans preference remedies before a city civil service board. The employee thereafter

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2/ The existence of a state statutory remedy was irrelevant to the holding in Sigman II in view of established precedents holding that a public employee who is wrongfully denied a promotion under civil service rules may maintain an action for damages. Devin v. City of Hollywood, **351** So.2d 1022 (Fla. 4th DCA 1976); City of Lake Worth v. Walton, 462 So.2d **1137** (Fla. 4th DCA 1984).

obtained the retroactive promotion and back pay before the civil service board but brought a new action in Sigman II seeking further relief in the form of, inter alia, prejudgment interest on the back pay. The Third District held that the city was immune from liability for prejudgment interest, stating:

> There is a public policy, expressed by the supreme court in Flack v. Graham, 461 So.2d 82 (Fla. 1984), which insulates government from liability for interest on back pay in the absence of an express statutory provision, authorization implied by statute, or stipulation by government, Here there is no express statutory provision waiving the immunity of municipal corporations, no stipulation by the City to be responsible for interest on back pay awards, and no statute which implies that interest shall be paid by the State or its political subdivisions in an action for back pay. [id. at p. 695, emphasis supplied].

The decision below in Finlayson II involves a similar assertion of a back pay claim based upon civil service ordinances before a civil service board and then in the courts. As in Sigman 11, there was no express written contract or express statutory provision waiving the County's immunity from prejudgment interest on back pay claims. However, unlike the Third District, the Finlayson II court found an implied waiver of this immunity in the mere fact that the County could be sued for alleged violation of the civil service ordinances which formed its employment contract with the EMT's. The Finlayson II decision thus makes it clear that prejudgment interest would have been awarded on the back pay at issue in Sigman II if the case had been reviewed by the Fourth District.

The County concedes, as it must, that two other Florida District Courts have awarded prejudgment interest on back pay

claims. In Flack, this court cited a prior award of prejudgment interest on back pay to a teacher who had been wrongfully dismissed. The appellate court in that case also based the implied statutory waiver on the school board's general authority to sue and be sued. Brooks v. School Board of Brevard County, 419 So.2d 659 (Fla. 5th DCA 1982).[3/]

The County submits that Brooks also conflicts with Sigman II and was wrongly decided because it fails to consider the fact that public employment, by its nature, differs substantially from other "arms length" contracts to which a governmental entity may be a party. Unlike its vending machine, road building or insurance contracts with private entities, a local government's only employment contracts with its employees are normally comprised of state laws, civil service ordinances imposed by special acts of the Legislature or, more recently, legislatively adopted collective bargaining agreements. Myriad protections for public employee rights exist in such ordinances and agreements which have no corollary in private sector employment contracts or other contracts for goods or services. As in the instant case, these legislative employment "contracts" normally include built in dispute resolution procedures

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3/ The County also acknowledges Department of Health and Rehabilitative Services v. Boyd, 525 So.2d 432 (Fla. 1st DCA 1988), rev dism 525 So.2d 877 (Fla. 1988) which upheld the authority of PERC to award prejudgment interest on back pay in Florida career service cases. The case can be distinguished from the prejudgment interest assessed herein because it was resolved through an expedited administrative process specifically intended by the state employer as a substitute for employee wage suits. Likewise, the Sattler decision may be an anomaly involving an individualized written contract with a high level department head as to whom no civil service procedure was available.

before an administrative civil service board or arbitrator in which prompt notice and resolution of claims is anticipated and awards of prejudgment interest on back pay are not permitted. Such procedures are included in recognition of the fact that public employers must budget for and assess taxes necessary to cover anticipated personnel costs on an annual basis. In City of St. Petersburg v. Norris, 335 So.2d 333, 334 (Fla. 2d DCA 1976) the court thus observed:

> [W]e believe that reasonable men would not draw conflicting inferences of fact as to the severe impact and financial dilemma that would result to the city treasury and, as a consequence, to the taxpayers of the city, should appellant be required to pay overtime compensation for periods prior to the fiscal year when the claims were asserted.

This Court's decision in Flack evidences similar concern for the impact which exaction of prejudgment interest has upon a local government and its taxpayers. It cautions that implied statutory authority for such awards should be found only where the nature of the claim and the object designed in permitting suit against a governmental unit warrant such relief. The Fourth District ignored this instruction by equating back pay suits for alleged breach of civil service ordinances --- to which specific non-judicial enforcement procedures apply --- with all other contracts upon which governmental units have assented to suit in the courts. In so ruling, it acknowledged an express and direct conflict with Sigman II, which held that although implied waivers may be readily found with respect to other public contracts, a more stringent rule should be applied in civil service back pay cases.

CONCLUSION

Neither the nature of the overtime claim at issue herein nor the object of permitting suits on civil service back pay claims warrant the Fourth District's finding of an implied waiver of the County's sovereign immunity from prejudgment interest in this case. Sigman II properly recognized a public policy in this state prohibiting awards of prejudgment interest on public employee back pay claims. The Fourth District's decision stands in express and direct conflict with Sigman II and the policy expressed by this Court in Flack. Accordingly, this Court should accept jurisdiction and should adopt a single rule applicable to all public employers as to when waivers of immunity from prejudgment interest on civil service back pay awards may lawfully be implied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Petitioner/Appellant with attached Appendix has been furnished to Paul R. Regensdorf, Esquire, Fleming, O'Bryan & Fleming, P.O. Drawer 7028, Fort Lauderdale, Florida 33338, Counsel for Respondent/Appellee, by depositing same in the United States mail, first class postage affixed thereto, this 3 day of January, 1989.

James C. Crosland
James C. Crosland

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