IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,014

ARROW AIR, INC.,	)
Petitioner,	)
vs.	)
MICHAEL WALSH,	)
Respondent.	)

On Discretionary Review from the District Court of Appeal of Florida, Third District

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

I.

THE DISTRICT COURT MAJORITY ERRED IN HOLDING THAT FLORIDA'S PRIVATE SECTOR WHISTLE BLOWER'S ACT COULD BE APPLIED RETROACTIVELY WHERE THE LEGISLATURE DID NOT PROVIDE FOR RETROACTIVE APPLICATION.

It is well established under Florida law that, in the absence of a clear legislative intent to the contrary, a statute is presumed to apply prospectively. Appellee attempts to avoid this well established rule by arguing that the private sector Whistle Blower's Act is purely remedial and should, therefore, be applied retroactively. That argument has no merit. While the statute in question may be remedial in purpose or effect, it clearly and indisputably is substantive as well because it creates an entirely new statutory cause of action for wrongful termination of a private sector employee. The rule against retroactive application of a statute which creates new substantive rights and liabilities is rigidly enforced.

Conspicuously absent from appellee's brief is any citation to any case in which this or any other court in the State of Florida has ever applied a statute creating new substantive rights and liabilities retroactively where the legislature did not provide for retroactive application. In regard to retroactive application of § 448.102, the legislature has spoken. The statute is not to be given retroactive application. The legislature specified an effective date for the statute and that rebuts any argument that retroactive application of the statute was intended. *State,*

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Department of Revenue v. Zuckerman-Vernon Corp., 354 So. 2d 353, 358 (Fla. 1977).

Furthermore, appellee has completely ignored Section § 448.105 of the Whistle Blower's Act, entitled "Existing rights", which provides that:

> This act does not diminish the rights, privileges or remedies of an employee **or employer** under any other law or rule or under any collective bargaining agreement or employment contract.

The legislature has made it clear that Section 448.102 is not to be given retroactive application.

II.

THE DISTRICT COURT MAJORITY ERRED IN HOLDING THAT A STATUTE WHICH CREATED NEW SUBSTANTIVE RIGHTS AND OBLIGATIONS COULD BE APPLIED RETROACTIVELY.

Appellee argues, based on *City of Orlando v. Desjardins*, 493 So. 2d 1027 (Fla. 1986), that a remedial statute which creates new substantive rights must be given retroactive application. That case does not support appellee's argument. In *Desjardins*, this Court held that a statutory amendment to the Public Records Act, which provided for a limited attorney-client exemption, could be applied retroactively. In doing so, this Court stated that the amendment was addressed to precisely the type of "[r]emedial rights [arising] for the purpose of protecting or enforcing substantive rights...." (Citation omitted.) This court permitted retroactive application of the statute in order to enforce the already existing substantive right embodied in the attorney-client privilege.

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The Public Records Act exemption involved in *Desjardins* is drastically different than the Whistle Blower's Act involved in the case at bar. The Public Records Act provided for a remedial right to enforce an already existing substantive right. The Whistle Blower's Act, on the other hand, creates entirely new substantive rights and provides for accompanying remedies. In *Desjardins*, this Court cited with approval its prior decisions in *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985) and *State v. Lavazzoli*, 434 So. 2d 321 (Fla. 1983). In both of those cases the Court held that statutes which create new substantive rights must be applied prospectively. Those cases are controlling here.

Appellee also attempts to rely upon *Martin County v. Edenfield*, 609 So. 2d 27 (Fla. 1992), in which this Court held that the public sector Whistle Blower's Act was remedial. The decision in *Edenfield*, however, supports Arrow's position. Despite the holding that the statute was remedial, this Court clearly held that substantive amendments to the statute could ***not*** be applied retroactively. 609 So. 2d 27, 29, n. 2. Appellee has deliberately ignored that part of the Court's holding, and instead argued that in *Edenfield* this Court acknowledged that it may be appropriate to apply a whistle blower's statute retroactively. For that proposition, appellee relies upon the Court's statement that: "These amendments, however, were retroactive only to July 1, 1992". 609 So. 2d 29 n.2. The only reason the amendments were applied retroactively to that date was that the Legislature provided the amendments would be effective on July 1, 1992, or retroactively to

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that date if the act was passed thereafter.

In *Edenfield*, therefore, this Court clearly held that the effective date provided for ***by the legislature*** controlled. That holding supports Arrow's position. In regard to both the public and private sector Whistle Blower's Act the legislature specified an effective date. That effective date controls and rebuts any argument that retroactive application was intended.

Appellee also makes the totally unfounded argument that Section 448.102 did not create an entirely new cause of action. According to appellee, this Court already recognized a cause of action for wrongful discharge in *Smith v. Piezo Technology & Professional Administrators*, 427 So. 182 (Fla. 1983). In *Smith*, this Court did not create a cause of action, it simply applied a statutory cause of action created by the legislature. In fact, in *Smith* this Court emphasized that Florida courts have never recognized a common law cause of action for wrongful termination.

> The established rule in Florida relating to employment termination is that "'[W]here the term of employment is discretionary with either party or indefinite, then either party for any reason may terminate it at any time and no action may be maintained for breach of the employment contract.'" *DeMarco v. Publix Super Markets, Inc..*, 384 So. 2d 1253, 1254 (Fla. 1980) (quoting *DeMarco v. Publix Super Markets, Inc.*, 360 So. 2d 34, 136 (Fla. 3d DCA 1978), *aff'd*, 384 So. 2d 1253 (Fla. 1980)). Some jurisdictions have recognized exceptions to this rule and one exception takes the form of a common law tort for retaliatory discharge. [Citations omitted.] Florida has not followed that path. *Segal v. Arrow Industries Corp.*, 364 So. 2d 89 (Fla. 3d DCA 1978).

Contrary to appellee's argument, no court in Florida has ever recognized a common law cause of action for wrongful termination.

As stated by the Third District in *Hartley v. Ocean Reef Club,Inc.*, 476 So. 2d 1327 (Fla. 3d DCA 1985):

> The plaintiff concedes that no Florida court has recognized a cause of action for retaliatory discharge of an at-will employee. The established rule in Florida is that when the term of employment is discretionary or indefinite, either party may terminate the employment at any time for any reason or no reason without assuming any liability. *See Smith v. Piezo Technology & Professional Administrators*, 427 So. 2d 182 (Fla. 1983); *Segal v. Arrow Industries Corp.*, 364 So. 2d 89 (Fla. 3d DCA 1978); *DeMarco v. Publix Super Markets, Inc.*, 360 So. 2d 134 (Fla. 3d DCA 1978), *cert. denied*, 367 So. 2d 1123 (Fla. 1979), *aff'd*, 384 So. 2d 1253 (Fla. 1980). Nevertheless, the plaintiff would have this court create an exception to this rule in the form of a tort for retaliatory discharge where the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state.
>
> ***
>
> [F]lorida courts have consistently and expressly refused to adopt this new tort theory. *See Smith*, 427 So. 2d at 194; *Segal*, 364 So. 2d at 90.

476 So. 2d at 1328-29.

In fact, every court in Florida that has considered the question has rejected creation of a common law cause of action for wrongful termination. In *Hartley*, the Third District refused to recognize a cause of action where an employee was discharged for refusing to commit unlawful acts.

> [T]he creation of a cause of action for retaliatory firing of an at-will employee would abrogate the inherent right of contract between employer and employee. *Hinricks v. Tranquilaire Hospital*, 352 So. 2d 1180 (ALa. 1977). It would overrule longstanding Florida law and create uncertainty in present employer-employee relationships as to the rights of the parties involved. This would be contrary to one of the basic functions of the law which is "to foster certainty in business relationships." *Muller v. Stromberg Carlson Corp.*, 427 So. 266, 270 (Fla. 2d DCA 1983).

476 So. 2d at 1329.

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Appellee also argues, ignoring every case ever decided on the issue, that there should be no difference between retroactive application of legislatively and judicially created causes of action. The crucial difference is that when the legislature creates a cause of action, it is the legislature's function to specify an effective date. In the case of the Whistle Blower's Act, the legislature clearly decided not to provide for retroactive application. The case of *State Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981), cited by appellee, is totally inapplicable because in that case, unlike the case at bar, the legislature specifically provided for retroactive application of the statute in question.

Appellee's final argument is that this court should somehow imply a cause of action for wrongful termination from Federal Aviation Regulations ("FARs") providing for safe carriage of passengers. That argument in totally lacking in merit. While violation of the Federal Air Regulations may, under certain circumstances, be offered as evidence of negligence in a suit by an injured passenger, the FARs do not create a cause of action for safety violations and certainly do not create a cause of action for wrongful termination.

III.

THE DISTRICT COURT MAJORITY ERRED IN HOLDING THAT A PARTY'S CONSTITUTIONAL DUE PROCESS RIGHTS WERE NOT VIOLATED BY RETROACTIVE APPLICATION OF A STATUTE WHICH CREATED NEW SUBSTANTIVE RIGHTS AND OBLIGATIONS.

Appellee argues that application of the private sector Whistle Blower's Act would not violate Arrow's due process rights because

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Arrow had a pre-existing duty to safely carry passengers. While it is true that Arrow had a pre-existing duty to safely carry passengers, that observation avails appellee nothing. This is not a lawsuit brought by a passenger injured by safety violations.

The point here is that Appellee, Walsh, had *no* preexisting right to continuance of his at will employment and Arrow had *no* preexisting duty to retain Walsh. Based on longstanding case law, and the absence of any applicable statute, that employment was terminable at will by either party.

Appellee argues that Arrow's alleged conduct in the case at bar would subject Arrow to legal consequences, citing among other things, the Civil Rico Act. If that is true, then presumably Walsh would have filed a claim under the Rico Act, which he did not. The fact remains that liability for wrongful termination was never one of the legal consequences of Arrow's conduct at the time Walsh was terminated.

In addition, there are dozens of cases in which courts have refused to apply a statute retroactively where the statute simply increased or decreased liabilities for conduct that previously subjected the defendant to liability. In *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994), this court held that a statute which limited the amount of punitive damages to no more than three times the amount of compensatory damages was substantive and could not be applied retroactively. In *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985), this Court held that a statute providing for an award of attorney's fees to the prevailing party in medical

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malpractice actions could not be applied retroactively. Obviously there was a pre-existing duty to render medical care in a non-negligent manner, however, this Court held that additional liability for attorney's fees could not be imposed retroactively.

In the case at bar, on the other hand, retroactive application of the Whistle Blower's Act does not simply increase duties or liabilities. The Whistle Blower's Act created an entirely new cause of action and entirely new remedies, including the award of attorney's fees. If, as this Court held in *Young*, it is impermissible to apply an attorney's fee statute retroactively, then certainly it is impermissible to apply retroactively a statute which creates an entirely new cause of action and also imposes attorneys fees.

Appellee also argues, citing *State Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981), that the court should apply a balancing test to determine if the Whistle Blower's Act can be applied retroactively. *Knowles* is inapplicable because in that case, unlike the case at bar, the ***legislature*** provided for retroactive application of the statute. The balancing test is applied to determine if the legislation is constitutional. Furthermore, in *Knowles*, this Court found that the statute in question could not be applied retroactively where it would have the effect of reducing a previously obtained jury verdict by $20,000.00.

Contrary to appellee's argument, where, as here, a statute creates a new obligation or duty in connection with a past

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transaction, retroactive application is invalid. The case law is well established and unanimous in that regard. *See, e.g. Florida Patient's Compensation Fund v. Scherer*, 558 So. 2d 411, 414 (Fla. 1990) ("Due process considerations preclude retroactive application of a law that creates a substantive right"); *Cantor v. Davis*, 489 So. 2d 18 (Fla. 1986) (statute which provided for award of attorney's fees in medical malpractice action was unconstitutional as applied to action which accrued prior to statute's effective date); *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985) (statute which creates a "new obligation or duty" cannot be applied retroactively); *McCord v. Smith*, 43 So. 2d 704 (Fla. 1949) (retroactive application of statute which creates a new obligation or duty is invalid); *L. Ross, Inc. v. R. W. Roberts Construction Co.*, 466 So. 2d 1096 (Fla. 5th DCA 1985) (legislature cannot constitutionally increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred), *aff'd.*, 481 So. 2d 484 (Fla. 1986); *Stone v. Town of Mexico Beach*, 348 So. 2d 40, 43 (Fla. 1st DCA 1977) (retrospective statute is invalid if a new obligation or duty is imposed or an additional disability is established in connection with a previous transaction), *cert. denied*, 355 So. 2d 517 (Fla. 1978).

Appellee did not cite or even attempt to distinguish a single one of the cited cases. All of those cases are controlling here and mandate that the Whistle Blower's Act, which creates an entirely new cause of action, cannot be applied retroactively. In addition, application of the *Knowles* balancing factors would favor

Arrow, because if the statute were applied retroactively Arrow would be subjected to liability as a result of an entirely new cause of action that was not in existence at the time Walsh was terminated. In *Knowles*, this court applied a balancing test, stating that is was sometimes difficult to determine whether a right was "vested" or "accrued". In the case at bar, on the other hand, it is a very simple matter to determine that the Whistle Blower's Act creates an entirely new cause of action which did not exist at the time of Walsh's termination. Based upon numerous decisions from this Court, a statute creating a new cause of action cannot be applied retroactively to events that occurred prior to its enactment.

IV.

THE DISTRICT COURT MAJORITY ERRED IN HOLDING, ON REHEARING, THAT PLAINTIFF BELOW SHOULD BE PERMITTED TO AMEND HIS COMPLAINT TO STATE A CAUSE OF ACTION UNDER FLORIDA'S WHISTLE BLOWER'S ACT, WHERE THE SOLE POINT RAISED BY PLAINTIFF ON REHEARING WAS THAT THE COURT SHOULD HAVE APPLIED NEW YORK LAW, AND PLAINTIFF NEVER SOUGHT LEAVE TO AMEND TO STATE A CAUSE OF ACTION UNDER FLORIDA LAW.

Appellee's argument in favor of amendment is that leave to amend should be freely granted. While that may be true, leave to amend should not be granted to state a cause of action under Florida law where plaintiff steadfastly insisted at every stage of the proceedings that he did not choose to state a cause of action under Florida law. It is axiomatic that leave to amend should not be granted where plaintiff never sought leave to amend.

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V.

CONTRARY TO APPELLEE'S ARGUMENTS, THIS COURT HAS NEVER RECOGNIZED A COMMON LAW CAUSE OF ACTION FOR WRONGFUL TERMINATION AND FLORIDA, NOT NEW YORK, LAW APPLIES TO THIS CASE.

A. This Court has never recognized a cause of action for wrongful termination.

In section B of his brief, Appellee asks this court to recognize a cause of action for wrongful termination by applying the "exception" to the employment at will doctrine recognized in *Smith v. Piezo Technology & Professional Administrators*, 427 So. 2d 182 (Fla. 1983) and *Scott v. Otis Elevator Co.*, 572 So. 2d 902 (Fla. 1991). This court has never recognized any such exception. In both *Smith* and *Scott*, this Court simply applied a ***statutory*** cause of action. This court has never recognized a common law cause of action for wrongful termination and has never taken a step toward recognizing any such cause of action. In *Smith*, this Court reaffirmed the principle that Florida does not recognize a common law cause of action for wrongful termination.

Without any legislative provision for retroactive application, and without any case law to support retroactive application of the Whistle Blower's Act, appellee argues that this court should adopt a clearly defined, narrow exception to the employment at will doctrine. Appellee's real argument is that this court should adopt a specific "Walsh" exception to the employment at will doctrine. In hoping to convince this court that such an exception is necessary, Appellee has throughout his brief slung mud at Arrow,

claiming that Arrow runs a shoddy operation. Appellee attempts to support those assertions by pointing to the fact that there has been a single air crash in Arrow's history. *See Connelly v. Arrow Air*, 568 So. 2d 488 (Fla. 3d DCA 1990), *rev. denied*, 581 So. 2d 1307 (Fla. 1991). *Connelly* did not involve any finding of liability on the part of Arrow. In *Connelly*, the Third District, by a vote of 2-1, simply found that the allegations were sufficient to withstand a motion for summary judgment by Arrow. As this Court will recognize, the *Connelly* case is totally irrelevant in the case at bar.

Furthermore, a similar argument in regard to adoption of a public policy exception to the employment at will doctrine was rejected by the Third District Court of Appeal in *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327 (Fla. 3d DCA 1985), where the court stated:

> [T]he foundation underlying the cause of action for retaliatory discharge advanced by the plaintiff, "intent which is contrary to public policy," is too vague a concept to justify the judicial creation of such a new tort. [Citation omitted.] The determination of what constitutes public policy, or which of competing public policies should be given precedence, is a function of the legislature. [Citation omitted.] It follows that a significant change in the law such as the creation of a cause of action for retaliatory or wrongful discharge in this state is best left to the legislature.

476 So. 2d at 1329. *Cf. Walt Disney World Co. v. Wood*, 515 So. 2d 198, 201-202 (Fla. 1987) (in view of public policy considerations bearing on the issue of joint and several liability, the viability of the doctrine is a matter which should be decided by the legislature).

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At the time of Walsh's termination, Arrow's actions were governed by the decision of this Court in *Smith v. Piezo* and the decision of the Third District in *Hartley v. Ocean Reef.* Based on those decisions, Walsh had no cause of action for wrongful termination. The subsequent enactment of Section 448.102, which creates an entirely new statutory cause of action cannot be applied retroactively. This court should refuse, as the Third District did, to recognize a special exception to the employment at will doctrine. The legislature has spoken on this issue and the legislature declined to apply the Whistle Blower's Act retroactively.

B. The Trial Court and the District Court correctly ruled that Florida law governed this action for wrongful termination.

Appellee asserts as he did in the trial court and in the District Court that this action should be governed by New York law. That argument has no merit because Florida indisputably has the most significant relationship to the cause of action for wrongful termination. *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980). Both Walsh and Arrow are Florida residents and the complained of termination occurred in Florida. Clearly, Florida law applies. *See Birnstill v. Home Savings of America*, 907 F.2d 795 (8th Cir. 1990) (in a wrongful discharge case Missouri had the most significant relationship where injury occurred in Missouri and Florida; employer constructively discharged employee in Missouri and employment relationship was commenced, continued for a

substantial time and was terminated in Missouri); *Caton v. Leach Corp.*, 896 F.2d 939 (5th Cir. 1990) (Texas law applied to wrongful discharge claim where employee resided in Texas, served employer in Texas and was terminated in Texas); *Economu v. Borg-Warner Corp.*, 652 F. Supp. 1242 (D. Conn. 1987), *aff'd*, 829 F.2d 311 (2d Cir. 1987) (New York law applied to claims arising out of employment relationship where employment was negotiated in New York and employee worked in New York); *Belanger v. Keydril Co.*, 596 F. Supp. 823 (E.D. La. 1984), *aff'd*, 772 F.2d 902 (5th Cir. 1985) (Louisiana law applied to wrongful discharge claim based on age discrimination where employee was resident of Louisiana and employer did business in Louisiana).

While it is true that in most of the cited cases the courts made a choice of law determination at a summary judgment hearing, there is nothing to prevent a court from making a determination of the applicable law at an earlier date, if there are sufficient facts to show which state has the most significant relationship to the parties and the occurrence. In the case at bar the undisputed facts demonstrate that Florida law should apply and, therefore, the trial court was correct in dismissing plaintiff's complaint. Plaintiff has not pointed out any facts that could be developed during discovery that would support application of New York law to this case.

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CONCLUSION

Based on the foregoing authorities, the decision of the District Court of Appeal reversing the trial court's dismissal of plaintiff's complaint should be quashed.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was duly served by U.S. Mail this 29th day of August, 1994 upon Kelly B. Gelb, Esq., Krupnick, Campbell, Malone & Roselli, P.A., 700 Southeast 3rd Avenue, Suite 100, Ft. Lauderdale, Florida 33316 and Barbara Green, Esq., 999 Ponce de Leon Boulevard, Suite 1000, Coral Gables, Florida 33134.

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