SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,
STATE OF FLORIDA, et al.,

Appellants,

vs.

CASE NO. 88,267
5th DCA Case No. 96-699

DAVID KUHNLEIN and SCOTT ENOS,
BARBARA BLANCHARD, JOEL CURRAN,
and KATHERINE CURRAN, BOTH
individually and on behalf of all others
similarly situated,

Appellees.
_____/

APPEAL OF A CERTIFIED JUDGMENT
FROM THE TRIAL COURT

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

On September 29, 1994, this Court issued its ruling on the motor vehicle impact fee in Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). The Court declared Section 329.231, Florida Statutes, unconstitutional and ordered all monies collected under that law to be refunded. The Court sent the case back to the circuit court for the formulation of the refund process.

Both parties at first insisted that they be in charge of the refund process. Eventually, Class Plaintiffs agreed to the Department of Highway Safety and Motor Vehicles ("Department") serving as Claims Administrator as the representative of the Comptroller, for the refund process. The State agreed to have the process monitored for the benefit of the Class and court.

Class Plaintiffs recommended that Peterson Consulting Limited Partnership ("Peterson") be the monitor for the process. The State had no objection to Peterson as the monitor, however since the State would be paying for Peterson's services, Peterson and the Class were told that Peterson would have to enter into a contract with the State. (App. 2). The State informed Peterson and the Class that the Department did **not** have authority and could **not** enter into any contract with Peterson if the total cost of the contract would exceed $150,000. $150,000 was the statutory authority of the Department. If the costs were to exceed $150,000, then the contract would have to be bid out to all qualified companies. (App. 2). Peterson agreed to those terms and a contract not to exceed $150,000 was proposed between the Department and Peterson.

On March 24, 1995, the trial court entered an Order on Claims Administration. (App. 57-61). The Order appointed Peterson to monitor the refund process involving the vehicle impact fee. (App. 3). While the State was responsible for the costs incurred by all persons involved in the refund process, including Peterson's costs, the trial court required that the fees of Peterson be paid by the State "**pursuant to its [Peterson's] contract with the State**". (App. 4). The trial court, by its Order on Claims Administration, limited Peterson's fees to those provided for in the proposed Agreement with the Department.

Predicated on the trial court's order and Peterson's assurances, the Department entered into an Agreement with Peterson on August 4, 1995 without conducting a bidding process. (App. 6-11). Peterson agreed to perform the services set forth in the Agreement. (App. 6). Article 4 of the Agreement specifically addressed compensation and consideration to Peterson. (App. 2-3). In pertinent part, Article 4 of the Agreement stated:

> The contractor [Peterson] shall be paid not more than $220.00 per hour for the services of its consultants. The **total amount of payment under this contract and under purchase order RO 7451 shall not exceed $150,000,** including justified and reasonable travel expenses. (App. 2)

A further limitation was noted in the event that the terms of the Agreement extended into a later fiscal year as the "Department's performance and obligations to pay under this Agreement were *contingent upon an annual appropriation by the Legislature.* (App. 3).

Further agreements between the State and Peterson were set out in Article 11 and Article 12 of the Agreement. Article 11 addressed amendments to the Agreement and Article 12 addressed the scope of the Agreement.[1] (App. 5-6). Article 11 of the Agreement between the Department and Peterson provided as follows:

> ARTICLE 11. AMENDMENTS
>
> > Either party may, from time to time, request changes in the scope of the services to be performed under the AGREEMENT. Such changes which are mutually agreed upon by and between the DEPARTMENT and the CONTRACTOR and approved by the court shall be incorporated in written amendments to this AGREEMENT. No other amendments shall be made. (App. 5).

Article 12 of the Agreement stated:

> ARTICLE 12. AGREEMENT AS INCLUDING ENTIRE AGREEMENT
>
> > This instrument (including Exhibits 1 and 2) embodies the entire AGREEMENT of the parties. There are no provisions, terms, conditions, or obligations other then those contained herein. This AGREEMENT supersedes all previous communication, representations or agreements on this same subject verbal or written between the parties. (App. 6).

In summary, in Agreement Articles 1 and 4, Peterson agreed to perform and complete all services required by the trial court's Order of March 24, 1995 and the Agreement, for an amount not to exceed $150,000.00. (App. 6-7).

Peterson entered into the Agreement with the State, agreed to the terms and

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1/ The Agreement also addressed termination for cause, Article 7, and termination for convenience, Article 8. (App. 8)

there was no request by Peterson to terminate the contract. Peterson also understood the monetary limitations contained in the Agreement. (App. 2). Peterson even admitted that "[r]epresentatives of the State informed Peterson that this amount [$150,000] was the maximum amount which State procedures allowed for purchase orders without competitive bidding. . ." (App. 2). Peterson had anticipated that total costs would be $125,000. (App. 2).

During the course of the refund process and Peterson's monitoring of the process, Peterson discovered that it would exceed the agreed upon contract limit of $150,000. The Department did not agreed to, and in fact opposed any additional work or expenses by Peterson outside of the terms of the Agreement. (App. 65). Peterson unilaterally decided to work beyond the Agreement and in direct contravention of the Agreement. (App. 3).

Peterson served a motion on January 11, 1996, in the Kuhnlein case seeking additional monies from the Department, notwithstanding the express contractual terms. (App. 1-44). No separate suit was filed, no complaint served on the State and no discovery conducted. The motion contained few allegations supported by any factual assertions. For relief, Peterson requested that the trial court give carte blanche to any expense asserted by Peterson without regard to the Agreement or government budgeting. (App. 4).

Just two weeks after serving the motion, Peterson set the matter for a hearing. (App. 45-46). The State objected to the procedure of using a motion in substitution for separate litigation. (App. 47-65).

The trial court issued a ruling on January 26, 1996. (App. 66-69). The trial court, nunc pro tunc, modified its March 29, 1995 Order, voided the contract between Peterson and the State, and held that Peterson should get paid for whatever work they had done, and would do, without limitation. (App. 67). In addition, the State was to pay Peterson FIRST and then file any objections to the amount requested. (App. 67).

The State appealed the trial court's order to the Fifth District Court of Appeal which certified the case to this Court.

SUMMARY OF ARGUMENT

Peterson' s Motion in the trial court arose from a dispute with the State (Department of Highway Safety and Motor Vehicles) over the amount Peterson was to be paid by the Department under a contract Peterson entered into with them. The terms of the contract were clear and unambiguous. The amount of money Peterson was to be paid for its work ($150,000.00) was agreed to by Peterson and written into the contract. Later, Peterson wanted to be paid additional monies above the agreed contractual amount, for additional work. Peterson, by motion, succeeded in getting the trial court, in effect, to re-write the contract and order the the State to pay Peterson the additional money requested.

The trial court improperly allowed a non-party in pending litigation, to seek, simply by motion, additional compensation over and above a specified contract amount.

ARGUMENT

PETERSON'S CONTRACT DISPUTE WITH THE STATE CANNOT BE LITIGATED IN THIS CASE

The basis for this appeal is a contract dispute between Peterson and the Department arising out of the "monitoring" of the Kuhnlein [2]/ refund procedures. The dispute arose because after Peterson entered into a contract with the Department, Peterson decided that they needed to do more work than agreed to under the contract, for more than the amount agreed upon. Rather than bringing its own action, complete with a complaint, an answer by the Department, full discovery of the facts and circumstances of the case and a hearing on all the evidence produced, Peterson went directly to the trial court in the Kuhnlein v. Department of Revenue case and sought a determination of the issues in the contract dispute. Peterson asked the trial court to rule in a motion hearing on a matter that had no basis in law and was completely foreign to the proceedings heretofore heard by this Court.

The underlying action in this case, Kuhnlein v. The Department of Revenue, was a constitutional challenge by Mr. Kuhnlein to the vehicle impact fee, Section 319.231, Florida Statutes. This Court declared the statute unconstitutional and refunds were ordered. Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). The refunding process was initiated, with refund checks being mailed after this Court ruled on the pre-judgment and post judgment issues in Kuhnlein v. Department of Revenue, 659 So. 2d 248 (Fla. 1995) and the attorneys' fees issue in Kuhnlein v. Department of

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[2]/ Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994).

Revenue, 662 So.2d 309 (Fla. 1995) and continues as the Department strives to send refund checks to the maximum number of people who paid the fee. The parties to the Kuhnlein action have been, and remain, Mr. Kuhnlein and Mr. Enos as the Plaintiffs and the Departments of Revenue and Highway Safety and Motor Vehicles, the Governor and the executive heads of the agencies. **Peterson Consulting has never been a party to this action or been affected by the impact fee.**

What Peterson succeeded in litigating in the Kuhnlein proceeding was an entirely new and different cause of action that did not and does not involve any dispute between the Class Plaintiffs and the Defendants. Because of Peterson's tactics, the factual record in this case is scant.

1. Peterson never filed a complaint setting forth factual allegations and the law upon which it sought recovery;

2. The State never had the opportunity to file an answer addressing Peterson's claims and framing the issues to be litigated;

3. The State never had the opportunity to conduct discovery into the basis for Peterson's claims, establish that the State would not have entered into a contract with Peterson if it had any idea the cost would have gone above $150,000; establish that the State would have bid the project out as required by law.

Due to the above, the State was denied the chance to present a full and complete legal and factual argument in response to Peterson's claim. The trial court abused its discretion in permitting an independent matter being heard in an entirely different case.

A. FORM OF ACTION; "MULTIFARIOUS"

Peterson, a non-party, succeeded in having the trial court entertain a contract dispute between Peterson and the Department without the requirement of formal litigation. This Peterson cannot do. Where a non-party attempts to interject an issue extraneous to the underlying case into an action, it is multifarious. Long ago this Court set the standard on just what may be litigated in one judicial proceeding. An action, or a complaint, becomes multifarious when:

> [D]istinct and disconnected subjects, matters, or causes are joined in the same complaint or when parties, either as defendants or plaintiffs, who have no common interest in the subject matter of the litigation or connection with each other insofar as the issues in the litigation are concerned joined in the same litigation.

Williams v. Ricou, 143 Fla. 360, 196 So. 667, 669-670 (1940). See also Rosenwasser v. Frager, 322 So. 2d 640, 641 (Fla. 3rd DCA 1975). The Court has stated that it is improper to join in one complaint "separate distinct and independent matters and thereby confounding and confusing them and the issues to be presented." Franklin Life Insurance Co. v. Tharpe, 118 Fla. 832, 160 So. 199, 201 (1935). See also American Federation of Labor v. Watson, 31 So. 2d 394 (Fla. 1947) [case dismissed because of six different factual causes of action]. Even when related, if the causes of action are separate and distinct, there needs to be two independent actions filed in court. See Allstate Insurance Co. v. Collier, 428 So. 2d 379 (Fla. 4th DCA 1983); Daniels v. Weiss, 385 So. 2d 661 (Fla. DCA 1980); Horowitz v. United Investors Corp., 227 So. 2d 719 (Fla. DCA 1969).

Rule 1.110(g), Florida Rules of Civil Procedure permits joinder of multiple claims in one action where the right for all is in one pleader. However, Rule 1.110(g) does not permit the joinder of different claims in one suit even where the plaintiff and defendant are the same. The Third District Court Of Appeal stated that:

> Rule 1.110(g), Florida Rules of Civil Procedure (1989) states in pertinent part: "A pleader may set up in the same action as many claims or causes of action or defenses in the same right as he has ...". This rule "forbids the joinder of causes which arise out of separate rights." Horowitz v. United Investors Corp., 227 So.2d 719, 721 (Fla. 3d DCA 1969), cert. denied, 237 So.2d 180 (Fla.1970); see also General Dynamics Corp. v. Hewitt, 225 So.2d 561, 563 (Fla. 3d DCA 1969) (quoting 1 Am.Jur.2d Actions Sec. 125 (1962)) ("One cannot in the same action sue in more than one distinct right or capacity."). Causes of action accruing to a plaintiff in different capacities must be brought separately regardless of whether or not the causes of action arise "out of the same occurrence because the respective causes of action are not 'in the same right.' " Metropolitan Dade County v. Hicks, 323 So.2d 590, 591 (Fla. 3d DCA 1975) (citing Pensacola Elec. Co. v. Soderlind, 60 Fla. 164, 53 So. 722 (1910) and Latimer v. Sears Roebuck & Co., 285 F.2d 152 (5th Cir.1960)).

Department of Insurance of State of Fla. v. Coopers & Lybrand, 570 So.2d 369, 370 (Fla. 3rd DCA 1990). If such attempts between identical plaintiffs and defendants are prohibited, then surely separate and distinct claims between different plaintiffs and defendants cannot be joined in one suit. See also Pages v. Dominguez By and Through Dominguez, 652 So.2d 864, 867 (Fla. 4th DCA 1995) [". . . rule 1.110(g) does not permit separate actions of distinct plaintiffs to be joined in a single lawsuit, . . . ']. Thus, if Peterson had attempted in the first place to bring its contract case along with

the statutory challenge in Kuhnlein, Peterson would not have been permitted to do so under Rule 1.110(g). Peterson cannot use an end run around that Rule in the middle of the Kuhnlein litigation.

What Peterson has done by its motion in the Kuhnlein case is to avoid general rules of pleading, the Rules of Civil Procedure and discovery in the process to determine the validity of a contract claim by a plaintiff against a defendant. This Court has stated that "the purpose of pleading is to present, define, and narrow issues and to form the foundation of, and limit, the proof to be submitted at trial." White v. Fletcher, 90 So. 2d 129 (Fla. 1956). The purpose of a complaint is to advise the court and defendant of the nature of the cause of action against the defendant. Connolly v. Sebeco, Inc., 89 So. 2d 482 (Fla. 1956).

It is axiomatic that in order to state a course of action against a defendant, the plaintiff must, in a complaint, state some set of facts[3]/ that alleges that the defendant committed some wrong or injury against the plaintiff. Ultimate facts supporting each element of the cause of action, i.e., showing the defendant injured the plaintiff, must be pled. Medary v. Dalman, 69 So. 2d 888 (Fla. 1954); Rankin v. Coleman, 476 So. 2d 234 (Fla. 5th DCA), rev. denied, 484 So. 2d 7 (Fla. 1985). Accord Newton v. Bryan, 433 So. 2d 577 (Fla. 5th DCA 1983) [must plead sufficient jurisdictional facts to show compliance with long-arm statute]; Florida Power & Light Co. v. Canal Authority of State

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[3]/ Florida is a "fact pleading" jurisdiction. Continental Baking Co. v. Vincent, 634 So. 2d 242 (Fla. 5th DCA 1994).

of Florida, 423 So. 2d 421 (Fla. 5th DCA 1983) [for court to have subject matter jurisdiction, there must be a sufficient pleading of facts]. Allegations must set forth clearly, positively, and specifically facts, In re. Ruch's Estate, 48 So. 2d 289 (Fla. 1950); mere conclusions are insufficient, Beckler v. Hoffman, 550 So. 2d 68 (Fla. 5th DCA 1989). In other words, the complaint must state facts with sufficient particularity for a defense to be prepared by the defendant. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 537 So. 2d 561 (Fla. 1988). See also, Myers v. Myers, 652 So. 2d 1214 (Fla. 5th DCA 1995).

The defendant then has the opportunity to answer the complaint, including any defenses or affirmative defenses, counterclaim against the plaintiff, or seek the complaint's dismissal. Then the defendant has the right to test the plaintiff's allegations through the use of discovery. Like pleadings, discovery is necessary in the course of litigation for discovery has the purpose of discovering relevant and pertinent evidence to the issues before the court. Reynolds v. Hofmann, 305 So. 2d 294 (Fla. DCA 1974).

Peterson, by a simple motion, succeeded in avoiding the entire pleading and discovery process in having the trial court hear its alleged breach of contract complaint against the Department. The contract entered into between Peterson and the Department is entirely separate and distinct from the underlying tax challenge and refund process. Class Plaintiffs have not challenged the refund process of the Department. Class Plaintiffs filed no paper claiming that they are injured in any way by the dispute between Peterson and the Department. The refund process has been proceeding. Peterson only claimed that their contract with the State should be re-

written. Whatever Peterson's complaint against the Department, it does not belong in the Kuhnlein case and certainly not by way of a motion.

The trial court erred in canceling the contract and ignoring the statutory requirements of contracting with the State. The State is not arguing that it was not responsible to the payment of all reasonable costs. Nor does the State object to the trial court's responsibility in monitoring the refund process. However, both goals can be reached within the statutory requirements of contracting with state agencies. It is not the objection to the payment of the costs, only the objection that Peterson contracted for an amount certain based on information that has not changed. IF the State had any idea that the amount for the monitoring would have exceeded $150,000, the State would have been required to issue an invitation to bid for the monitoring services. The State does not believe that a court has the power to give a company carte blanche permission to raid the treasury. Courts, like all branches of government, are constrained by budgets and purchasing laws. Not only did Peterson assure the State that $150,000 was sufficient, it entered into the Agreement for that amount. And then without regard for the terms and conditions it agreed to, Peterson, without any prior notice or reasons to the trial court or the State, violated the terms of the Agreement.

Peterson succeeded in short-circuiting well-established jurisprudence, by having the trial court rule on an entirely extraneous matter in a truncated proceeding. All the State is requesting is that this Court rule that such contractual disputes are separate and distinct from the refund case and that the issues raised by Peterson need to be heard in an organized and timely manner in a separate case that allows both parties to

the dispute to present evidence why Peterson should or should not be allowed part or all of its costs beyond that which Peterson agreed to.

B. PROCEDURAL DUE PROCESS

What the trial court did by proceeding to make a decision on legal issues totally unrelated to the legal issues in the Kuhnlein case before it, was in essence deny the Department procedural due process for the trial court's failure to require a complaint, answer, discovery and a full and fair hearing on the contract matter. As this Court has succinctly stated, "due process must be observed in every case." Keller v. State ex rel. Epperson, 265 So. 2d 497 (Fla. 1972). Procedural due process demands, as a minimum, the provision of reasonable notice and a reasonable opportunity to be heard. Peoples Bank of Indian River County v. State, Department of Banking and Finance, 395 So. 2d 521 (Fla. 1981); Ryan v. Ryan, 277 So. 2d 266 (Fla. 1973).

What the trial court did with Peterson's motion was insufficient because procedural due process requires more that what was done. Hart v. Hart, 458 So. 2d 815 (Fla. 4th DCA 1984) [opportunity to be heard must be full and fair]; Robbins v. Robbins, 429 So. 2d 424 (Fla. 3rd DCA 1983) [the process and hearing must be neither a sham or pretense]. What this Court has required is

> In any proceeding which is to be accorded finality, due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

Dawson v. Saada, 608 So.2d 806, 808 (Fla. 1992). And,

> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. Tibbetts v. Olson, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. State ex rel. Munch v. Davis, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals.

Scull v. State, 569 So.2d 1251, 1252, (Fla. 1990). Lastly, the First District has stated:

> Due process concerns preclude a ruling on matters which have not been placed at issue, since the parties are entitled to notice so that they may fairly present their case.

Town of Jupiter v. Andreff, 656 So. 2d 1374, 1378 (Fla. 1st DCA 1995); Southeast Recycling v. Cottongim, 639 So.2d 155, 157, (Fla. 1st DCA 1994); Florida Power Corp. v. Hamilton, 617 So.2d 333, 334 (Fla. 1st DCA 1993).

While most of the law formulated in procedural due process has evolved from individuals attacking governmental actions, that does not detract from the Department's position. The State, made up of the citizens of Florida, is entitled to procedural due process when it is sued. That did not happen here. The trial court did not "proceed after inquiry," the Department was not given the opportunity to acquire the evidence necessary in a contract dispute and not given the opportunity to fairly present its case against Peterson. Based on the actions of the trial court below, this Court should reverse the trial court's order and order dismissal of Peterson's motion for additional compensation without prejudice and require Peterson, if Peterson so chooses, to file a

separate action over the alleged contract dispute.

PETERSON'S MOTION FOR FEES AND COSTS IS BARRED BASED UPON THE CONTRACT BETWEEN PETERSON AND THE STATE

Without waiving any of the arguments and rights just stated above that this case needs to be dismissed without prejudice to allow Peterson to file its own contract action, if they so desire. If this Court were to look to the merits of the issues on the scant record before them, the Court should reverse the trial court order voiding the State's contract with Peterson and require the terms of the contract to be completed in full.

The determination of whether a contractor is legally entitled to be compensated for extra or additional work beyond the fixed contract price is governed by the express terms of the contract. Coggin v. C.C. Moore Construction Co., 24 So. 2d 97 (Fla. 1945); Housing Authority of Sanford v. Boyce Construction Co., 358 So. 2d 35 (Fla. 4th DCA 1978).

In the instant case, the express terms of the Agreement between the Department and Peterson provides clear, specific procedures for changes or modifications to the contract, including compensation for work beyond the fixed price of the original contract as claimed by Peterson.[4]/

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[4]/ The trial court, by its Order on Claims Administration (March 24, 1995), limited Peterson's fees to those provided for in its contract with the Department. (App. 59-60).

Article 11 of the Agreement provides as follows:

> **ARTICLE 11. AMENDMENTS**
> **Either party may, from time to time, request changes in the scope of the services to be performed under the AGREEMENT. Such changes which are mutually agreed upon by and between the DEPARTMENT and the CONTRACTOR and approved by the court shall be incorporated in written amendments to this AGREEMENT. No other amendments shall be made.** (App. 10).

As Peterson acknowledged in its motion, they were aware that the contract limited compensation to $150,000.00[5]/, but claim they are entitled to monies over and above that amount. They came before the Circuit Court, as a non-party, with a contract dispute, seeking the Court to impose upon the Department an amendment to the Agreement completely contrary to the express terms of the contract. Such action on behalf of Peterson is feckless and contrary to a plethora of Florida case law.

Florida courts, when faced with a situation where a contractor fails to obtain a contract amendment, and then seeks extra or additional compensation for work allegedly performed have uniformly denied the claims. In Acquisition Corp. v. American Cast Iron, 543 So. 2d 878 (Fla. 4th DCA 1989), Coffman Leasing, Inc., as subcontractor, entered into a contract with Hemmerle Construction, as general

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[5]/ In fact, Peterson requested in letters to the Department that the Agreement be amended, and the Department rejected the request. (App. 62-65). Peterson, is not entitled to a Court imposed amended contract because they tried to amend the contract and were turned down.

contractor. The contract provided that for the lump sum price of $390,000.00, Coffman would construct water, sewer and drainage facilities in Boca Raton, Florida. The contract also provided that no claim for additional work would be recognized unless authorized in writing by the general contractor. Disputes arose and ultimately Coffman filed a claim against Hemmerle for breach of contract and for extra work. The trial court ruled in favor of Coffman and awarded damages based upon additional work. Hemmerle, the general contractor, argued that the additional work claimed by Coffman was not authorized in writing and thus not recoverable according to the contract. The Fourth District Court of Appeals agreed with Hemmerle, reversed the trial court, and held that:

> [T]he conditions of the contract require that no claim for extra work will be authorized unless in writing. There is no evidence of any such written authorization from the general contractor. Thus, the subcontractor cannot now make claim for the extras required by revision.

Acquisition, 543 So. 2d at 880.

A similar result was reached in Southern Road Builders, Inc. v. Lee County, 495 So. 2d 189 (Fla. 2d DCA 1985). In Southern Road Builders, the contract in question contained a specific provision for compensation outside the original contract. In dismissing the contractor's claims based on work outside the fixed contract price, the Second District Court of Appeals noted that:

> [T]he additional costs claimed by appellant were neither addressed in the original contract nor in any subsequent legally operative instruments. Of particular significance to this fact is the presence of job specification GP 50-16. This specification provided procedural instructions to be followed

> by appellant in order to change the terms of the written contract. Appellant totally ignored these procedural instructions and failed to secure any properly executed written instrument approving changes in the contract.

Southern Road Builders, 495 So. 2d at 190.

In Phillips and Jordan v. Department of Transportation, 602 So. 2d 1310 (Fla. 1st DCA 1992), the Department of Transportation ("DOT") entered into a contract with Phillips and Jordan ("P & J") to construct a fence along Interstate 95. The written project proposal provided for the clearing of a ten-foot wide strip within which the fence was to be located. P & J bid on the project based upon the plans and specifications provided by the DOT. Like Peterson in the instant case, P & J alleges that the actual work exceeded those plans. P & J performed the work, but sought additional compensation for work outside the original contract. Like Peterson here, P & J did not obtain an amendment to the contract pursuant to the express contractual provisions for seeking additional compensation. The trial court granted summary judgment in favor of DOT and the First District Court of Appeal affirmed as follows:

> Appellant could have sought written authorization for payment for such work, in effect a reformation of the contract, under a contractual provision providing for such a reformation where it appears necessary. In fact, under the terms of the contract, appellant is precluded from seeking payment for work performed outside the contractual specifications without first seeking a written reformation of the contract. Therefore, appellant's claim is barred by the express terms of the contract.

Phillips, 602 So. 2d at 1313.

The fact that the contract in this case arose out of a lawsuit does not alter the

above-stated facts or law on contracting. Peterson freely entered into the Agreement with the State. The terms and conditions were clearly spelled out. Peterson has never stated that it did not know the terms and conditions it agreed to in the Agreement. The very wording in Peterson's motion (App. 2) shows that Peterson knew the limitations of the State on contracting and the need to request amendments when needed. Like the contractors in Acquisition Corp, Southern Road Builders and Phillips & Jordan, Peterson did not follow the specific, express contractual procedures for seeking additional compensation over and above the contractual amount agreed upon. Peterson did not obtain any written modification of the contract terms from the Department as required by the Agreement.

Additionally, Peterson in its Motion alluded to alleged verbal conversations with the "State" as follows:

> 6. At the time of the execution of the Agreement Peterson had estimated the total costs to be $125,000, but discussed with the State what procedure would be followed in the event the expenses exceeded the $150,000 set forth in the Agreement. Peterson believed that the Agreement would be amended to reflect the actual amount incurred as required by the Administration Order. (App. 2).

It is totally immaterial what discussions Peterson may have had with the "State" and what Peterson "believed" about the Agreement. Article 12 of the Agreement is clear, unambiguous and controlling:

> **ARTICLE 12. AGREEMENT AS INCLUDING ENTIRE AGREEMENT**
>
> **This instrument (including Exhibits 1 and 2) embodies the entire AGREEMENT of the**

> **parties. There are no provisions, terms, conditions, or obligations other then those contained herein. This AGREEMENT supersedes all previous communication, representations or agreements on this same subject verbal or written between the parties.** (App. 11).

The above is simply a recitation of first-year law school contracts law that any alleged representations made prior to a written contract merge into the contract. Jacksonville Paper Co. v. Smith & Winchester Mfg. Co., 147 Fla. 311, 2 So. 2d 890 (1941); Carlon, Inc. v. Southland Diversified Co., 381 So. 2d 291 (Fla. 4th DCA 1980); Bleemer v. Keenan Motors, Inc., 367 So. 2d 1036 (Fla. 3d DCA 1979); and C. H. Robinson Co. v. L & M Brokerage Co., 344 So. 2d 894 (Fla. 1st DCA 1977).

The trial court erred when it ignored the Agreement. The trial court did not rule that no contract was necessary; it did not rule the State was wrong in the State's determination that a contract was necessary. Rather, the trial court, without citation to any law, negates a valid contract without any reason. While the State may have the responsibility to pay for all of the costs of monitoring, the trial court had no authority telling the State how it would meet its obligation to the court's Order.

The trial court's intrusion on how it proceeds to meets the trial court's order is a "separation of powers" issue under Articlt II, Section 3 of the Florida Constitution. As this Court has stated before, ". It must be presumed that members of the executive branch will properly perform their duties." Buenoano v. State, 565 So.2d 309, 311 (Fla. 1990). This includes the duty to comply with a court's order. The theory advanced here is no different that that espoused in Department of Health and Rehabilitative

Services v. Pelz 609 So.2d 155 (Fla. 5th DCA 1992). In that case the 5th DCA ruled that the while the court had the power to adjudicate a person, it did not have the power to order how HRS was to treat a person.

The State did comply with the Administration Order. It agreed to contract, after assurances with Peterson. It was Peterson who chose to ignor express terms a contract it freely entered into without any request to amend to the State or the trial court. The State did NOT have to contract with Peterson. The State was free to seek qualified companies that could have monitored the refund procedure. The State could have sought a company through a Request For Purchase process. As long as the company was qualified, then the trial court had no role in the process. The trial court erred when it choose to void the entire contracting process and contract without any stated reasons and without explaining how the State was wrong and why Peterson could proceed without compliance with contract law and the Agreement.

CONCLUSION

Based upon the foregoing authorities, the Department of Highway Safety and Motor Vehicles requests this Court in the alternative, to 1) dismiss, without prejudice, Peterson's action against the Department contained in the Kuhnlein case, allowing Peterson to bring a separate and independent action against the State. In the alternative, 2) reverse the trial court below, reinstate the written contract between the State and Peterson, and deny Peterson's requested relief as it is outside the scope of the contract.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to: ROBERT L. YOUNG, Esq., Carlton Fields, Post Office Box 1171, Orlando, FL 32802; and JOSEPHINE A SCHULTZ, Esq., Office of the Comptroller, The Capitol, Tallahassee, Florida 32399-0350 9 day of September, 1996.

Denis Dean