IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA, LAWTON CHILES, Governor of the State of Florida, and FLORIDA DEPARTMENT OF MANAGEMENT SERVICES,

Appellants,

vs. **CASE NO. 89-181**

FLORIDA POLICE BENEVOLENT ASSOCIATION, INC.; FLORIDA NURSES ASSOCIATION, et al.,

Appellees.
_____/

REPLY BRIEF OF APPELLANTS
On Appeal from the Circuit Court for the Second Judicial Circuit
Case No. 88-2944

COUNSEL FOR APPELLANTS

ROBERT A. BUTTERWORTH
Attorney General

KIMBERLY J. TUCKER
Deputy General Counsel
Florida Bar No. 0516937

WILLIAM W. WERTZ
Assistant Attorney General
Florida Bar No. 0850497

LOUIS F. HUBENER
Assistant Attorney General
Florida Bar No. 0140084

Office of the Attorney General
PL 01 - The Capitol
Tallahassee, FL 32399-1050

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Statutes and Constitutions:

Rules:

ARGUMENT

This case raises important issues regarding the integrity of the collective bargaining process for State employees in Florida. The record before this Court is replete with examples of union counsels' use of misrepresentations and omissions to obtain relief from the trial court which is contrary to the express order of this Court, is contrary to law, and is violative of the express provisions of the ten subsequently negotiated and ratified collective bargaining agreements between the State and these unions.

Although Appellants have repeatedly referred to the fact that union counsel failed to inform Judge Padavano that the March 14, 1990, Order had been quashed in 1992 by this Court, union counsel fail to even address this issue in their brief or acknowledge to this Court that this order was quashed; union counsel offer no explanation for their actions or their misrepresentations regarding the 1990 Order.

Because the right to collectively bargain serves so important a role in our State -- both for our employees and our citizens who ultimately fund such agreements -- it is imperative that collective bargaining negotiations and litigation be conducted with candor and integrity. No one is served by a process that proceeds under a cloud of misrepresentations and omissions of material fact.

I. Timeliness of Appeal

The unions assert that Appellants' appeal is untimely. They characterize the March 5, 1990 Order, which orders the enforcement of the March 14, 1990, order -- quashed by this Court in 1992 -- as a judgment entered by Judge Padavano. Accordingly, the unions argue that the State cannot challenge the March 5, 1996 Order, as no motion for rehearing or notice of

appeal was filed as to that order.

This argument ignores the fact that (1) the motion Appellants filed on September 3, 1996, was both a Motion for Rehearing of the *August 21, 1996 Orders* and a Motion to ***Vacate*** the March 5, 1996 Order; and (2) the time for filing a motion to vacate, even if the March 5, 1996, Order satisfies the requirements of a judgment, had not passed as of September 3, 1996.

The Appellants' Motion to Vacate the March 5, 1996 Order, filed pursuant to Fla.R.Civ.P. 1.540, was timely filed as it was filed within a "reasonable" time, and less than a year had passed. That Rule provides in relevant part that:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which could not have been discovered in time to move for a new trial or rehearing; (3) ***fraud*** (whether heretofore denominated intrinsic or extrinsic), ***misrepresentation***, or other ***misconduct*** of an adverse party; (4) that the ***judgment or decree is void***; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be made within a reasonable time, and for the reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

(Emphasis supplied).

The order of March 5, 1996, is not a final judgment and does not purport to be a final

judgment. It denies a motion for summary judgment[1] (filed by Defendants/Appellants) and purports to enforce the void order of 1990. However, even assuming, *arguendo*, that this order constitutes the entry of a judgment, Appellant timely filed a motion to vacate this void order.

In *DeClaire v. Yohanan*, 453 So.2d 375, 378-379 (Fla. 1984) (Overton, J.), this Court noted the following guidelines regarding the circumstances under which a judgment may be challenged:

> *Within One Year under Rule 1.540(b)*
> 1) Mistake, inadvertence, surprise, or excusable neglect.
> 2) Newly discovered evidence which could not have been discovered in time to move for a new trial.
> 3) Any type of fraud, misrepresentation, or other misconduct of an adverse party including intrinsic fraud which occurs during the proceeding such as false testimony.
>
> *No Time Limitation under Rule 1.540(b) or Independent Action*
> 1) Where the judgment is void.
> 2) Where it can be established that the judgment has been satisfied, released, or discharged.
> 3) Where the judgment has prospective application and equity should now require relief from its present enforcement.
> 4) Extrinsic fraud which prevents a party from having an opportunity to present his case in court.

A. There are No Time Limits on a Challenge to a Void Judgment

Appellants first move to vacate the March 5, 1996 Order as void. To the extent the March 5, 1996 Order attempts to enforce an order this Court quashed in its 1992 order on remand, the March 5 order is as void as the 1990 order, itself. Accordingly, Appellants had no

[1] A motion denying a motion for summary judgment is a nonfinal order. *Ramos v. Univision Holdings, Inc.*, 655 So.2d 89 (Fla. 1995).

time limit for filing their challenge.[2] Furthermore, Appellants have filed their motion to vacate in a reasonable time, well within one year. Thus, this appeal is timely.

B. Appellants met the One Year Time limit for Moving to Vacate the March 5, 1996 Order on Grounds of Fraud, Misrepresentation, and Misconduct

The September 3, 1996 motion to vacate on which this appeal is based makes clear that Appellants challenged the March 5, 1996 Order, pursuant to Fla.R.Civ.P. 1.540(b)(3). Appellants filed that motion based on their firm belief that the March, 1996 and August 21, 1996 Orders had been obtained from the trial court on the basis of fraud and misrepresentations spanning eight years of litigation. The record evidence demonstrates that:

> 1. The Appellees took advantage of the lack of familiarity of new counsel for Appellants and a new circuit court judge to obtain enforcement of a 1990 order previously quashed by the highest Court in this State -- and never advised the trial court of the fact that that order had been quashed.
>
> 2. The underlying premise of this suit is false -- negotiations *did* occur in 1988 over leave accrual and use rates, prior to the Legislature's enactment of Section 9.3.A(5). And, they also occurred every year subsequent to that.
>
> 3. As a consequence of misrepresentations and omissions, the Appellees obtained a remedy, spanning eight years, which was expressly contrary to the terms of TEN subsequently ratified collective bargaining agreements -- most of which were negotiated by Appellees' counsel, without the knowledge or participation of Appellants' counsel.
>
> 4. The Appellees obtained a remedy, spanning eight years, which was expressly contrary to the impasse resolution provisions contained in the eight subsequently enacted Appropriations Acts -- all of which counsel for Appellees were aware of, but counsel for Appellants was not and, since this case concerned the 1988-89 Appropriations Act only, he need not be

---

[2] *See also, Falkner v. Amerifirst Federal Sav. And Loan*, 489 So.2d 758 (Fla. 3d DCA 1986) (On motion, a court may, at any time, relieve a party from a void final judgment.); and *Ramagli Realty Co. v. Craver*, 121 So.2d 648 (Fla. 1960) (the passage of time cannot make valid that which has been void).

expected to be familiar with.

5. The Appellees obtained a remedy, spanning eight years, which was expressly contrary to the resolution of impasse, sought by the FNA in 1990 concerning the very issue in this case -- the accrual rates and use of annual and sick leave -- a process that these union counsel participated in before the Legislature but counsel for Appellants did not; and, since this case concerned the 1988-89 Appropriations Act only, he need not be expected to be familiar with subsequent years' collective bargaining proceedings.

6. The Appellees obtained a remedy, spanning eight years, by misrepresenting to Judge Padavano that Appellants had ignored orders of the trial court, especially the March 14, 1990 Order of Judge Gary, and had relied on an automatic stay provision as a means of noncompliance with this allegedly valid order, knowing full well that Appellants were under no legal obligation to adhere to or comply with an order that the Florida Supreme Court had quashed in 1992.

7. The Appellees obtained a remedy, spanning eight years, which was expressly contrary to federal and state labor law because, even if Appellants had refused to bargain over leave -- a mandatory subject of bargaining in this State -- Appellees' remedy was under Chapter 447, for FY 1989 to present, not through this case which merely challenges the constitutionality of an Act that, by its very terms, only could apply for one year.

8. The Appellees obtained a remedy, spanning eight years, which was expressly contrary to the terms of the contract they allegedly seek to enforce and which, by its terms, expired on June 30, 1990.

The trial court entered that order indicating utterly no awareness that this Court had quashed the 1990 judgment, on which the relief it granted was allegedly based. It ordered relief, without any inquiry into the content of subsequent collective bargaining agreements or subsequent Appropriations Acts. Appellants submit that there is no foundation, in fact or law, to support union counsels' contention that this appeal is untimely.[3]

---

[3] Why did the unions seek enforcement of the March 14, 1990, order -- quashed by this Court in 1992 -- rather than simply and properly requesting that judgment be entered under the August, 1994 Order granting summary judgment? The answer is simple -- avarice. The 1990

II. The Effect of "Admissions" in the Answer Contradicted by Sworn Evidence in the Record

Next, union counsel assert that the State cannot introduce evidence that, in fact, the issue of annual and sick leave accrual and use rates was negotiated by the State and these unions, in 1988, before the Legislature enacted Section 9.3.A(5). The unions assert the "law of the case" doctrine and alleged "admissions" by Appellants prevent the Court from considering this issue. However, the law does not require nor will equity permit such a result -- the State taxpayers will not be made to pay a $579 million bill, regardless of the veracity of the claim that no negotiations occurred in 1988.

The record evidence in this case demonstrates that the underlying premise of this suit -- that no negotiations took place in 1988 -- is false. See Appellants' App. Vol. VI, pp. 114-184. These documents, agendas and minutes of the negotiating sessions, demonstrate that extensive

---

order stated that benefits were to be restored as if they "were in full force and effect at all times subsequent to the effective date of Section 9.3. A.(5) of the of the 1988 General Appropriations Act." (Appellants' App.Vol. I, p.90) The unions would construe this quashed language to extend benefits to the present year, 1996. On the other hand, the 1994 order of Judge Smith, granting the motion for summary judgment filed after the remand by this Court, stated that "the leave benefits *as negotiated* must be enforced." (Appellants' App. Vol. I, p. 175) (Emphasis supplied). The order of Judge Smith did *not* state that the "original [1990] order is valid," as the unions represented to Judge Padavano. (Appellants' App. Vol. II, p. 143). The 1994 order, entered after remand, simply did not give the unions enough of what they wanted -- they wanted more. So they convinced the new trial judge to enforce the order quashed by this Court because it appeared to give them more. Through enforcement of the quashed order the unions were able to circumvent and thwart eight years of negotiations and ten subsequently ratified (and funded) collective bargaining agreements, irrespective of the fact that their complaint challenged the Legislature's action in 1988 *only*. Indeed, they obtained eight years of benefits which were contrary to the terms of the ten subsequently negotiated and ratified collective bargaining agreements and obtained $579 million dollars worth of benefits by judicial fiat. Such a result could never be obtained through enforcement of the 1994 order directing restoration of benefits ***as negotiated.***

discussions took place on this issue prior to the enactment of Section 9.3.A(5) in 1988. Indeed, counsel for Appellee PBA, Mr. Johnson, was an active participant in many of these sessions and a recipient of correspondence regarding the subject of these negotiations. Appellants' App. Vol. VI, pp. 127, 133, 166, 168, 176, 178, 180.

In their Answer Brief, the unions assert that ". . . the unions provided affidavits supporting this factual assertion [that the changes in the accrual rates for annual and sick leave provided for in Section 9.3.A.(5) occurred unilaterally and without negotiations]. Answer Brief, p. 22. However, the affidavits, filed in November, 1988, with the unions' first motion for summary judgment, do not lend support for the unions' claim that no negotiations took place. Indeed, perhaps nothing in this record on appeal demonstrates the disingenuousness that union counsel have employed in litigating this case more than these affidavits and their reference to them now in this Court.

First, the affidavits are from Stanley Rodgers, an employee of the PBA, and Barbara Lumpkin of the FNA. No affidavit or other evidence was ever filed by AFSCME in support of their bald allegation that no negotiations occurred prior to enactment of Section 9.3.A(5). Second, the affidavits filed do ***not*** refute Appellants' record evidence demonstrating that negotiations did, in fact, occur.

In his affidavit, Stanley Rodgers states, in relevant part, that:

> 2. I have attended *most* negotiation sessions between the State and the Association from the 1985 negotiations to the present. I am personally familiar with the bargaining proposals presented and discussed between the State and the Association during this period.
>
> * * *
>
> 6. In 1988, the State and the Florida PBA did negotiate over a wage increase for fiscal year 1988-89. At no time *during these negotiations* were

> changes in annual and sick leave benefits applicable to the law enforcement and security services units negotiated. No impasse on annual or sick leave benefits was ever reached, nor did the Association ever consent to the changes in the annual and sick leave benefits made by the Florida Legislature. The Association objected to the changes made by the Legislature in the 1988 legislative session.

Union App. At 25-26 (Emphasis supplied). An examination of this affidavit in detail, against the record evidence from the actual negotiation sessions, reveals Stanley Rodgers was not at most of the sessions concerning the annual and sick leave renegotiation; however, he was at one of those sessions, on April 21, 1988. Appellants' App. Vol. VI, p. 166-67. Did Mr. Rodgers file a false affidavit then? No. If you look at the careful wording of this document it shows the following:

> 1. It is *true* that, in 1988, the State and the Florida P.B.A. negotiated over a wage increase.
>
> 2. It is *true* that "at no time during *these* negotiations were changes in the annual and sick leave benefits applicable to the law enforcement and security services units negotiated." (Emphasis supplied). The negotiations regarding wages were held at a separate time, in separate sessions, with each of the units. Therefore it is not inaccurate to say that no negotiations over leave took place during "these" (the wage) negotiations. The annual and sick leave negotiations took place at a different time.
>
> 3. It is *true* that no impasse on annual or sick leave benefits was ever reached. True, in the formal sense that no impasse was declared by either side, although the Legislature was informed that no agreement had been reached with the unions. Appellants' App. Vol. VI, pp. 205-208.
>
> 4. It is *true* that the Association never consented to the changes in annual and sick leave benefits made by the Florida Legislature.
>
> 5. And, it is *true* that the Association objected to the changes made by the Legislature in the 1988 legislative session.

Thus, Mr. Rodgers' Affidavit contains five truisms; and, yet, fails to reveal the truth that, in fact, negotiations took place regarding the adjustment of annual and sick leave accrual and use rates to address the Health Insurance Trust Fund crisis -- in 1988 -- ***before*** the enactment of Section 9.3.A.(5).

Similarly, the Affidavit filed by Ms. Lumpkin fails to contradict the record evidence that negotiations, in fact, occurred and that this case has proceeded for eight years on the basis of a false premise. Ms. Lumpkin's Affidavit states in relevant part that:

> 5. In 1987, negotiations for a successor agreement to the old collective bargaining agreement took place between the F.N.A. and the State, the annual and sick leave benefits were not changed during *these negotiations*. Under the current collective bargaining agreement, the attendance and leave provisions are not subject to negotiations for changes until 1989 (effective date of the next collective bargaining agreement will be next July 1, 1989).
>
> 6. The F.N.A. did not consent to the changes in the annual and sick leave benefits made by the Florida Legislature. The F.N.A. objected to the changes made by the Legislature in the 1988 legislative session.

(Emphasis supplied).

Like the Rodgers' Affidavit, every one of these statements is *true*, but none of these statements contradicts the fact that, in 1988, the State of Florida negotiated with these unions over the alterations in the annual and sick leave rule which were necessary to address the crisis in the State Employees' Health Insurance Trust Fund. Ms. Lumpkin, in fact, was an active participant in those negotiations. Appellants' App. Vol. IV, pp. 132, 134, 166, 168, 169, 170, 176, 177, 179, and 180.

Accordingly, the unions' attempt to use these affidavits as proof that negotiations did not occur, is illustrative of the manipulation of facts that has led us to the current posture of this case.

In addition, the unions point to several alleged "admissions" by Appellants, during the course of this litigation that they assert, now prevent the State from objecting to the current proposed raid on the State fisc. Some of the "admissions" were statements made during different stages of this litigation (like references to briefs filed in 1989 in the District Court "admitting" that

the March 14, 1990 Order is valid and final. See, e.g. Answer Brief, pp. 27-29. Well, of course it was valid then. But it wasn't valid or binding after this court quashed it in 1992! Similarly, Appellants' counsel in 1994, Mr. McCoy represented that the 1994 order was final when he took an appeal of that order to the District Court. However, he was wrong and his error cannot render a nonfinal order final -- finality of an order is a jurisdictional matter and jurisdiction cannot be conferred by consent or mistake.

On page 17 of the Answer Brief, the unions state that "[t]he governor responded to the complaint making several significant admissions including . . .(c) the modifications to the accrual rate for leave 'were accomplished without negotiations with, impasse resolution or the agreement' of the unions." The Brief goes on to reference the following citation to the record for the location of this "significant admission." "Compare, Paragraphs 15-17, Complaint for Declaratory Relief, Gov. App. at Vol. I, pg. 5 and Paragraphs 15-17, Answer and Affirmative Defenses, Union App. at 15." When the comparison is made, the quoted text is actually from the unions' Complaint. The only word regarding this proposition uttered by Appellants was "Admitted."

Regardless, the Answer does contain an erroneous admssion that no negotiations took place, although the record evidence refutes this. The case law establishes that a party will not be held to an erroneous admission in an answer if he has subsequently filed an affirmative pleading containing an allegation that is contradictory to the admission set forth in the answer. *See, e.g. Lane v. Waste Management, Inc.* 432 So.2d 70, 72 (Fla. 4th DCA 1983), *Pet. for rev. denied,* 442 So.2d 633 (Fla. 1983); *Bowen v. American Arlington Bank*, 325 So.2d 31, 32 (Fla. 1st DCA 1976).

Here, Appellants have filed substantial record proof demonstrating that their admission

was erroneous. This filing was attached to a motion to vacate based on Fla.R.Civ.P. 1.540(b)(3), not a pleading; however, the result should be the same. While it would have been far preferable to have discovered this error at an earlier stage in these proceedings, Appellants filed this evidence and their motion at the earliest time it was known to the undersigned (or any counsel for the Appellants). Further, the unions and their counsel had superior knowledge regarding these facts, the statements regarding the failure to negotiate are false -- with no contradictory evidence being offered by the unions in the past eight years to support their bear contention that negotiations did not occur. The unions should not be permitted, at taxpayer expense, to take advantage of such an egregious misrepresentation. Accordingly, the record evidence, not the erroneous admission from the 1988 Answer, should control.

Additionally, even if the Court determines that Appellants should be bound by their erroneous admission in the Answer, such admission only applies to one year -- fiscal year 1988-89; Appellants never admitted -- and the unions never pleaded -- that negotiations did not take place in subsequent years. Therefore, that admission does not entitle these unions to releif spanning eight years and does not entitle them to defeat the express terms of ten subsequently negotiated and ratified collective bargaining agreements.

CONCLUSION

For the foregoing reasons, and the reasons stated in Appellants' Initial Brief, Appellants request the following relief:

1. An order quashing the March 5, 1996 and August 21, 1996 Orders directing the enforcement of the March 14, 1990 Order and judgment, as void, pursuant to Fla.R.Civ.P.

1.540(b)(4), and because such orders were entered as a result of conduct violative of Fla.R.Civ.P. 1.540(b)(3).

2. A ruling that these unions are not entitled to relief for any year other than 1988-89, if they are entitled to relief for any year at all.

3. A ruling on the record before this Court that the State has established the existence of a compelling State interest for the Legislature's enactment of the changes to annual and sick leave in Section 9.3.A(5) of the 1988-89 Appropriations Act or, in the alternative, an order remanding this case to the trial court for such a determination.

4. A ruling on the record before this Court that the State has established that negotiations indeed occurred in 1988, prior to enactment of Section 9.3.A(5) of the 1988-89 Appropriations Act, thus, establishing a fraud on the part of these unions in pursuing this action or, in the alternative, an order remanding this case to the trial court for such a determination.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

KIMBERLY J. TUCKER
Deputy General Counsel
Florida Bar No. 0516937
(904) 487-1963
Fax: (904) 487-2564

WILLIAM W. WERTZ
Assistant Attorney General
Florida Bar No. 0850497
(904) 488-1573
Fax: (904) 488-4872

LOUIS F. HUBENER
Assistant Attorney General
Florida Bar No. 0140084

Office of the Attorney General
PL 01 - The Capitol
Tallahassee, FL 32399-1050
(904) 488-9935
Fax: (904) 488-4872

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by facsimile transmission and mail to: **GENE "HAL" JOHNSON**, Esq., 300 East Brevard Street, Tallahassee, Florida 32301; and **BENJAMIN R. PATTERSON**, III, Esq., P.O. Box 4289, Tallahassee, Florida 32315-4289; and by facsimile transmission and mail to **DONALD D. SLESNICK II**, Esq., 10680 N.W. 25th Street, Suite 202, Miami, Florida 33712-2108; this 25th day of November, 1996.

Kimberly J. Tucker
Deputy General Counsel