IN THE SUPREME COURT OF FLORIDA

THE GOLF CHANNEL, etc.

Petitioner,

vs.

MARTIN JENKINS,

Respondent.
_____/

CASE NO. 93,426

District Court of Appeal
5th District-No. 97-2049

COLUMBIA PALMS WEST HOSPITAL, LIMITED PARTNERSHIP'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Alexander D. del Russo, Esq.
LEVY, KNEEN, MARIANI, CURTIN,
KORNFELD & DEL RUSSO, P.A.
1400 Centrepark Boulevard
Suite 1000
West Palm Beach, Florida 33401
Florida Bar No. 350273
(561) 478-4700
Attorneys for Columbia Palms West

Hospital, Limited Partnership,
as Amicus Curiae

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STATEMENT OF THE FACTS AND OF THE CASE

This Brief adopts the statement as set forth by the Petitioner.

SUMMARY OF THE ARGUMENT

The conflict certified to this Court concerns the interpretation of Florida's private sector Whistle Blower Protection Act ("the Act"), Section 448.101, et seq., Florida Statutes. Employee activity protected by the Act includes the disclosure or threatened disclosure of unlawful practices on the part of the employer, as well as objection to, or refusal to participate in, such practices. Section 448.102, Florida Statutes. The Act authorizes a civil cause of action for employees subjected to retaliatory action in violation of its substantive provisions. Section 448.103, Florida Statutes. This Court has been asked to decide whether the Act requires ***all*** prospective plaintiffs to provide their employer with written notice of the pertinent illegal practices on the part of the employer, or whether the requirement is confined to those prospective plaintiffs who have disclosed or threatened to disclose the illegal practice to the appropriate authority.

This question of statutory construction has come before the Court because of apparent inconsistency between Sections 448.102 and 448.103. Section 448.102(1) prohibits employer retaliation against employees who disclose or threaten to disclose the

employer's illegal activities to appropriate authorities, providing further that

> this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy, or practice.

Neither 448.102(2), forbidding retaliation for employee cooperation with investigatory hearings, nor 448.102(3), prohibiting retaliation for objecting to or refusing to participate in illegal practices, makes mention of written notice.

Section 448.103 authorizes a civil cause of action for employees subjected to prohibited retaliation, and contains a list of available remedies. Section 448.103(1)(e) provides that

> [a]n employee may not recover in any action brought pursuant to this subsection if he failed to notify the employer about the illegal activity, policy, or practice as required by s. 448.102(1)....

Read in isolation, 448.103 would appear, by its plain language, to make written notice to the employer a prerequisite for any lawsuit brought pursuant to the Act. But 448.102, read in isolation, would appear under the principle of *expressio unius est exclusio alterius* to restrict the written notice requirement to situations where an employee has disclosed or threatened to disclose the employer's illegal practices to the relevant authorities.

Although the pertinent statutory subsections appear to be in

conflict, settled rules of statutory construction require that they be reconciled in favor of Petitioner, THE GOLF CHANNEL. Such an outcome is lent additional support by cases from other jurisdictions which shed light on the legislature's probable intent in enacting Florida's Whistle Blower Act.

ARGUMENT

1. SETTLED RULES OF STATUTORY CONSTRUCTION REQUIRE A DECISION IN FAVOR OF PETITIONER.

"It is a cardinal rule of statutory construction that courts should avoid readings that would render part of a statute meaningless." *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So.2d 452, 456 (Fla. 1992). The "cardinal rule" expounded by this Court in *Forsythe* was simply ignored by the lower court in the instant case. *Jenkins v. Golf Channel a/k/a TGC, Inc.*, 1998 WL 335789 (Fla. 5th DCA).

According to the lower court, s. 448.102 of the Act makes clear that the requirement of written notice and an opportunity to cure any legal violations applies only to plaintiffs suing under s. 448.102(1), and not to those traveling under s. 448.102(2) or 448.102(3). The fatal flaw in the lower court's interpretation is that it renders the pertinent portion of s. 448.103(1)(c) an utter nullity. Recall that under s. 448.103(1)(c), "[a]n employee may not recover in any action brought pursuant to this subsection if he failed to notify the employer about the illegal activity, policy,

or practice as required by s. 448.102(1)...." If the lower court's reading of the statute is correct, then the only conceivable purpose of the quoted language from s. 448.103(1)(c) is to serve as a superfluous, redundant reminder of that which s. 448.102 has already made clear: that the written notice requirement is confined to s. 448.102(1) and does not apply to actions brought under s. 448.102(2) or 448.102(3).

"[R]espondent's interpretation violates the **settled rule** that a statute must, if possible, be construed in such fashion that **every word** has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (emphasis added). In *Nordic Village*, the Court emphasized the necessity that each portion of a statute be construed to have "practical consequences" or a "significant function." *Id.* at 35-36. Neither the lower court in the instant case, nor the Third District Court of Appeal in *Baiton v. Carnival Cruise Lines, Inc.*, 661 So.2d 313 (Fla. 3d DCA 1995), has identified any practical consequence or significant function that could possibly attach to s. 448.103(1)(c) under their interpretation of the Act.

> In the interpretation of a statute, it will be presumed that the legislature intended every part thereof for a purpose, and that it had some purpose in introducing the particular language used in an enactment. The maxim "ut res magis valeat quam pereat" requires not merely that the statute should be given effect as a whole, but that effect should be given each of its provisions. Significance and

> effect should be accorded every part of the statute. . . . [T]hat construction is favored which gives effect to every clause and part of the statute, thus producing a consistent and harmonious whole. A construction that would leave without effect **any part of the language used** should be rejected if possible.

State v. M.M., 407 So.2d 987, 990 (Fla. 4th DCA 1982) (emphasis added) (citation omitted). *See also State ex rel. City of Casselberry v. Mager*, 356 So.2d 267, 269 n.5 (Fla. 1978) ("A statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all its parts."); *Kungys v. United States*, 485 U.S. 759. 778 (1988) (citing "the cardinal rule of statutory construction that no provision should be construed to be entirely redundant").

"[S]tatutory phrases are not to be read in isolation, but rather within the context of the entire section." *Acosta v. Richter*, 671 So.2d 149, 153 (Fla. 1996) (citation omitted). "Just as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. United States*, 508 U.S. 223, 233 (1993). The lower court's decision in the instant case flagrantly flouts these established rules of construction. Rather than attempt to harmonize the allegedly conflicting sections of the Act, the lower court pronounces that the conflict could be "resolved by recognizing that each section operates in its own sphere." *Jenkins v. Golf Channel a/k/a TGC, Inc.*, 1998 WL 335789, *6 (Fla. 5th DCA). But as this Court has stated, "[t]he doctrine of *in pari materia*

requires the courts to construe related statutes together so that they illuminate each other and are harmonized." *McGhee v. Volusia County*, 679 So.2d 729, 730 n.1 (Fla. 1996). *See also Courtney v. State Dept. of Health*, 388 S.E.2d 491, 496 n.6 (W. Va. 1989) ("The rule concerning construction of statutory provisions in pari materia applies with at least as much force to subsections of one section as it does to more that one section of statutory provisions.")

Rather than construe two statutory provisions separately in order to render one superfluous, two courts have correctly interpreted the Act in such a way as to harmonize and give effect to all its provisions: by finding that s. 448.103(1)(c) incorporates by reference the notice requirements of s. 448.102(1). *See Potomac Systems Engineering, Inc. v. Deering*, 683 So.2d 180 (Fla. 2d DCA 1996) ("We read section 448.103(1)(c) to provide that an employee may not recover in any action brought pursuant to section 448.103(1) if he fails to notify the employer about the illegal activity, policy, or practice as required by section 448.102(1), i.e. in writing, bringing the activity, policy, or practice to the attention of a supervisor or the employer and affording the employer a reasonable opportunity to correct the activity, policy, or practice."); *Martin v. Honeywell, Inc.*, 1995 WL 868604 (M.D. Fla.) ("The Court finds that the plain language of the statute imposes a written notice and opportunity to cure

requirement as an element of proof in every private sector whistleblower claim because 448.103(1)(c) incorporates the notice provision set forth in 448.102(1).")

This Court has provided instructive examples of the judicial practice of recognizing incorporation by reference in order to give effect to all of a statute's provisions. In *Florida Police Benevolent Ass'n, Inc. v. Dept. of Agriculture and Consumer Services*, 574 So.2d 120, 122 (Fla. 1991), the Court was called upon to interpret section 570.15, Florida Statutes, which authorizes the Department's "road guard inspection special officers" to make arrests as provided in: (1) section 570.15 itself; (2) "all other laws relating to livestock, citrus and citrus products, tomatoes, limes, avocados, plants, and other horticultural products"; as well as (3) "any section with respect to which any authority is conferred by law on the department." Section 570.151(2), Florida Statutes.

In *Florida Police Benevolent Ass'n,* the Court rejected the argument that the doctrine of *ejusdem generis* required it to hold that the special officers' powers of arrest could derive only from statutes specifically relating to agricultural products such as those listed in section 570.151(2). *Id.* at 121-22. To so hold, the Court reasoned, "would render meaningless that portion of section 570.151(2) conferring authority to make arrests 'under any section with respect to which any authority is conferred by law on

the department.'" *Id.* at 122. Because the Court found that section 901.15(11) was such a section, it concluded that "the only fair reading of this statute is to view the quoted clause as **incorporating by reference** section 901.15(11). . . . This is the only reading that vests the final clause with a meaning. . . . As a result, the final clause of section 570.151(2) is construed to have an effect." *Id.* (emphasis added).

In *State v. Gale Distributors, Inc.*, 349 So.2d 150 (Fla. 1977), the Court construed section 543.041(2), Florida Statutes, which then regulated the unauthorized reproduction and sale of recorded sounds. The section provided as follows:

> (2) It is unlawful:
> (a) Knowingly and willfully and without the consent of the owner, to transfer or cause to be transferred any sounds recorded . . . with the intent to sell or cause to be sold for profit such article on which sounds are so transferred.
> (b) To sell any such article with the knowledge that the sounds thereon have been so transferred without the consent of the owner.

349 So.2d at 152. Holding that the statute was not unconstitutionally vague, the Court determined that section 543.041(2)(b) incorporated by reference the elements found in section 543.041(2)(a):

> [I]t is a cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent, and effect must be given to every part of the section and every part of the statute as a whole. . . . [R]eading the statute as a whole and giving effect to all of its provisions, for purposes

> of determining what articles are prohibited from being sold, **subsection (b) incorporates by reference the elements of subsection (a).** Subsection (b) provides that it is unlawful "to sell any such article with the knowledge that that the sounds thereon have been so transferred without the consent of the owner." "So transferred," in subsection 2(b), means that anybody found guilty under subsection 2(b) must have knowledge of all the essential elements of the crime charged in subsection 2(a). . . .

Id. 153-54.

In both *Florida Police Benevolent Ass'n* and *Gale Distributors*, this Court applied the principle of incorporation by reference where the incorporating provision made only implicit or indirect reference to another section or subsection. Where, as in the instant case, the incorporating provision makes express reference to another, the application of the principle of incorporation by reference should be a clear matter of plain language.

The lower court in the present case attempts to justify its end run around fundamental rules of statutory construction with the argument that the Whistle Blower Act should be "liberally construed" because it is "remedial in nature." *Jenkins v. Golf Channel a/k/a TGC, Inc.*, 1998 WL 335789, *5 (Fla. 5th DCA). As other courts have recognized, however, a statute's remedial nature is not valid ground for disregarding legislative intent as embodied in statutory language. Taken too far, the notion that remedial statutes must be liberally construed represents "a thumb on the scales of justice." *Neal v. Honeywell, Inc.*, 33 F.3d 860, 863 (7th

Cir. 1994).

In *Neal,* the court reversed the trial court's holding that "federal whistleblower protection laws are to be broadly construed to cover internal whistleblowers, even where the specific conduct at issue does not fall within a literal reading of the statute." *Id.* at 861-62 (citation omitted). Pointing out that "all laws . . . are compromises among competing interests," the court explained that the appropriate balance among relevant interests is to be discerned from statutory language rather than determined by courts: "No principle of statutory construction says that after identifying the statute's accommodation of competing interests, the court should give the favored party a little extra." *Id.* at 862-63. *See also Regency Towers Owners Ass'n, Inc. v. Pettigrew*, 436 So.2d 266, 267-68 (Fla. 1st DCA 1983) (acknowledging the desirability of construing liberally a provision of the remedial Age Discrimination in Employment Act in light of the Act's remedial nature, but holding a liberal construction foreclosed where it would violate the rule that "a court should not construe a statute in a way that makes words or phrases meaningless, redundant, or superfluous").

2. PETITIONER'S INTERPRETATION OF SECTION 448 IS CONSISTENT WITH THE POLICIES UNDERLYING WHISTLE BLOWER NOTICE REQUIREMENTS, AND WITH THE LEGISLATURE'S APPARENT INTENT.

"Giving the employer the first opportunity to correct a

violation allows it to avoid harm to its reputation, the burden of undergoing an investigation, preparation for a hearing, etc. Informal resolution of infractions also saves [governmental authorities] both time and resources." *Appeal of Bio Energy Corp.*, 607 A.2d 606, 608 (N.H. 1992). A Whistle Blower Act that contains a notice provision has a dual purpose: "to encourage employees to come forward and report violations without fear of losing their jobs and to ensure that as many alleged violations as possible are resolved informally within the workplace." *Id.* at 609. To construe Florida's Act as requiring that all prospective plaintiffs give their employers written notice and a reasonable opportunity to correct any alleged illegalities would plainly serve the latter purpose, while doing no harm to the former:

> Although we recognize that the whistleblower's act is designed to encourage employees to report certain violations without fear of reprisal, we do not believe it is unduly burdensome to require employees to notify their employer of their complaint in writing before being entitled to the civil remedies provided by the act. The requirement promotes the purpose of the act by affording the employer the first opportunity to correct a violation. This allows the employer to avoid, among other things, unnecessary harm to its reputation, the burden of undergoing an investigation and preparation for a hearing or trial.

Potomac Systems Engineering, Inc. v. Deering, 683 So.2d 180, 182 (Fla. 2d DCA 1996).

One of the few jurisdictions with a well-developed body of

case law concerning private sector whistleblower statutes and the role of played by notice to employers is Ohio. That state's whistleblower statute applies to situations "where an employee becomes aware of a violation of any state or federal statute or any ordinance or regulation . . . that the employer has the authority to correct, and the employee reasonably believes that the violation either is a criminal offense likely to cause an imminent risk of physical harm or a hazard to public health or safety or is a felony." *Contreras v. Ferro Corp.*, 652 N.E.2d 940, 943 (Ohio 1995) (citation omitted). In such circumstances, Ohio's statute "requires that the employee orally notify his or her supervisor or other responsible officer of the employer of the violation *and* subsequently file with that person a written report that provides sufficient detail to identify and describe the violation." *Id.* (emphasis added). If the employee satisfies these requirements and the employer fails to make a good faith effort to correct the violation within twenty-four hours after receiving the first notification, the employee may then inform the appropriate authority of the violation and qualify for protection under the act.

> Clearly, the provisions of [Ohio's whistleblower statute] contemplate that the employer shall be given the opportunity to correct the violation. The statute mandates that the employer shall be informed of the violation both orally and in writing.

Id. at 944. The manner in which the second sentence of the quoted

passage from *Contreras* amplifies the first makes clear the view of the Ohio court that a written notice requirement advances the policy goal of allowing and encouraging employers to correct their own unlawful practices.

The critical importance of written notice to this policy goal is thoughtfully discussed in an opinion from another Ohio appellate court:

> The necessity that the employee fulfill both [the oral and written notice] requirements is obvious. Oral notification is needed to establish a direct, personal contact between an official in a position of responsibility with the employer and the employee who is aware of the violation. The written report, on the other hand, is required to show that notice of the violation was given and, equally as important, to provide the employer with the specific facts surrounding the infraction so that the employer may formulate the necessary corrective measures. The failure on the employee's part to satisfy either one of these two requirements, **but in particular the written notice**, hampers an employer's ability to quickly and effectively rectify the situation.

Bear v. Geetronics, Inc., 614 N.E.2d 803, 806 (Ohio Ct. App. 1992).

Not only do the policies underlying notice provisions in whistleblower acts strongly indicate the Florida Legislature's intent to require written notice of all plaintiffs under the private sector whistleblower act, but so does comparison with its public sector counterpart. *See* Fla. Stat. § 112.3187. For an employee to state a cause of action under the public sector statute "requires an allegation that a terminated employee disclose the

wrongdoing to a governmental agency." *Kelder v. ACT Corp.*, 650 So.2d 647, 648 (Fla. 5th DCA 1995). *See also Leibowitz v. Bank Leumi Trust Co. of New York*, 152 A.D.2d 169, 176-77 (N.Y. App. Div. 1989) (using public sector whistleblower statute to interpret legislative intent behind corresponding provision of private sector whistleblower statute).

CONCLUSION

Based on the arguments and authorities set forth herein, and based on the arguments of the Brief by Petitioner, it is respectfully requested that this Court reverse the decision below which vacated the trial court's Order Dismissing Respondent's Complaint, and thereafter remand this cause for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of August, 1998, to Anthony J. Hall, Esq., Jackson, Lewis, Schnitzler & Krupman, 390 North Orange Avenue, Suite 1285, Orlando, Florida 32801-1641; and to Keith R. Mitnik, Esq., Morgan, Colling & Gilbert, P.A., 20 North Orange Avenue, Suite 1600, Orlando, Florida 32802.

LEVY, KNEEN, MARIANI, CURTIN, KORNFELD & DEL RUSSO, P.A.

By:_____
Alexander D. del Russo
1400 Centrepark Boulevard
Suite 1000
West Palm Beach, Florida 33401
(561) 478-4744
Fax (561) 478-5811
Florida Bar No. 350273