THE SUPREME COURT
OF FLORIDA
Case No.SC00-190

JOHN ELLSWORTH
Plaintiff/Petitioner,

vs.

POLK COUNTY BOARD OF COUNTY COMMISSIONERS,
Defendant/Respondent.

ON DISCRETIONARY REVIEW FROM
THE SECOND DISTRICT COURT OF APPEALS
LAKELAND,FLORIDA

BRIEF OF PETITIONER JOHN ELLSWORTH

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CERTIFICATE OF TYPE AND STYLE

The size and style used in this brief is Times New Roman Regular 14 point.

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STATEMENT OF THE CASE

On November 19,1998, Ellsworth, the Petitioner filed a Complaint in the Circuit Court of the Tenth Judicial Circuit in an for Polk County alleging age discrimination against his employer Polk County (Vol. 1 R. 1-14). The Petitioner filed an Amended Complaint on January 25,1999 (Vol. 1 R. 22-29). The Respondent filed a Motion to Dismiss on December 4, 1998 (Vol. 1 R. 19-20). A Hearing was held before the Honorable Harvey Kornstein on January 26,1999 (Vol. 1 R. 18). The Circuit Court entered an order dismissing the Petitioner's claim with prejudice. The dismissal was appealed to the Second District Court of Appeals, Lakeland ,Florida on February 2,1999 (Vol. 2 R. 54). The Second District Court of Appeals affirmed the dismissal on December 29,1999 citing Deneace Joshua v. City of Gainesville, 734 So. 2d 1068 (Fla. 1st DCA 1999).

STATEMENT OF THE FACTS

The Petitioner, JOHN ELLSWORTH, is a 68 year old man, was hired on February 7, 1991 by the Polk County Board of County Commissioners as a Water Pollution Control Operator. (Vol.1 R 3) In February of 1996, one position for Engineer III, Utilities Permit and Compliance became available and was posted on a bulletin board within the Polk County Personnel department. (Vol.1 R 3) The minimum qualifications for this position consisted of being a graduate of a four (4) year college or university with major course work within the engineering or natural science curriculums and have a minimum of two (2) years technical experience in water, wastewater, or regulatory compliance management; a valid driver's license or be able to secure one at the time of employment, a comparable amount of training and experience may be substituted for the minimum qualifications. He met all requirements. (Vol.1 R 3) Petitioner submitted an application for the position to Personnel and was called for an interview with Personnel. (Vol.1 R 3) In March, 1996, Petitioner was then called for a second interview with Don Crawford, who was the Director of Utilities, and Cindy Sammon, Supervisor of Sampling and Monitoring. (Vol.1 R 3) The interview was conducted in a very negative fashion, with Don Crawford concentrating on what Petitioner could not do. (Vol.1 R 3)

Only three people were interviewed for the Engineer III, Utilities Permit and

Compliance Operator position; Petitioner, Brian Bowers, and another man. (Vol.1 R 4) Petitioner met all requirements for the position.(Vol.1 R 4). Brian Bowers, who was 28 years old at the time, did not meet any of the minimum requirements for the position.(Vol.1 R 4) Bowers was hired for the position.(Vol.1 R 4) When Petitioner confronted Nancy Adams, a supervisor in Personnel, as to why he was not promoted, Nancy told him she would check into the matter and get back to him. He was not contacted again. (Vol.1 R 4)

Three positions for Lead Water Pollution Control (WPC) Operator Trainee became available on December 19, 1996, and were posted on the bulletin board at the Polk County Personnel office. (Vol.1 R 4,5) The qualifications for these positions consisted of: being a graduate of an accredited high school, or posses an equivalency diploma, a minimum of (4) years wastewater plant operations and maintenance experience with one (1) year in a supervisory position, posses a "B" level certification as issued by the Florida Department of Professional Regulations and/or Florida Department of Environmental Protection; a valid driver license. Petitioner met all qualifications. (Vol.1 R 5)

Three people submitted applications for the open positions; Petitioner, Robert Gloyd, and Roy Gerstner. (Vol.1 R 5) Petitioner was called for an interview with Bobby Rowell, Manager of Operations, Mike Hodge, Rowell's Assistant, and Greg

McMaster, Chief Operator. (Vol.1 R 5) Petitioner was not hired for the position. Two of the positions were filled by Robert Gloyd and Roy Gerstner. The third position remained open. (Vol.1 R 5) Petitioner had five more years seniority with the County than Gerstner, and one year more experience than Gloyd. In addition, he had one year of school experience in Wastewater and Water Treatment with an Associate Degree in Environmental Health. Neither Gerstner nor Gloyd had any education beyond high school related to this position. (Vol.1 R 5,6) Both Robert Gloyd and Roy Gerstner are substantially younger than Petitioner. (Vol.1 R 6)

After hiring Gloyd and Gerstner to the Lead Water Pollution Control Operator positions, Bobby Rowell, Manager of Operations, then changed the requirements of the Lead Operator position to require an "A" license, which made Petitioner ineligible for the third open position, as he held a "B" license. Neither Gloyd nor Gerstner held an "A" license at the time they were hired to the Lead Water Pollution Operator position. (Vol.1 R 6) Rather than promoting Petitioner, the third position remained open, and was eventually filled by an outside applicant, Sam Bettle. (Vol.1 R 6) Petitioner inquired to the Personnel office as to why he was not hired for the position. No one in that department could provide an answer to Petitioner, but told him the matter would be looked into. Petitioner was never given an answer. (Vol.1 R 6)

On February 11, 1997, Petitioner filed an administrative claim with the EEOC

and Florida Commission on Human Relations (FCHR). (Vol.1 R 9) It was assigned a Florida Human Relations Commission case number 97-1174. (Vol.1 R 13)

In March, 1997, Petitioner was transferred to the Polo Park Water Treatment Facility, which is one of the most difficult Plants to operate in Polk County because of the physical and technical labor involved in performing the daily operations. (Vol.1 R 6)

On or about October 3, 1997, Roy Gerstner completed an employee evaluation for Petitioner. Bobby Rowell returned it to Gerstner and told him to lower the score. Gerstner lowered many of the ratings. This caused Petitioner not to receive a merit increase. (Vol.1 R 6)

The Petitioner remained in contact with representatives of the Florida Commission on Human Relations and was told repeatedly that an investigation would be made in the following months. (Vol.1 R 27) Petitioner was never advised by any spokesperson at the Florida Commission on Human Relations that after 180 days he may hire a private attorney who may pursue a claim for him. (Vol.1 R 27) Further, he was never advised that at the expiration of 180 days he had only one year to file suit in this matter. (Vol.1 R 27)

The Petitioner filed a civil complaint on November 16, 1998, (Vol.1 R 8) and an amended complaint relating back to the first complaint on January 25, 1999. (Vol.1

R 29)

On or about December 4, 1998, the Respondent filed a Motion to Dismiss claiming that the Petitioner had filed a lawsuit beyond the expiration of the Statute of Limitation set forth §760.11(5), claiming that the Petitioner had filed his lawsuit three months past the Statute of Limitations. (Vol.1 R 20)

A hearing was held on the matter on January 26, 1999 (Vol.1 R 18) and an Order entered granting Respondent's Motion to Dismiss on February 2, 1999. (Vol.1 R 51)

SUMMARY OF THE ARGUMENT

The Circuit Court erred in dismissing the Petitioner's claim, as the Court did not interpret the meaning of the Florida Statute §760.11 Florida Statutes (1998) correctly. The Court erred in ruling that the Statute of Limitations for filing the civil action based upon the Florida Civil Rights Act begins to run after 180 days, even if the Florida Commission on Human Relations does not issue a determination. The Court ignored the plain and ordinary meaning of the Statute with its ruling. Further, the Court's interpretation of this Statute, has denied the Petitioner due process of law in denying the Petitioner's right to have required Statutory notice. Further, as in the case of Title VII of the Civil Rights Act of 1964, the limitations periods for the Florida Civil Rights Act are subject to equitable tolling, the Circuit Court erred in granting dismissal without giving the Petitioner the opportunity to show the case warrants equitable tolling by submitting testimony and evidence to a jury for determination.

ARGUMENT

I. Whether the One Year Statute of Limitation noted in § 760.11 (5) Florida Statutes, commences at the Expiration of 180 Days from the Date of a FCHR Charge when no finding has been issued by the Florida Commission on Human Relations

A. The Court Ignored the Plain and Ordinary Meaning of the Statute.

§760.11(5) provides a civil action brought under this action shall be commenced no later than one year after the date of determination of reasonable cause by the Commission**.**

The Florida Civil Rights Act of 1992, §761.01 et seq., Florida Statutes (1997), creates a cause of action for employment discrimination. §760.11 Florida Statutes (1997) provides administrative and civil remedies for violations of §760. It also sets out the guidelines for exhaustion of administrative remedies prior to filing a suit in Court. It requires an aggrieved party to file a complaint with the Florida Commission on Human Relations or the EEOC within 365 days of this discriminatory act.§760.11(1). §760.11(3) requires the Florida Commission on Human Relation to investigate the claim within 180 days. It states:

> . . . the commission shall investigate the allegations in the complaint. Within 180 days of the filing the complaint, the commission shall determine if there is reasonable cause to believe a discriminatory practice has occurred. . .

The aggrieved party must then await a finding from the Florida Commission on Human Relations before taking any further action. In the event the commission does not investigate the within 180 days claim, the aggrieved party may file suit.

§760.11(8), Florida Statutes notes:

> In the event that the commission fails to conciliate or determine whether there is a reasonable cause on any complaint under this section within 180 days of filing of the complaint, an aggrieved person may proceed under subsection (4), as if the commission determined that there was reasonable cause.

§760.11(4), Florida Statutes reads:

> In the event that the commission determines that there is a reasonable cause to believe that a discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992, the aggrieved person may either:
>
> (a) bring a civil action against the person named in the complaint in any Court of competent jurisdiction; or
> (b) request an administrative hearing under §120.569 and §120.57.

It is obvious subsection(5) in included in the Act to give an aggrieved party the option of withdrawing their charge in the event the Commission does not expediently investigate a charge, within 180 days. The present issue is the applicability of §760.11(5), Florida Statutes (1997) to a case where no finding was ever issued.

§760.11(5), Florida Statutes (1997) states:

> . . . A civil action brought under this section shall commence no later than one year after the date of <u>determination of reasonable cause by the commission</u> [Emphasis added]

The 4th District Court of Appeals in Milano v. Mold Master, Inc. 703 So.2d 1093 (Fla.4th DCA 1997) held that the one year Statute of Limitations noted in §760.11(5) applies even when the Florida Commission on Human Relations fails to make a determination. This complete

It is by authority of Milano that the Circuit Court below dismissed John Ellsworth's complaint. It is the Petitioner's contention this interpretation is incorrect as it ignores the plain and ordinary meaning of subsection (5).

Subsection (5) states the limitation period begins upon "The date of determination of reasonable cause by the commission." §760.11(5), Florida Statutes (1997). The Legislature must be assumed to have intended the plain and ordinary meaning of its words United Bonding Insurance Co. v. Tuggle, 216 So. 2d 80 (Fla. App. 1968). The plain and ordinary meaning is that a "determination" must have been made for it to apply. If the Legislature intended this to apply in situations where no finding had been made but 180 days had passed it would have so stated.

To read these two subsections together to arrive at the Milano interpretation is in err as the purpose of the two subsections is completely different. The purpose of §760.11(5), Florida Statutes (1997) is to put closure to a claim which was investigated by the Florida Commission, and merit is found. Once the finding is issued the Commissions involvement ends, and the claim may lie inactive, with no active

investigation and no active civil case. This is similar to §760.11(7) which puts closure to instances where a no cause finding is made. The purpose of §760.11(8) is not to restrict the aggrieved. It is to actually benefit the aggrieved party by granting them the option of pursing their claim in an alternative arena, rather than awaiting the Florida Commission on Human Relations.

Further it is important to note the restrictive language of §760.11(5) which states:

> A civil action brought under this section shall be commenced no later than one year after the date of determination of reasonable cause by the commission.[Emphasis Added]

and the permissive language of §760.11(8) which notes in the event the Commission fails to make a determination:

> An aggrieved person may proceed under subsection (4), as if the Commission determined that there was reasonable cause.[Emphasis Added]

There is a clear inconsistency in the use of "may" in subsection (8) and "shall" in subsection (5). It is apparent and obvious that the use of the word "may" showed a clear intent that the one year Statute of Limitations in subsection (5) did not apply to these situations where the Florida Commission on Human Relations has failed to act. It shows an express intent upon the Legislature to avoid penalizing those who decided to stay within the administrative system. This is a more logical interpretation of the Statute.

Acceptance of this Petitioner's argument does not result in an indefinite Statute of Limitations in cases where no finding has yet to be made. §95.11(3)(f), Florida Statutes (1997) limits statutory claims to four years, see also Hullinger v. Ryder Truck Rental Inc. 548 So. 2d 231 (Fla. 1989).

B. Any ambiguity in §760.11(5) and §760.11(8) when applied to situations where no finding has been made by the Florida Commission on Human Relations should be rectified in favor of the aggrieved party.

In Angrand v. Fox 552 So.2d 1113 (Fla.3rd DCA 1989) the Court held that:

> A limitation defense is not favored and any substantial doubt on the question should be resolved by choosing the longer rather than the shorter plausible statutory period. Any ambiguity as to whether an action is barred by the Statute of Limitations should be resolved in favor of the plaintiff.

The Court noted in Haney v. Holmes 364 So.2d 81 (Fla.2nd DCA 1978)that:

> Where there is a reasonable doubt concerning legislative intent to provide for a shortened limitation period, benefit of the doubt should be given to the plaintiff.

In Silva v. Southwest Florida Blood Bank 601 So.2d 1114 (Fla. 1992), this Court ruled:

> The courts have narrowly construed statutes in favor of plaintiffs when the Statute of Limitation shortens the time in which a plaintiff may bring an action.

A narrow interpretation of §760.11(5) requires that it apply only in instances where the Florida Commission on Human Relations somehow acts upon an aggrieved person's complaint and issues either a "cause" or "no cause" determination. Nowhere in §760.11(8) is the Statute of Limitations in §760.11(5) noted, referred to, or incorporated by reference. In addition, no other subsection addresses the issue of what the Statute of Limitation should be in the event that the Commission fails to act, therefore, §760.11(8) should be referred to exclusively without regard to any other statutory provision.

The Circuit Court's interpretation of §760.11(4),(5) and (8) places those individuals whose complaints the Florida Commission fails to act upon on an unequal footing with those that the Florida Commission has investigated and found groundless.

§760.11(7) provides that in the event that the Florida Commission acts upon a complaint and issues a "no cause" finding, that it may be appealed within 35 days of the finding to an administrative law judge. In the event that reasonable cause is found by the administrative law judge, the aggrieved party has the option of filing suit in civil Court, pursuant to subsection (5).

Therefore, in this scenario, a complainant who the Florida Commission found to have a meritless claim, can conceivably, may enter into civil Court no matter how long

the process from start to finish may be.

It is inconsistent to interpret one section of the Statute, subsection (7), to allow an infinite period of time for one to file a civil lawsuit who receives a "no cause" finding, but then interpret a shorter limitation period for a complainant whose claim has not been investigated whatsoever by the Florida Commission on Human Relations.

If the Legislature intended to apply the one year limitation period to those situations where the Florida Commission on Human Relations does not act, the Statute would have said so. Instead, it only states that the one year Statute begins from "determination of reasonable cause made by the commission" See §760.11(5).

It important t not lose site of the true purpose of a Statute of Limitations. Its purpose is to avoid unfair prejudice to the defendant by preventing the plaintiff from bringing a stale claim. When a claim remains pending with the Florida Commission on Human Relations the respondent is on notice an active FCHR case remains open and active, when FCHR's involvement ceases through an issue of a finding FCHR's involvement ceases.

If the Milano interpretations of these subsections are correct then the majority of claims will never be investigated by the Florida Commission on Human Relations due to an aggrieved parties' fear that if he or she does not act within the one year Statute of Limitations by filing suit, their claim will be waived. This will essentially

work to divert complaints away from the administrative system into the judicial system. This, in essence, works to defeat the purpose of the administrative procedure provided in §760.11, and will work only to flood the judicial system with Florida Civil Rights Act claims. This interpretation may also work foreclose civil suits to the vast majority of claims presently pending, as many of them are more than 18 months old.

There are many individuals who are unable to afford entry into the judicial system on an immediate basis (i.e. within 18 months) and rely solely upon administrative agencies such as the Florida Commission on Human Relations to rectify their complaints until the resources are gathered to file suit. The interpretation in Milano will essentially work to penalize those who prefer to remain in the FCHR system, because after 18 months their claim will no longer be civilly viable. Assuming an aggrieved person gathers resources to prevent a long wait within the administrative system and is later able to file suit in a civil Court of law, he will be forever penalized according to Milano if he is unable to gather the resources within 18 months.

The argument may also be made these charging parties still have the option of pursuing their claims through an administrative law judge under §760.11(4)(b) but even this is foreclosed according to several administrative cases, (see John Finn v. City of Holly Hill, DOAH case No. 99-2864 (February 2,2000), Donald Garrepy v. Dept. of Environmental Protection, DOAH case No. 98-5090 (April 9,1999), and Jules Itule v.

Marine Muffler Corporation, DOAH case No. 99-4035 (March 10,2000)). If an aggrieved party waits longer than 18 months after filing a charge, all remedies are foreclosed. Surely this was not the intent of the Florida Legislature.

C. Because Chapter 760 Is Patterned after Title VII, it is Appropriate to Apply the Same Statute of Limitations Analysis, Which Requires Notification of the Statute of Limitations Before the Statute of Limitations Begins to Run.

Chapter 760 was patterned after 42 U.S.C. §2000(e), referred to as Title VII of the Civil Rights Act of 1964, as amended. Accordingly, Federal case law interpreting Title VII is applicable to cases arising under employment discrimination claims, pursuant to the Florida Civil Rights Act of 1992. Weaver v. Leon County Classroom Teachers Association 680 So.2d 478 (Fla. 1st DCA 1996)

Recognizing federal and state agencies have limited resources resulting in delay in the investigation of a charge, the Florida and U.S. Legislatures have solved this problem by allowing a party whose complaint has yet to be addressed by the administrative agencies to file suit at the expiration of 180 days. See 42 U.S.C. §2000e-5(f)(1) and §760.11(8).

Under the Federal System, an aggrieved party must request from the EEOC a Notice of Right to Sue, which allows the complainant to enter civil Court. There is no statute of limitation which dictates a specific window of time the request must be made. An aggrieved party may Request the Right to Sue Letter immediately after the

181st day or months thereafter.

The Milano decision seeks to create a limitation for identical Florida Civil Rights Act claims by stating a claimant may only wait 18 months if no decision has been made by the Florida Commission on Human Relations. This interpretation of §760 under Milano seeks to create a dissimilarity between Title VII and the Florida Civil Rights Act, wherein none was intended to exist. Because Title VII and the Florida Civil Rights Act have been interpreted to be similar in almost all ways, it is incorrect to distinguish the two statutes in this manner as prescribed by Milano.

Because the Circuit Court dismissed Petitioner's claim based upon the Milano, the Circuit Court erred.

D. The Court's Decision Deprives the Petitioner the Procedural Due Process as the Statute of Limitations Can Run Against the Petitioner Without Notice to the Petitioner.

Article I, Section 9 of the Florida Constitution guarantees that, "No person shall be deprived of life, liberty, or property without due process of law." Section I of the 14th Amendment of the U.S. Constitution states also: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Procedural due process has two essential components; notice and opportunity to be heard. Florida Public Service Commission v. Triple A Enterprises, Inc. 387 So.2d 940(Fla.1980). Before a State may deprive an individual of life, liberty, or

property, it must first give notice that it is considering deprivation and provide the individual who will be deprived time to respond. In any proceeding which is to be accorded finality, due process requires notice to be reasonably calculated under all circumstances to apprise interested parties of the pendency of an action to deprive one of his or her life, liberty, or property. Dawson v. Saada 608 So.2d 806 (Fla.1992)

Due process is not offended when that person has knowledge of a deprivation event but fails to take action. Keys Jeep Eagle, Inc. v. Chrysler Corp. 897 F. Supp. 1437(S.D. Fla.1995)

§760.11(3) Florida Statutes requires that the Florida Commission on Human Relations provide adequate notice to the Petitioner of his options to avoid due process concerns, it states:

> When the Commission determines whether or not there is reasonable cause, the Commission by registered mail, shall promptly notify the aggrieved person and the respondent of the reasonable cause determination, the date of such determination, and the options available under this section.[Emphasis Added]

This includes a notification that a party who has been given a "cause" determination, they must file suit within one year or be forever barred from filing a civil suit. This also includes a notification in the event of a "no cause" determination an appeal must be filed within 35 days or have the claim forever barred. A person who has yet to receive a finding is never notified of any of these options, let alone the

Milano limitations period.

In the Petitioner's situation, the one year Statute of Limitations ran without notice to him. The Petitioner was without any notice that his right to proceed against the Respondent in Civil Court was in jeopardy. If, as in Keys Jeep Eagle, the Petitioner had been notified his rights were in jeopardy and he failed to act, due process would not be abridged, but Petitioner was never afforded this notice.

As noted in Holmes v. The City of West Palm Beach 627 So.2d 52 (Fla.4th DCA 1993) courts may carve exceptions to rules and statutes in certain individual cases based on consideration of fairness and due process.

The notice provision required in §760.11(3) is similar to that which is required in unemployment decisions. Florida Statutes §443.151 mandates an automatic dismissal for late filed appeals and provides that each party shall be promptly notified of a referee's decision, as such decision shall be final, unless within 20 days after the date of mailing of the notice, further review is initiated.

This language is very similar to Florida Statute §760.11(3) which requires the Florida Commission on Human Relations to notify a claimant of its findings and notify them of their options available once its decision is made. It is apparent that the Florida Legislature thought it important that a claimant be made aware an agencies' decisions and options that are available. This, in part, is due to its desire to guarantee procedural

due process. In Finney v. Florida Unemployment Appeals Commission 587 So.2d 637 (Fla.4th DCA 1991) the Court found it to be a denial of due process to dismiss the claimant's appeal where the claimant alleged he was not notified of the referee's decision, and the requirement and an appeal must have been made within 20 days of delivery of the notice. The Court found adequate notice was not timely given and although the Statute completely bars the appeal, an exception was made.

Assuming that the Milano interpretation is correct to avoid infringement of procedural due process, an exception should be made in the interest of fairness as noted in Holmes.

E. Assuming the Circuit Court Was Correct in Ruling this Limitation Period Applies, the Circuit Court Erred Procedurally as it Ruled upon a Statute of Limitations Issue Which Is Subject to Equitable Tolling at the Motion to Dismiss Stage of Proceedings.

The Petitioner, in his complaint, alleged facts which indicate that he was never told of any Statute of Limitations period by the Florida Commission on Human Relations. The Respondent in this matter filed a Motion to Dismiss and the Circuit Court disposed of the Petitioner's case at the Motion to Dismiss stage. It is the Respondent's contention that because the Statute of Limitations is subject to equitable tolling, the Petitioner should have been afforded the opportunity to present evidence showing that he is entitled to tolling.

Statute of Limitations is an affirmative defense which is not properly raised on a Motion to Dismiss complaint and should be raised in a defendant's answer. Hough v. Menses 95 So.2d 410 (Fla.1957) When Motion to Dismiss is based upon the Statute of Limitations, it can only be granted if the assertions of the complaint read with the required liberality would not permit the plaintiff to prove that the Statute was tolled. See Eaton v. Coal Par of West Virginia, Inc. 580 F. SUPP 572 (S.D. Fla.1984)

As noted in Petitioner's prior argument, the Florida Civil Rights Act was modeled after Title VII. See Weaver v. Leon County. Title VII's procedural requirements and exhaustion of administrative remedies are not jurisdictional prerequisites but are instead conditions precedent to suit subject to waiver, estoppel and equitable tolling. Forehand v. Florida State Hospital at Chattahoochee 839 F. Supp. 807 (N.D. Fla. 1993).

In Underwood v. City of Fort Myers 890 F. Supp. 1018 (M.D. Fla.1995) the plaintiff did not receive a Right to Sue letter until approximately three months after its issuance. The Court found that there were reasonable grounds for equitable tolling of the 90 day period within which to file a Title VII action because of her late notification.

In the instant case, the Petitioner, John Ellsworth, was never notified of any Statute of Limitations period. He also alleges in his complaint and was prepared to testify he was told by representatives of the Florida Commission on Human Relations

that an investigation was going to take place soon.

Petitioner should have been entitled to submit the issue of equitable tolling as a factual issue to the jury and let a jury and judge decide whether the Petitioner knew or should have known of the Statute of Limitations, and if so, whether he is entitled to equitable tolling. Koehler v. Merrill Lynch & Company, Inc. 706 So.2d 1370 (1998).

As such, the Circuit Court erred in dismissing his complaint at the Motion to Dismiss stage and Petitioner should have been allowed to present the issue of whether he knew or should have known of the Statute of Limitations or whether he was entitled to the equitable tolling to a jury for a decision.

CONCLUSION

The Circuit Court erred in dismissing the Petitioner's claim based upon the Milano v. Mold Master decision. The Circuit Court's decision denied the Petitioner his due process right to be notified of the alleged Statute of Limitations as prescribed by Milano. In addition, the Circuit Court ignored the plain meaning of the Statute by interpreting the limitations in the way noted in Milano. Further, because the Florida Civil Rights Act was modeled after Title VII, the limitations period, assuming Milano is correct, is subject to equitable tolling. The Petitioner has alleged facts within his complaint which give rise to a material issue of fact, namely whether the Petitioner knew or should have known of the Statute of Limitations requirement as set forth in Milano.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular course of U.S. mail to Denise Wheeler, Esquire, Post Office Box 153, Tampa, Florida 33601, this the ___ day of June, 2000.

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