IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC 01-472

FRANK POER,
ROBERT ANDERSON,
STANLEY CORCELL,
and ARTHUR CARRATT,

Petitioners,

-vs-

CALDER RACE COURSE, INC.,

Respondent.

On Discretionary Review of the
District Court of Appeal of the State of Florida, Third District Court of Appeal
DCA Case No. 3D 00-524

PETITIONER'S REPLY BRIEF

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RESTATEMENT OF JURISDICTION

The Petitioners/Plaintiffs and the Respondent/Defendant are in agreement that the Third District Court of Appeals announced an incorrect legal standard in resolving Petitioners' appeal. Answer Brief, pp. 18-19. As written, the Third District's opinion states that it is applying a federal collateral estoppel test; however, the elements utilized are those for res judicata. Consequently, the Third District's opinion is in express and direct conflict with a prior decision of the Fifth District Court of Appeal which sets forth the proper standard for resolving federal collateral estoppel claims. *Compare*, Poer v. Calder Race Course, Inc., 775 So.2d 970 (Fla. 3d DCA 2000) *with* All Pro Sports Camp, Inc. v. Walt Disney Co., 727 So.2d 363 (Fla. 5th DCA 1998); *see also*, Baxas Howell Mobley, Inc. v. BP Oil Co., 630 So.2d 207 (Fla. 3d DCA 1993).

While the parties agree that the Third District announced an incorrect standard of law, the parties disagree on what effect that error had on Plaintiffs' claims. The Defendant argues that while it agrees "the Third District's decision requires correction, it does not agree that the Third District applied any incorrect standard in its determination of the appeal below." Answer Brief, p. 20. It is the Plaintiffs position that the use of the incorrect standard was fatal to their claim, as this standard omitted consideration of whether the Plaintiffs received a full and fair opportunity to litigate the issues in the federal court action. Accordingly, the Third District's opinion never

addressed this paramount issue and, instead, relied upon a misplaced notion of privity in resolving Plaintiffs' appeal.

It is in this context that the Plaintiffs have sought to invoke the discretionary jurisdiction of the Florida Supreme Court. As the parties agree, the Third District's opinion must be corrected to harmonize the law on federal collateral estoppel and to otherwise eliminate the unavoidable confusion which will result from this conflicting and incorrect statement of law. In addition, it is necessary for this Court to address the question left unresolved by the Third District: did the Petitioners receive a full and fair opportunity to litigate the issues in the federal court system wherein the EEOC abandoned them and dismissed an otherwise meritorious appeal, without notice to, or the consent of, the Plaintiffs?

ARGUMENT

I. COLLATERAL ESTOPPEL WILL NOT PRECLUDE A STATE DISCRIMINATION LAWSUIT WHERE THE PLAINTIFFS WERE DEPRIVED OF A FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUES IN FEDERAL PROCEEDINGS BY VIRTUE OF THE EEOC ABANDONING THE PLAINTIFFS AND DISMISSING THEIR APPEAL.

In its Answer Brief, the Respondent again relies upon the proposition that the Plaintiffs and the EEOC were in absolute privity and, therefore, the Plaintiffs must suffer the consequences of the EEOC's abandonment. The Defendant's argument, however, is misplaced.

Privity between the EEOC and aggrieved persons under the federal discrimination laws is not a static concept. The Eleventh Circuit Court of Appeals has recognized that there may come a time in the EEOC's pursuit of a lawsuit that its interests will diverge from those of the aggrieved person and, consequently, privity will cease to exist between the EEOC and the individual. Riddle v. Cerro Wire & Cable Group, Inc., 902 F.2d 918, 923 (11th Cir. 1990). In this respect, the Court noted that "[t]he differing interests of the EEOC and of the aggrieved individual are not necessarily compatible" and privity will be destroyed where the EEOC sacrifices the individual's interests to pursue its own. Id. Applying this legal principle, the Eleventh Circuit declined to preclude a plaintiff from pursuing her individual claim wherein the individual was dissatisfied with the EEOC's handling of her interests. Id. at 922-93.

The Court held:

> In this case, Riddle made clear to the EEOC and Cerro before the consent decree was finalized that she was dissatisfied with the Commission's handling of her interests. Riddle's interests and those of the EEOC diverged at that point. The EEOC acknowledged that fact when it informed Riddle that she was not bound by the EEOC's resolution of the matter but was free to institute a private action against Cerro. Riddle did not, in fact, accept the terms of the consent decree; she did not sign a release, and she did not receive any money from Cerro. We conclude, based on these circumstances, that Cerro is not entitled to summary judgment because it has not demonstrated that Riddle and the EEOC were in privity.

Id. at 923; *see also*, Loveridge v. Fred Meyer, Inc., 887 P.2d 898, 902 (Wash. 1995) (privity will not exist where the interests of the EEOC and the aggrieved person diverge).

Under the ADEA, once the EEOC brought its enforcement action, the Plaintiffs were precluded from pursuing their own claims in federal court or otherwise seeking to intervene in the EEOC action. 29 U.S.C. §626(b); EEOC v. Pan American World Airways, Inc., 897 F.2d 1499, 1509-10 (9th Cir. 1990), *cert. denied*, 498 U.S. 815, 111 S.Ct. 55 (1990). Pursuant to this shot-gun wedding, the Plaintiffs had little choice but to allow the EEOC to pursue its action in the federal courts while the Plaintiffs sought to vindicate their rights in the Florida courts. However, and unlike the amicus brief filed in this matter, the Plaintiffs do not dispute that they were in privity with the EEOC in the district court proceedings. As the *Riddle* case demonstrates, privity is

automatically presumed and the only concern is whether, at some point, the interests of the EEOC and the aggrieved person sufficiently diverge such as to destroy that presumption. 902 F.2d at 923.

The divergence point occurred in the present case when the EEOC made the decision to abandon the Plaintiffs and followed through with this action by dismissing its appeal without notifying the Plaintiffs or otherwise seeking their consent. The consequence of this abandonment was the forfeiture of the Plaintiffs rights in the federal courts. Thus, as in *Riddle*, the Plaintiffs were left holding the bag once the EEOC decided to extricate itself from the controversy. However, the facts here are much more egregious that those suffered by the *Riddle* claimant. In short, the Plaintiffs were burdened with a questionable summary judgment order from which it had no means to contest or pursue appellate review. As such, it cannot be reasonably disputed that the privity which existed between the EEOC and the Plaintiffs ceased to exist once the EEOC decided to abandon the Plaintiffs. With privity having been extinguished, the Third District's reliance upon this singular concept was erroneous. Id.

The consequences of the EEOC's action were to deprive the Plaintiffs of a fundamental and necessary right. Federal law clearly provides that every litigant in the federal court system may take an appeal "as of right" from all final decisions of the

district court. 28 U.S.C. §1291; Fed.R.App.P. 3. Having been deprived of this basic right, it is neither fair nor equitable to estop the Plaintiffs, captive hostages to the federal proceeding, from pursuing their individual claims in the Florida courts. "Estoppel is, of course, 'founded on equitable considerations' in Florida courts, *Avant v. Hammond Jones, Inc.*, 79 So.2d 423, 424 (Fla. 1955), as well as in federal courts." In re Green, 262 B.R. 557, 570 (M.D.Fla.2001); *see also*, James v. Paul, 49 S.W.3d 678, 683 (Mo. 2001) ("The doctrine of collateral estoppel will not be applied where to do so would be inequitable").

Collateral estoppel should be narrowly applied since the doctrine "poses a danger of placing termination of the litigation ahead of the correct result." Chartier v. Marlin Mgmt., LLC, 202 F.3d 89, 94 (2d Cir. 2000). The trial court and the Third District applied a mechanical application of the doctrine to this case, ignoring essential considerations such as privity between the EEOC and the Plaintiffs had been eliminated, that the EEOC's dismissal of the appeal was done in its own interests, and that the Plaintiffs did not approve of the dismissal nor were they even informed until after the dismissal was taken and their rights had been extinguished. *See*, Banner v. U.S., 238 F.3d 1348, 1355 (Fed.Cir. 2001) ("Collateral estoppel requires that a party have had an opportunity to appeal a judgment as a procedural matter"). Collateral estoppel must be determined on a case-by case basis and only when equity so

requires. Under the peculiar facts of this case, the use of collateral estoppel is wholly inappropriate as it cannot fairly be said that the Plaintiffs have received a full and fair opportunity to litigate the issues. Accordingly, the summary judgment order should be reversed.

II. THE PLAINTIFFS ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION AND DEMONSTRATED THAT DEFENDANT'S ALLEGED NON-DISCRIMINATORY REASON FOR NOT HIRING THEM WAS MERELY A PRETEXT.

As a preliminary matter, the Plaintiffs recognize that neither the trial court nor the Third District have ever ruled on the factual basis of Plaintiffs' claims and, therefore, such matters are generally inappropriate for this Court to consider for the first time on appeal. The incorporation of this argument has been presented for the sole purpose of demonstrating that Plaintiffs did, in fact, have a sufficient factual underpinning to demonstrate reversible error of the federal summary judgment order. As such, the Plaintiffs will limit their discussion on this point.

The first point of contention between the parties is Defendant's attempt to recharacterize the Plaintiffs' claim as a reduction in force (RIF) case; however, the Plaintiffs have brought a failure to rehire case and the overwhelming facts demonstrate as much. Answer Brief, pp. 24-25; *see,* Benson v. Tocco, Inc., 113 F.3d 1203, 1207-

08 (11th Cir. 1997) (comparing general ADEA prima facie claims with RIF claims). Factually, the division heads were seasonal employees and each year were required to fill out applications in order to be rehired. As such, the Plaintiffs' claims are premised on not being hired for the available division head positions. In short, this case involves the Defendant's failure to rehire the Plaintiffs and the appropriate standard for assessing a prima facie claim is set forth in Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 439 (11th Cir. 1996). Refusing to utilize the proper standard, the Defendant naturally disregarded the proper considerations for a prima facie case.[1] As the Initial Brief demonstrates, pp. 12-13, the Plaintiffs established a prima facie failure to rehire case.

During the appellate process, the Plaintiffs have not challenged whether the Defendant offered a legitimate, non-discriminatory reason for its actions. As such, the proper issue is whether the Plaintiffs have offered sufficient circumstantial evidence which would tend to show that the Defendant's proffered reasons are merely a pretext. Benson, 113 F.3d at 1207. As set forth in the Initial Brief, pp. 14-19, there is a

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[1] In this respect, the Defendant's entire argument that Petitioners did not establish a prima facie case of age discrimination is misplaced. The cases upon which it relies concern the elements inherent in a RIF claim. *See, e.g.*, Answer Brief, pp. 43-44. Of note, even the district court recognized that the Plaintiffs' claim was properly reviewed under the failure to hire standard. (R. 128-49 at p. 15 n.7).

plethora of evidence demonstrating that the Defendant's reasons are pretextual. This evidence includes the age disparities between the Plaintiffs and those rehired, the superior skill levels and qualifications of the Plaintiffs, various discriminatory comments made by a decision maker[2], the subjective nature of the hiring process, and that the Defendant's proffered reason is entirely inconsistent with its own actions. As there was sufficient evidence to demonstrate pretext, the summary judgment entered by the district court would not have withstood appellate review. Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997); Reeves v. Sanderson Plumbing Products, Inc., – U.S. –, 120 S.Ct. 209 (2000). In short, the EEOC dismissed a meritorious appeal to the absolute detriment of the Plaintiffs.

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[2] The deposition testimony of Patrick Mahoney demonstrates that John Gantz was, in fact, a decisionmaker. (Mahoney Depo., pp. 37-39). "[T]o be deemed a decisionmaker, evidence must show that the employee made a recommendation concerning the challenged employment action, such as members of a hiring committee or promotion panel." Chambers v. Walt Disney World Co., 132 F.Supp.2d 1356, 1364 (M.D.Fla.2001); *see also*, Rios v. Rossotti, 252 F.3d 375, 382 (5th Cir. 2001).

III. THE FEDERAL COURT WAS NOT A COURT OF COMPETENT JURISDICTION WITH RESPECT TO PLAINTIFFS' FLORIDA CIVIL RIGHTS ACT AGE DISCRIMINATION CLAIMS.

In its Answer Brief, the Defendant simply argues that the Fourth District Court of Appeals decision in Andujar v. National Property & Casualty Underwriters, 659 So.2d 1214 (Fla. 4th DCA 1995), and the federal precedents upon which it relies, is a res judicata case and does not involve collateral estoppel. While technically true, the Defendant fails to recognize that these two defenses having overlapping elements. One such element is that a federal court is not a court of competent jurisdiction for resolving state discrimination issues. In this respect, the Plaintiffs again submit that "[t]he federal court would have been competent to decide [the state claims] only if the plaintiff had asked the court to do so and the court, in its discretion, agreed to assume jurisdiction over them." Id. at 1217. As such, the district court was not a court of competent jurisdiction for those issues arising under the Florida Civil Rights Act of 1992.

CONCLUSION

Pursuant to the argument and legal authorities cited herein, the Petitioners respectfully request this Court to reverse the summary judgment and remand this matter for a trial on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 13th day of November 2001 to: Eric D. Isicoff, Esq., Isicoff & Ragatz, P.A., 1101 Brickell Avenue, Suite 800 South Tower, Miami, Florida 33131.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Petitioners' Reply Brief utilizes Times New Roman 14-point font and otherwise comports with the requirements of Fla.R.App.P. 9.210(a)(2).

By_____

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