SUPREME COURT
STATE OF FLORIDA

JANET MAGGIO,

Petitioner/Appellant,

v.

CASE NO.: SC04-755
DCA CASE NO.: 2D03-2046

FLORIDA DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY,

Respondent/Appellee.

BRIEF OF AMICUS CURIAE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION FLORIDA CHAPTER IN SUPPORT OF PETITIONER/APPELLANT JANET MAGGIO

THIS BRIEF IS FILED BY CONSENT OF ALL PARTIES

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STATEMENT OF IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

The National Employment Lawyers Association (NELA) is an organization of approximately 3,000 attorneys around the nation who represent employees in civil rights and other employment-related litigation. NELA has filed numerous amicus briefs in the United States Supreme Court and in the United States Courts of Appeals.

The Florida Chapter was founded in 1993 and has approximately 200 participating attorneys around the state. The Florida Supreme Court has previously accepted six amicus briefs from the Florida Chapter, Joshua v. City of Gainesville, 767 So. 2d 432 (Fla. 2000), The Golf Channel v. Jenkins, 752 So. 2d 561 (Fla. 2000), Allstate v. Ginsburg, 863 So.2d 156 (Fla. 2003); Poer v. Calder Race Course, Inc., 775 So.2d 970 (Fla. 3d DCA 2000), rev. dism'd 823 So.2d 739 (Fla. 2002); Woodham v. Blue Cross and Blue Shield of Florida, Inc., 829 So.2d 891 (Fla. 2002); and Bach v. United Parcel Service, Inc., 837 So.2d 395 (Fla. 2002). Florida NELA has also filed amicus briefs in the District Courts of Appeal throughout Florida and in the U.S. Court of Appeals for the Eleventh Circuit. Florida NELA has filed more than 20 amicus briefs.

Florida NELA seeks to address the issue in this case whether the notice of claim requirements of § 768.28(6) apply to claims brought under

The Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes. This issue is one of statewide importance in that it concerns the contours of the sovereign immunity wavier under Chapter 760. The outcome of this case will determine the access to court and access to remedies for unlawful discrimination for a large number of the clients of NELA members and an even larger number of initially unrepresented parties who seek to navigate the pre-suit requirements of the Florida Civil Rights Act.

SUMMARY OF ARGUMENT

The trial court and district court erred in holding that that persons bringing claims under the Florida Civil Rights Act of 1992 ("FCRA"), Chapter 760, Florida Statutes, against the state must comply with the notice requirements of § 768.28(6), Florida Statutes. The lower courts decided the issue from the standpoint of whether FCRA claims sound in tort, thus bringing them within the ambit of § 768.28. Decisions of the Courts of Appeal for the First, Third and Fourth Districts finding that the FCRA contains a separate and independent waiver of sovereign immunity provide a clear basis for finding that §768.28(6) was never meant to apply to the FCRA, except to the limited extent specifically incorporated by the Legislature.

Application of the principles of statutory construction demonstrate that the Florida Legislature carefully considered the issue of sovereign

immunity when it enacted the FCRA in 1992 and chose to put the waiver of immunity in the FCRA itself. And, further, it clearly considered § 768.28 when it made the waiver contained in the FCRA because it chose to incorporate only a single provision of § 768.28, subsection (5). Its decision not to incorporate any more evinces a clear intention that no other provisions of § 768.28 apply to the FCRA.

This construction is consistent with other established principles of statutory construction. Chapter 760 is a self-contained special statute that covers a particular subject. Its provisions should control over the general provisions of § 768.28 relating to the waiver of sovereign immunity. The FCRA has a comprehensive and specific administrative claims procedure that mirrors and serves the very purpose of the notice requirement in § 768.28(6). The FCRA establishes the Florida Commission on Human Relations ("FCHR") and empowers it to investigate, determine and conciliate all FCRA claims. §§ 760.03 and 760.06, Florida Statutes. FCRA claimants must file claims with the FCHR as a condition precedent to filing suits in the courts under the FCRA. § 760.11(7) and (8). The FCHR in turn notifies the party alleged to have violated the statute. § 760.11(7).

Finally, to hold that § 768.28(6) applies to the FCRA is inconsistent with its remedial purposes and undermines its effectiveness by adding another layer of administrative exhaustion and notice requirements. The

notice requirements of § 768.28(6) serve no salutary purpose. Rather, they defeat and undermine the remedial purpose of the FCRA. They complicate the administrative process for lay persons and allow the state to interpose satisfaction of a superfluous additional administrative notice requirement when confronted by one of its own agencies with a charge of discrimination.

ARGUMENT

ISSUE: WHETHER FCRA CLAIMANTS MUST COMPLY WITH § 768.28(6), FLORIDA STATUTES

The trial court decided the case on summary judgment; thus, the applicable standard of review is de novo. Major League Baseball v. Morsani, 790 So.2d 1071 (Fla.2001)

1. Chapter 760 Contains A Separate And Independent Waiver of Sovereign Immunity Which Preempts § 768.28(6)

In Klonis v. Dept. of Revenue, 766 So.2d 1186 (Fla. 1st DCA 2000), the court considered whether the FCRA contained a waiver of sovereign immunity. Analyzing the language of the FCRA, the Court held that the FCRA "evinces a "clear, unambiguous legislative intent" to waiver of sovereign immunity. Id. at 1189; Bell v. Board of Regents, State of Florida, 768 So.2d 1244 (Fla. 1st DCA 2000) ("We conclude that, when read in pari materia, sections 760.02(6), 760.02(7), 760.11(4), 760.11(5), (Florida Statutes 1993), constitute a clear and unequivocal waiver of sovereign

immunity."). The Third and Fourth District Courts of Appeal have reached the same result. Williams v. School Board of Palm Beach County, 770 So.2d 706 (4th DCA 2000); Jones v. Brummer, 766 So.2d 1107 (3rd DCA 2000). These courts' analysis makes clear that the waiver is a separate and independent waiver that does not depend upon § 768.28.

Section 760.11(5) of the FCRA incorporates by reference subsection (5) of § 768.28. Subsection (5) of § 768.28 places limits on recoveries against the state. There is no other reference to § 768.28. Because the FCRA contains an independent waiver of sovereign immunity, it is clear that when the legislature incorporated a single subsection of § 768.28 it meant to incorporate no more than that; that is, given the waiver in the FCRA the other provisions of § 768.28 are unnecessary and serve no purpose.

2. When Chapter 760 Is Construed In Accordance With Established Principles Of Statutory Construction, § 768.28 Has No General Application to Chapter 760

This conclusion is consistent with the principles of statutory construction applied by the Florida courts. Under the familiar principle of statutory construction expressio unius est exclusio alterius, which holds that "if a statue enumerates the things on which it is to operate, or forbids certain things, it is ordinarily construed as excluding from its operation all those matters not expressly mentioned," the specific reference to § 768.28(5)

excludes all other provisions of § 768.28. Sun Coast International, Inc. v. Dept. of Bus. Regulation, 596 So.2d 1118 (1st DCA 1992).

In the only other published opinion on the instant issue, which the District Court relied upon, Bearelly v. State, Dep't of Corr.,2002 WL 982429 (Fla. Cir. Ct. April 20, 2002), aff'd, 845 So.2 186 (Fla. 1st. DCA 2003 (table decision), the circuit court applied the principle of expressio unius est exclusio alterius to conclude § 768.28(6) applies to FCRA claims. This conclusion stands the principle on its head. That court reasoned that the specific exclusion of §§ 768.72 and 73 of Chapter 768 shows a legislative intent to incorporate § 768.28. The logic of this argument means that the legislature meant to incorporate every other provision of Chapter 768 as well. Why, then, if the legislature meant to incorporate every other provision of Chapter 768, did it take the care to incorporate subsection (5) of § 768.28? Why did it make a clear and unambiguous waiver of sovereign immunity in the FCRA? Why not incorporate all of § 768.28? It is far more reasonable to infer that the care with which the legislature incorporated a single provision of § 768.28 coupled with the clear and unambiguous waiver of sovereign immunity in the FCRA evinces an intent that only this single provision of § 768.28 applies to the FCRA.

Further, Chapter 768 is titled "Negligence." It provides for everything from wrongful death to the measure for damages for "pits and holes" to the

state-of-the-art defense for products liability. It has no application to claims of discrimination which are controlled entirely by the comprehensive statutory scheme set out in the FCRA.

This conclusion that the notice requirement of § 768.28(6) does not apply to the FCRA is buttressed by the comprehensive and specific administrative exhaustion procedure contained in the FCRA. The FCRA's administrative claims process mirrors and serves the very purpose of the notice requirement in § 768.28(6). The FCRA further establishes the Florida Commission On Human Relations ("FCHR"), a state entity assigned to the Florida Department of Management Services, and empowers it to investigate, determine and conciliate all FCRA claims. §§ 760.03 and 760.06, Florida Statutes. FCRA claimants are required to file claims with the FCHR as a condition precedent to filing suits in the courts under the FCRA. § 760.11(1), (7) and (8), Florida Statutes. The FCHR is required to send a copy of the complaint to the person alleged to have committed the violation with in 5 days of receipt. § 760.11(1), Florida Statutes. Thus, any notice that could possibly be served by imposing the notice requirement of § 768.28(6) is doubly served by the FCRA: the state gets the initial notice of the complaint, which it then provides to its specific agency involved.

The existence of these complex administrative notice procedures makes the application of expressio unius est exclusio alterius particularly

appropriate: "[A] legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way." Sun Coast International, Inc., 596 So.2d at 1121 (emphasis in original).

Other general principles of statutory construction require the same result. As the Court has held: "When a statute is self-contained, it covers only those subjects within its self-contained limitations and does not affect rights which are not within its purview or specifically excluded from its provisions." Grice v. Suwannee Lumber Manufacturing, 113 So.2d 742, 742 (Fla. 1st DCA 1959); Laborers' Int'l Union of North America v. Burroughs, 541 So.2d 1160, 1164 (Fla. 1989). Further, "It is well settled . . . that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms." Adams v. Culver. 111 So. 2d 665, 667 (Fla. 1959). Finally, "related statutory provision must be read together to achieve a consistent whole." Woodham v. Blue Cross and Blue Shield of Florida, 829 So.2d 891, 898 (Fla. 2002).

Chapter 760 is a self-contained, special statute that covers a particular area of law. Section § 768.28, by contrast, is a general statute dealing generally with the waiver of sovereign immunity for torts. The specific statute should control, particularly where it contains an independent waiver of sovereign immunity and a carefully articulated notice and administrative

exhaustion procedure. Imposing § 768.28(6)'s notice requirements prevents the formulation of any cohesive view of the FCRA, which has been this Court's aim in its prior decisions. Woodham, 829 So.2d at 898-899.

3. General Application of § 768.28 To Chapter 760 Defeats Its Express Remedial Purpose

Finally, courts must look to "'the provisions of the whole law, and to its object and policy,' rather than consider various statutory subsections in isolation from one another and out of context." Klonis v. Dept. of Revenue, 766 So.2d at 1189. The courts should further consider whether a statutory interpretation is reasonable in light of the purpose of the statute. Young v. Progressive Southeastern Ins. Co., 753 So.2d 80, 85 (Fla. 2000).

Section 760.01(3) of the FCRA states: "The Florida Civil Rights Act of 1992 shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the special purposes of the particular provision involved." (Emphasis added). This Court has held on two recent occasions that the FCRA "is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature." Woodham v. Blue Cross and Blue Shield of Florida, 829 So.2d at 894; Joshua v. City of Gainesville, 768 So.2d 432, 435 (Fla. 2000).

Far from liberally construing the FCRA, the wholesale application of § 768.28, as opposed to the limited incorporation of subsection (5) intended by the Legislature, defeats the remedial purpose of the FCRA. It hardly promotes access to the FCRA's remedies by adding another layer of administrative exhaustion for FCRA claimants, which is not only redundant and serves no purpose, but lays additional snares and traps for unwary claimants to negotiate. Like the remedial administrative provisions of Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., upon which it is modeled, the provisions of the FCRA were not designed for the "sophisticated or the cognoscenti" but rather for "ordinary people unschooled in the technicalities of the law." Sanchez v. Standard Brands, 431 F.2d 455, 463 (5th Cir. 1970).

Indeed, in Woodham, the Court held that because the exhaustion requirements of the FCRA abridge the right of access they must be "narrowly construed in a manner that favors access." 829 So.2d at 897. Imposing the additional exhaustion requirements of § 768.28(6) would not favor the right of access that is already fettered by the FCRA.

The trial court's interpretation also undermines the FCHR's mandate to promote and encourage fair treatment of employees and eliminate discrimination. § 760.05, Florida Statutes. The state should not be permitted to interpose or rely upon the exhaustion of the notice requirements

of § 768.28(6) when confronted by the FCHR with a charge of discrimination. The FCRA provides and intends that the FCHR be the sole state agency with jurisdiction to investigate, conciliate and determine charges of discrimination.

CONCLUSION

The Court of Appeal's decision is inconsistent with the waiver of sovereign immunity in Chapter 760 and established principles of statutory construction, is an unreasonable construction of the FCRA, and defeats the remedial purposes of the FCRA. It should be reversed and the Court should hold that § 768.28 applies to the FCRA only to the limited extent intended by the Legislature when it incorporated subsection (5).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served this _____ day of June, 2004, by U.S. Mail to Jay P. Lechner and Nancy A. Chad, Zinober & McCrea, 201 E. Kennedy Blvd., Ste. 800, Tampa, FL 33602; Mindy Raymaker, Agency for Workforce Innovation, 1320 Executive Center Drive, Atkins, Building-Kroger Center, Tallahassee, Fl 32399-2250; John W. Bakas, 201 E. Kennedy Blvd., Ste 300, Tampa, FL 33602-5896; Gary L. Printy, 1804 Miccosukee Commons Drive, Ste. 200, Tallahassee, FL 32308-5471.

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JOHN C. DAVIS

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using Times New Roman 14 point font.

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JOHN C. DAVIS