IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC04-755
Lower Tribunal Case No. 2D03-2046

JANET MAGGIO,

Petitioner,

vs.

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, et al,

Respondent.

BRIEF OF AMICUS CURIAE STATE OF FLORIDA, DEPARTMENT OF FINANCIAL SERVICES IN SUPPORT OF RESPONDENT

THIS BRIEF IS FILED BY CONSENT OF ALL PARTIES

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TABLE OF CONTENTS

TABLE OF CITATIONS iii

STATEMENT OF IDENTITY OF AMICUS CURIAE
AND INTEREST IN CASE..... 1

SUMMARY OF THE ARGUMENT..... 2

ARGUMENT..... 3

VIOLATIONS OF THE FLORIDA CIVIL RIGHTS ACT
ARE TORT CLAIMS, AND THEREFORE SUBJECT TO THE PRESUIT
NOTICE REQUIREMENTS OF ' 768.28(6), FLORIDA STATUTES.
..... 3

1. **Violations of the Florida Civil Rights Act Are Tort Claims.** 3

2. **Because Violations of the FCRA Do Constitute Tort Claims, Compliance with the Presuit Notice Requirements of ' 768.28(6), Florida Statutes Is Required.** 7

3. **The Mandate That the Pre-Suit Notice Requirements Necessary for Waiving State Sovereign Immunity Be Strictly Construed, Surmounts any Claim That the FCRA Should Be Liberally Construed.** 12

4. **Petitioner and NELA=s Statutory Construction Arguments Fail to Demonstrate that Pre-Suit Notice Under ' 768.28(6) Is Not Required.** 13

5. **Petitioner Misstates the Alleged AUndesirable Results@ From Requiring Compliance with the Pre-Suit Notice Requirements in ' 768.28(6).** 17

CONCLUSION..... 20

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT C-1

CERTIFICATE OF SERVICE..... C-1

TABLE OF CITATIONS

Cases — Page(s)

Adams v. Culver,
111 So. 2d 665 (Fla. 1959) 14, 15

Bell v. Board of Regents,
768 So. 2d 1244 (Fla. 1st DCA 2000) 8, 9

Byrd v. Richardson-Greenshields Securities, Inc.,
552 So. 2d 1099 (Fla. 1989) 4, 6, 7

Cagle v. Burns & Roe, Inc.,
726 P. 2d 434 (Wash. 1986) 5

Dahl v. Eckerd Family Youth Alternatives, Inc.,
843 So. 2d 956 (Fla. 2d DCA 2003) 6, 7

Florida Bar v. Prior,
330 So. 2d 697 (Fla. 1976) 15

Grice v. Suwannee Lumber Manufacturing,
113 So. 2d 742 (Fla. 1st DCA 1959) 16, 17

Hullinger v. Ryder Truck Rental, Inc.,
548 So. 2d 231 (Fla. 1989) 5, 7

Jones v. Brummer,
766 So. 2d 1107 (Fla. 3d DCA 2000) 8, 9

Joshua v. City of Gainesville,
768 So. 2d 432 (Fla. 2000) 4, 5, 15, 16, 18

Klonis v. Department of Revenue,
766 So. 2d 1186 (Fla. 1st DCA 2000) 8, 9

Levine v. Dade County School Board,
442 So. 2d 210 (Fla. 1983) 12

Menendez v. North Broward Hospital Dist.,
537 So. 2d 89 (Fla. 1988).....12

Metropolitan Dade County v. Reyes,
688 So. 2d 311 (Fla. 1996).....11

Scott v. Otis Elevator Co.,
524 So. 2d 642 (Fla. 1988).....5, 7

Scott v. Otis Elevator Co.,
572 So. 2d 902 (Fla. 1990).....5, 7

Sun Coast International, Inc. v. Department of Bus. Regulation,
596 So. 2d 1118 (Fla. 1st DCA 1992).....17

Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv.,
444 So. 2d 926 (Fla. 1983).....13

Williams v. School Bd. of Palm Beach County,
770 So. 2d 706 (Fla. 4th DCA 2000).....8, 9

Statutes Page(s)

' 13, ch. 92-77, Laws of Florida.....4

' 20.03(2), Florida Statutes 1

' 20.04(1), Florida Statutes 1

' 20.121, Florida Statutes.....1

' 95.11(3)(f), Florida Statutes.....15, 18

' 284.30, Florida Statutes.....1

' 440.205, Florida Statutes.....5, 6, 18, 19

' 760.01(3), Florida Statutes 13

' 760.07, Florida Statutes.....16

' 760.10, Florida Statutes.....5

' 760.11(1), Florida Statutes 11

' 760.11(5), Florida Statutes 16

' 760.11(11), Florida Statutes.....10

Ch. 766, Florida Statutes.....19

' 768.28, Florida Statutes.....3, 7, 13

' 768.28(1), Florida Statutes 8

' 768.28(5), Florida Statutes 15

' 768.28(6), Florida Statutes .....passim

Regulations Page(s)

29 C.F.R. '' 1601.70 B 1601.80 11

CONCISE STATEMENT OF IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

The State of Florida, Department of Financial Services (hereinafter ADepartment of Financial Services@ or ADFS@), is a principal administrative unit of the Executive Branch of the State of Florida. See '' 20.03(2), 20.04(1), Florida Statutes (2003); and ' 20.121, Florida Statutes (2003). A primary duty of DFS is to create and administer a self-insurance fund known as the AState Risk Management Trust Fund.@ See ' 284.30, Florida Statutes (2003).

As the guardian of the State Risk Management Trust Fund, DFS has a substantial interest in ensuring that adequate financial resources have been set aside to investigate, assess, defend, negotiate and/or pay claims brought against the agencies of the state. As part of its plan for creating a limited waiver of sovereign immunity, the Florida Legislature established pre-suit notice requirements that mandate that no action may be instituted against the state unless the claimant presents a claim in writing not only to the agency being sued, but also to DFS, within three (3) years of the claim=s accrual. See ' 768.28(6)(a), Florida Statutes.

These pre-suit notice requirements provide DFS with crucial information about claims that may be brought against state agencies, so it can investigate and assess those claims at the earliest opportunity, and make an intelligent decision to either settle or defend those claims. These pre-suit notice requirements also assist DFS in determining the amount of financial reserves needed to ensure that adequate insurance coverage exists to settle, defend, or pay losses related to such claims.

Petitioner=s and NELA=s argument that claimants suing state agencies under the Florida Civil Rights Act (AFCRA@) should be excused from the pre-suit notice requirements of ' 768.28(6)(a) is not only contrary to decades of Florida Supreme Court jurisprudence holding that waivers of sovereign immunity must be strictly construed, but it also threatens to jeopardize the State=s ability to accurately assess its exposure to FCRA claims and adequately allocate resources to pay those claims.

This threat must not be allowed to become a reality.

SUMMARY OF THE ARGUMENT

The sole question certified to the Court is whether claims for unlawful discrimination under the Florida Civil Rights Act (AFCRA) are Atorts@ and therefore subject to the pre-suit notice requirements of ' 768.28(6), Florida Statutes. This Court should answer the certified question in the affirmative for several reasons.

First, FCRA claims are torts. This conclusion is well supported by this Court=s jurisprudence regarding the tortious nature of discrimination and retaliation claims in the employment context.

Second, because FCRA causes of action are torts, no legitimate reason for exempting FCRA claimants from the pre-suit notice in ' 768.28(6) can be established. Despite any claim to the contrary, the purposes of the FCRA=s administrative process are different from the purposes of the pre-suit notice requirement in '768.28(6). Furthermore, compliance with the provisions in the FCRA regarding the filing of an administrative complaint does not satisfy the specific requirements of ' 768.28(6), which mandates that the claimant also file the pre-suit notice with DFS. No similar requirement exists under the FCRA.

Third, as this Court has repeatedly observed, because ' 768.28(6) provides a limited waiver of state sovereign immunity, it must be strictly construed in favor of the state. This Court has already required medical malpractice plaintiffs (who, similar to FCRA plaintiffs, must proceed through an administrative process prior to filing a lawsuit) to satisfy the pre-suit notice requirements of ' 768.28(6). Plaintiffs bringing suit under the FCRA should be held to the same requirement.

Fourth, applying ' 768.28(6) to causes of action under the FCRA is consistent with established principles of statutory construction. Petitioner=s and NELA=s arguments that pre-suit notice is not required under ' 768.28(6) because the FCRA is a more specific statute than ' 768.28, and/or is Aself contained,@ are unavailing.

Finally, Petitioner=s and NELA=s argument that the pre-suit notice requirement

in ' 768.28(6) produces unfair and severe results for FCRA plaintiffs ring hollow. The pre-suit notice requirements in ' 768.28(6) are easy to satisfy and do not interfere with the purposes or effectiveness of the FCRA.

ARGUMENT

1. Violations of the Florida Civil Rights Act Are Tort Claims.

Because the sole issue certified to be a matter of great public importance is Awhether claims filed pursuant to the Florida Civil Rights Act of 1992 are tort claims and thus subject to the pre-suit notice requirements of ' 768.28(6), Florida Statutes,@ DFS assumed that the centerpiece of both Petitioner=s and NELA=s Briefs would have been the argument that violations of the FCRA do not constitute tort claims. However, Petitioner does not make this argument until page 18 of her Initial Brief, whereas NELA, in its Amicus Brief, fails to make this argument altogether.

While Petitioner=s and NELA=s reluctance to argue that FCRA violations are not torts is notable, it is scarcely remarkable. In Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099, 1104 (Fla. 1989), this Court expressly concluded that claims of sexual harassment brought pursuant to the FCRA=s statutory predecessor, the Florida Human Rights Act of 1977 (AFHRA@), sound in tort, by stating:[1]

> In light of this overwhelming public policy, we cannot say that the exclusivity rule of the workers= compensation statute should exist to shield an employer from all tort liability based on incidents of sexual harassment. The clear public policy from federal and Florida law holds that an employer is charged with maintaining a workplace free from sexual harassment. Applying the exclusivity rule of workers= compensation to preclude any and all tort liability effectively would abrogate this policy, undermine the Florida Civil Rights Act, and flout Title VII of the Civil Rights Act of 1964.

552 So. 2d at 1104.

[1] Effective October 1, 1992, the FHRA was amended and renamed the FCRA. See ' 13, ch. 92-177, Laws of Florida (1992).

Although Petitioner argues that FCRA claims are not torts in the final pages of her Brief, she fails to acknowledge this Court=s ruling in Byrd. Instead, she mischaracterizes this Court=s decision in Joshua v. City of Gainesville, 768 So. 2d 432, 437 (Fla. 2000) as standing for the proposition that AFCRA claims are clearly not tort claims, but are >statutory liabilities.=@ See Initial Brief at p. 18. Petitioner=s reliance upon Joshua for such a premise, however, is erroneous.

Instead of addressing whether FCRA claims were torts versus Astatutory liabilities,@ this Court in Joshua merely remarked that a four year limitations period was applicable to the FCRA because it was a statutory cause of action. Joshua, 768 So. 2d at 437. This Court has never ruled that statutory causes of action, like the FCRA, cannot serve as the basis for tort liability.

Quite the contrary, this Court, in Scott v. Otis Elevator Co., 524 So. 2d 642, 643 (Fla. 1988) (AScott I@), ruled that claims for retaliatory discharge brought pursuant to ' 440.205, Florida Statutes were Atortious in nature.@ Id. Later, in the same case, this Court declared that A>wrongful termination of employment in violation of public policy can be accurately characterized as an intentional tort.=@ Scott v. Otis Elevator Co., 572 So. 2d 902, 903 (Fla. 1990@) (AScott II@); quoting Cagle v. Burns & Roe, Inc., 726 P.2d 434, 436 (Wash. 1986).

Although the public policy at issue in Scott I and II was the prohibition of wrongful and retaliatory discharge pursuant to ' 440.205, this Court=s determination that statutory causes of action can give rise to tort claims has never been limited solely to claims brought pursuant to that statute. In Hullinger v. Ryder Truck Rental, Inc., 548 So. 2d 231, 233 (Fla. 1989), this Court stated that an age discrimination claim predicated upon ' 760.10 of the FHRA could serve as the basis for an action for wrongful discharge. Additionally, and as previously mentioned, this Court in Byrd specifically determined that sexual harassment actions brought pursuant to the FHRA constituted tort claims. In making that determination, this Court unambiguously announced:

Public policy now requires that employers be held accountable in tort for

> the sexually harassing environments they permit to exist, *whether the tort claim is premised on a remedial statute or on the common law.*

Byrd, 552 So. 2d at 1104 (emphasis supplied).

In light of this Court=s numerous decisions stating that violations of remedial statutes such as ' 440.205 and the FHRA give rise to tort claims, it is simply absurd to suggest that Petitioner=s FCRA claims are not tort claims.[2] Nevertheless, that is precisely what Petitioner asserts.

In a misguided effort to advance this assertion, Petitioner cites to the Second District Court of Appeal=s decision in Dahl v. Eckerd Family Youth Alternatives, Inc., 843 So. 2d 956 (Fla. 2d DCA 2003) and argues that the pre-suit notice requirements of Section 768.28 Ashould have no application because this action arises under the FCRA, which is a statute like the whistleblower act, and should not be considered as sounding in tort.@ See Initial Brief at p. 20.

In Dahl, the plaintiff brought a Public Sector Whistleblower Act (APSWA@) claim against Eckerd. Dahl, 843 So. 2d at 957. In stating that Section 768.28, Florida Statutes did not bar the plaintiff=s PSWA claims, the district court, in *dicta*, stated that ' 768.28 Ahas no application in this context, because [the plaintiff] is exercising a right of action under statute; she is not suing in tort.@ Id. at 959.

In concluding that the pre-suit notice requirements of ' 768.28 did not apply to the PSWA simply because it was a statutory cause of action, the district court in Dahl wholly disregarded this Court=s repeated pronouncements in Scott I, Scott II, and Hullinger, that wrongful and retaliatory discharge claims based upon statutory enactments sound in tort. The district court also ignored this Court=s holding in Byrd that tort claims may be premised upon either a remedial statute or the common law. This it was not free to do. Thus, to the extent Petitioner relies upon *dicta* in Dahl that misconstrues the state of the law within Florida, she is mistaken.

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[2] On page 20 of her Initial Brief, Petitioner acknowledges that the FCRA is a Aremedial statute.@

2. Because Violations of the FCRA Constitute Tort Claims, Compliance with the Presuit Notice Requirements of ' 768.28(6), Florida Statutes Is Required.

Section 768.28, Florida Statutes creates a limited waiver of the State=s sovereign immunity from suit, and provides, in pertinent part:

> In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee=s office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations in this act.

' 768.28(1), Florida Statutes (2003).

In the present case, it cannot be seriously argued that the violations of the FCRA for which Petitioner brought suit **B** i.e., handicap discrimination claims **B** are not tort claims to recover money damages for personal injuries resulting from the alleged wrongful acts of Respondent=s employees. Thus, unless there is some provision of Florida law that excepts or exempts FCRA claimants from having to satisfy the pre-suit notice requirements for waiving Respondent=s sovereign immunity from suit, what possible basis exists for excusing FCRA claimants from complying with the requirements set forth in ' 768.28(6), Florida Statutes? Every other claimant suing the state in tort for non-FCRA claims must do so.

Notably, no portion of ' 768.28, the FCRA, or any other Florida Statute excuses claimants bringing suit pursuant to the FCRA from the pre-suit notice requirements in ' 768.28(6). Nevertheless, Petitioner and NELA claim that

compliance with such pre-suit notice requirements are unnecessary because the FCRA contains its own waiver of sovereign immunity. See Initial brief at pp. 9-10; NELA=s Amicus Curiae Brief at p. 4. Their assertion in this regard is predicated upon the Acookie cutter@ decisions of Klonis v. Dep=t of Revenue, 766 So. 2d 1186 (Fla. 1st DCA 2000); Jones v. Brummer, 766 So. 2d 1107 (Fla. 3d DCA 2000); Bell v. Bd. of Regents, 768 So. 2d 1244 (Fla. 1st DCA 2000); and Williams v. School Bd. of Palm Beach County, 770 So. 2d 706 (Fla. 4th DCA 2000). Once again, however, Petitioner=s and NELA=s reliance on these cases is misplaced.

The question at issue in Klonis, Jones, Bell and Williams was not whether the claimants in those cases had satisfied the pre-suit notice requirements of ' 768.28(6), Florida Statutes, but whether FCRA lawsuits could be maintained against the state at all. The defendants in those cases argued that state agencies were entitled to sovereign immunity because nowhere in the FCRA was there an express, clear and unequivocal statement that the Florida Legislature had waived state sovereign immunity in order to permit them to be sued. See e.g., Klonis, 766 So.2d at 1189; and Jones, 766 So. 2d at 1108. In rejecting this notion, the courts in Klonis, Jones, Bell and Williams noted that by reading various portions of the FCRA *in para materia*, an express and unequivocal legislative intent to permit FCRA actions against state agencies could be discerned. See e.g., Klonis, 766 So. 2d at 1190; Jones, 766 So. 2d at 1108-1109; Bell, at 1244; and Williams, 770 So. 2d at 707.

Although this Court is not bound by these decisions, DFS does not challenge the wisdom of the holdings in Klonis, Jones, Bell and Williams. Rather, it asserts that Petitioner and NELA are attempting to misapply those holdings to avoid compliance with ' 768.28(6). There is no indication in any of those cases that the claimants were excused from complying with the pre-suit notice requirements of ' 768.28(6), Florida Statutes simply because they were suing the state under the FCRA, as opposed to some other kind of statutory or common law tort claim. Thus, why should FCRA claimants be excused from the requirements that all other

tort claimants must satisfy; especially when such notice is critical to DFS in order for it to assess potential tort claims and allocate financial resources to deal with them?

Petitioner and NELA attempt to further obfuscate this issue of statutory compliance by claiming that the administrative exhaustion requirements of the FCRA are virtually identical to, and serve the same purpose as, the pre-suit notice requirements found in ' 768.28(6), Florida Statutes, and therefore compliance with ' 768.28(6) is unnecessary and redundant. However, any unbiased review of these two statutes clearly demonstrates that the administrative charge requirements set forth in the FCRA and the pre-suit notice requirements specified in ' 768.28(6)(a), Florida Statutes, differ in both purpose and substance.

The statutory purpose for the administrative exhaustion requirements of the FCRA is to permit an administrative agency, the Florida Commission on Human Relations (AFCHR@), an opportunity to Aattempt to eliminate or correct the alleged discrimination by informal methods of conference, conciliation and persuasion@ in an effort to avoid unnecessary litigation. See ' 760.11(11), Florida Statutes (2003). In this regard, the FCRA=s administrative exhaustion requirements apply to every charge of discrimination filed with the FCHR, not merely to those filed against state agencies and subdivisions. By contrast, the express legislative purpose of ' 768.28(6), Florida Statutes Ais to give the appropriate public bodies an opportunity to investigate all claims . . . ,@ so they can budget for future suits against the state and make intelligent decisions on whether to settle or fight those claims. See Metropolitan Dade County v. Reyes, 688 So.2d 311, 313 (Fla. 1996).

Irrespective of any claims made by Petitioner or NELA, the applicable administrative exhaustion provisions of the FCRA and the pre-suit notice requirements of ' 768.28(6), Florida Statutes clearly are not the same. For example, ' 768.28(6)(a), Florida Statutes prohibits the institution of a civil action against a State agency "unless the claimant presents the claim in writing to the appropriate agency, and also . . . to the Department of Financial Services, within 3 years after

such claim accrues . . . ." However, the FCRA contains no requirement that the claimant's charge of discrimination be served upon DFS. See ' 760.11(1), Florida Statutes (2003). Likewise, the FCRA, unlike ' 768.28(6)(a), Florida Statutes, contains no requirement that the claimant personally present any written claim to either the appropriate agency or DFS. To the contrary, the claimant is only required to file a charge of discrimination with the FCHR, the Equal Employment Opportunity Commission, or some other or some other governmental entity that serves as a fair employment practices agency, pursuant to 29 C.F.R. '' 1601.70-1601.80. See ' 760.11(1), Florida Statutes (2003).

While Appellant may attempt to trivialize the necessity of such pre-suit notice requirements -- especially the need to provide pre-suit notice to DFS -- this Court has long required that strict adherence be given to all of ' 768.28(6), Florida Statutes. Toward that purpose, this Court has expressed that:

> Because this subsection is part of the statutory waiver of sovereign immunity, it must be strictly construed. In the face of such a clear legislative requirement, it would be inappropriate for this Court to give relief to the petitioner based on his or our own beliefs about the intended function of the Department of [Financial Services] in the defense of suits against school districts. Our views about the wisdom or propriety of the notice requirement are irrelevant because the requirement is so clearly set forth in the statute. Consideration of the efficacy of the need for the notice requirement is wholly a matter within the legislative domain.

Levine v. Dade County Sch. Bd., 442 So. 2d 210, 212 (Fla. 1983).

Likewise, in Menendez v. North Broward Hosp. Dist., 537 So. 2d 89, 91 (Fla. 1988), this Court, applying a strict construction analysis, upheld the dismissal of a plaintiff's medical malpractice action where the plaintiff had only provided pre-suit notice to the hospital district and not to DFS. In so doing, the Court concluded that not even the agency against which the claim was brought could waive the claimant's requirement under ' 768.28(6)(a) to provide written pre-suit notice to DFS. Id.

In effect, Petitioner and NELA ask this Court, without sufficient or logical

justification, to: (i) disregard clearly expressed legislative notice requirements; and (ii) and reverse decades of Florida Supreme Court jurisprudence regarding the strict construction of the requirements for waiving state sovereign immunity, in order to uniquely allow FCRA claimants to sue the state without complying with the pre-suit notice requirements of ' 768.28(6). Such a request should not be countenanced.

3. The Mandate That the Pre-Suit Notice Requirements Necessary for Waiving State Sovereign Immunity Be Strictly Construed, Surmounts any Claim That the FCRA Should Be Liberally Construed.

Petitioner and NELA attempt to escape the consequence of decades of Florida Supreme Court precedent requiring the strict construction of the pre-suit notice requirements in ' 768.28(6) by arguing that the FCRA is to be liberally construed. Although it is true that the text of the FCRA states that it is to be Aliberally construed to further the general purposes stated in this section . . . ,@ this text does not say that it is to be construed in such a way that avoids or defeats the requirements of another, entirely distinct, legislative enactment requiring strict construction. Cf., ' 760.01(3) and ' 768.28, Florida Statutes (2003).

In the final analysis, however, any tension between the premise that the FCRA must be given a liberal construction and the principle that the pre-suit notice requirements are to be strictly construed, must be decided in favor of the state. See Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., 444 So. 2d 926, 928 (Fla. 1983) ("a waiver of sovereign immunity . . . should be strictly construed in favor of the state and against the claimant.").

4. Petitioner and NELA=s Statutory Construction Arguments Fail to Demonstrate that Pre-Suit Notice Under ' 768.28(6) Is Not Required.

Petitioner and NELA argue that established principles of statutory construction mandate that the pre-suit notice in ' 768.28(6) is not required for plaintiffs suing under the FCRA. Specifically, they rely on the law regarding the interpretation of specific and general statutes, and the law regarding Aself-contained@ statutes. Initial

Brief at pp. 16-17; NELA=s Amicus Curiae Brief at pp. 6-8. Even if such principles apply to the instant case, application of those principles actually supports the position that FCRA plaintiffs are required comply with the pre-suit notice requirements in ' 768.28(6).

Petitioner and NELA both cite the principle that Aa special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms.@ See Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959). However, as Adams teaches, this principle only comes into play when two statutory provisions cover the same subject.

In the instant case, it is doubtful whether the Aspecific statute versus general statute@ principle is relevant, as there is no provision in the FCRA which covers the subject of what a plaintiff suing the state in tort is required (or not required) to do once the decision to file a lawsuit has been made. However, even if such a principle would apply, the holding in Adams teaches that the more specific statute addressing the precise conduct at issue would apply. In the instant case, the very manner in which Petitioner and NELA frame their Aspecific versus general@ arguments demonstrates why they fail: they both attempt to contrast the specific legislative directive in ' 768.28(6) with the entire administrative scheme contained within the FCRA. The only way the FCRA can possibly be construed to cover the same subject as ' 768.28(6) is to make the generalized and unjustified inference that the FCHR=s administrative process (in which a person files an administrative complaint with the FCHR, and the FCHR sends a copy to the offending agency) is equivalent to what is described by ' 768.28(6), where both the agency and the DFS receive a notice from the claimant that: (i) contains the specific information described by ' 768.28(6), and (ii) indicates that the complainant is about to file a civil action against the agency. Clearly, under Adams, the specificity of ' 768.28(6) should control over a generalized (and certainly questionable) inference which must be drawn from the text of the FCRA.

Petitioner and NELA also argue that FCRA plaintiffs should be allowed to ignore ' 768.28(6) by relying on the idea that the FCRA is a Aself-contained@ statute. This argument fails for two primary reasons.

First, the FCRA is hardly a self-contained statute. A statute is Aself-contained@ only when it is able to be understood without reference to other statutes. See Florida Bar v. Prior, 330 So.2d 697, 699 (Fla. 1976) (determining that a Bar disciplinary rule was not self-contained because it Acannot be understood without reference to other provisions.@). In the present case, a plaintiff suing under the FCRA cannot learn all there is to know about his or her rights under the Act without looking outside its provisions. For example, a plaintiff who fails to receive a determination of Acause@ or Ano cause@ from the FCHR regarding his administrative complaint of discrimination must look to ' 95.11(3)(f), Florida Statutes, to determine the applicable statute of limitations for filing suit. See Joshua, supra, 768 So. 2d at 439. To determine the maximum amount of damages that can be obtained against the State, a plaintiff must look to ' 768.28(5), Florida Statutes. See '760.11(5), Florida Statutes. Even the FCRA itself directs a person to look beyond its provisions when it states that the violation of any Florida anti-discrimination statute can give rise to a lawsuit under the Act, *unless* that statute provides for greater damages than the FCRA. See ' 760.07, Florida Statutes. Given the foregoing, Petitioner and NELA=s argument that the FCRA is Aself-contained@ is unsupported by the text of the Act.

Second, even if the FCRA is Aself-contained,@ this fact would not excuse a plaintiff=s failure to comply with ' 768.28(6). On this point, NELA erroneously cites Grice v. Suwannee Lumber Manufacturing, 113 So. 2d 742, 742 (Fla. 1st DCA 1959) and quotes the following language: AWhen a statute is self-contained, it covers only those subjects within its purview or specifically excluded from its provisions.@ Notably, the quoted language does not appear in Grice or any other published case

in the United States.[3] In any event, the only principle of statutory construction in Grice is the common sense rule that when a statute defines a set of rights, it is presumed to cover only those rights. Id. at 744.

Applied to the instant case, the FCRA prohibits various forms of discrimination, and sets forth the procedures for how a person can file an administrative complaint against an employer and have that complaint resolved. With the exception of when no administrative decision is made (Joshua, supra, at 439) the FCRA describes the time frames for filing suit. Under a Aself-contained statute@ analysis, the FCRA can only be construed to cover those subjects which it addresses, and it is presumed *not* to cover those subjects it does not address, such as the right of DFS and the state agency to receive the pre-suit notice described in ' 768.28(6) once a person has decided to file a civil action in tort against the State.[4]

Stated differently, under a Aself-contained statute@ analysis, ' 768.28(6) defines the right of state agencies and DFS to receive the pre-suit notice described in the statute whenever a plaintiff has decided to file suit against a state agency in tort. Neither DFS nor Respondent is attempting to construe ' 768.28(6) to cover any rights other than those set forth in its text. Therefore, applying the reasoning of Grice to the instant case compels the conclusion that plaintiffs bringing suit against the State must comply with the requirements of ' 768.28(6).

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[3] Defendant searched all published decisions available on the Westlaw legal research service.

[4] Curiously, Petitioner quotes to the case of Sun Coast International, Inc. v. Dep=t of Bus Regulation, 596 So. 2d 1118, 1121 (Fla. 1st DCA 1992) for the proposition that Aa legislative directive as to *how* a thing is to be done is, in effect, a prohibition against it being done in any other way . . .@ (see Initial Brief at p. 16) (emphasis in the original). However, this authority actually supports DFS and Respondent=s arguments. Under Sun Coast, ' 768.28(6) constitutes a legislative directive as to *how* pre-suit notice should be provided when a claimant has decided to sue the State in tort. Thus, it is a prohibition *against* such notice being provided any other way (i.e., by a claimant=s participation in the administrative process set forth in the FCRA).

5. Petitioner Misstates the Alleged AUndesirable Results@ From Requiring Compliance with the Pre-Suit Notice Requirements in ' 768.28(6).

Several times in her brief, Petitioner uses hyperbole and rhetoric to claim that compliance with the pre-suit notice requirements leads to disastrous results, when such is not the case. For example, Petitioner makes the bizarre statement that if this Court holds that employment discrimination claims under the FCRA are torts, Aall state agencies will be virtually immune from discrimination that it claims is based upon a planning-level decision, such as a lack of sufficient funds in the state budget.@ Initial Brief at pp. 18-19. Petitioner cites no authority to support this proposition, which is not surprising given that nowhere in the text of the FCRA does it state that an employer can avoid liability for unlawful discrimination simply because the discrimination was the product of a Aplanning-level@ decision.[5]

Petitioner also argues that compliance with ' 768.28(6) Aserves only as a trap for the unwary who, like the petitioner here, have run out of time to comply with ' 768.28 and had no reason to believe there was[sic] any more steps required for them to take.@ Initial Brief at p. 12. However, compliance with ' 768.28 is no more a Atrap@ than any other statute or rule that requires a party to take a certain action within a certain time frame. Under Petitioner=s logic, noncompliance with ' 95.11(3)(f), Florida Statutes, is a Atrap for the unwary@ for any plaintiff seeking to file suit under the FCRA more than four years after the discrimination occurred. Yet, in Joshua, supra, this Court specifically endorsed the limitations period in ' 95.11(3)(f). Notably, Petitioner concedes that plaintiffs suing for retaliatory discharge under ' 440.205 Acould be expected to comply with ' 768.28(6), Fla. Stat., and give the state

[5] Petitioner=s concern about agencies being Aimmune@ from liability for discrimination based on budget concerns would appear to answer itself: if a state agency terminates an employee because of a budgetary shortfall, then necessarily the decision was not based on race, gender, religion or other improper criteria, and therefore would not constitute discrimination in violation of the FCRA.

pre-suit notice,@ even though there is no reference to ' 768.28(6) within the text of ' 440.205. Initial Brief at p. 21. It is unclear how compliance with ' 768.28(6) would be any more of a Atrap@ for plaintiffs suing for retaliatory discharge under ' 440.205 or for medical malpractice under Chapter 766, Florida Statutes than for plaintiffs suing under the FCRA.

Petitioner also claims that after a plaintiff provides the required pre-suit notice to the agency and DFS, Athe matter will be delayed for another one to three months while the agency has the opportunity to plead or make final disposition of the claim.@ Initial Brief at p. 13. Petitioner claims that during this Adelay period,@ the plaintiff will continue to accrue lost wages and attorney=s fees. Although it is true that a terminated employee who has not obtained re-employment will continue to accrue damages during the short period of time after it files the pre-suit notice under ' 768.28(6), it is also true that the plaintiff may obtain a settlement from the State during this time frame, which would avoid the necessity for filing a lawsuit. In this regard, a one to three month waiting period after filing the pre-suit notice seems fairly miniscule when compared to fairly lengthy period of time to resolve a claim through formal litigation.

Finally, Petitioner even goes so far as to cite her disability as a reason for why she should not be required to file a pre-suit notice under ' 768.28(6). According to Petitioner, requiring her to comply with ' 768.28(6) would be unfair because she cannot *see* the pre-suit notice requirements due to her blindness. Initial Brief at p. 22. Although DFS certainly sympathizes with the plight of the blind, ' 768.28(6) does not place any more of a burden on Petitioner than on other blind plaintiffs who seek to bring tort actions against the State, including victims of medical malpractice, who are required by this Court=s jurisprudence to file the ' 768.28(6) pre-suit notice.

CONCLUSION

The pre-suit notice requirement in ' 768.28(6), Florida Statutes is vitally important to DFS in determining if adequate funds have been set aside to investigate, assess, defend, negotiate and/or pay claims brought against the agencies of the State of Florida. It is a simple requirement for a claimant to satisfy, and every claimant has three years to do it. It does not frustrate, interfere with, or otherwise conflict with the Legislature=s intent to prevent discrimination through the enactment of the FCRA. Accordingly, this Court should follow the guidance of its prior precedent and hold that claims arising under the FCRA are torts, and therefore subject to the pre-suit notice requirement in ' 768.28(6).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that this brief is in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2).

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Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served this 29th day of June, 2004, by first class United States Mail to the following:

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