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.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL
CERTIFYING A QUESTION OF GREAT PUBLIC IMPORTANCE

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CERTIFIED QUESTION

The Second District Court of Appeal certified the following question as a matter of great public importance:

> Are claims filed pursuant to the Florida Civil Rights Act of 1992 tort claims and thus subject to the presuit notice requirements of Section 768.28(6), Florida Statutes (2003)?

Maggio v. Department of Labor & Empl. Sec., 869 So. 2d 690, 692 (Fla. 2d DCA 2004).

STATEMENT OF THE CASE AND FACTS

A. References To The Record

References to the record on appeal are abbreviated as "R:" followed by the appropriate page number of the record. References to the Appendix to this Brief are abbreviated as "A.," followed by the tab number in which the document is designated in the Appendix.

B. Nature of the Case

This matter is an employment discrimination action filed against a state agency. Petitioner, Janet Maggio, (hereinafter "Maggio"), is a former employee of Respondent, the State of Florida Department of Labor and Employment Security, State of Florida Agency for Workforce Innovation (hereinafter "AWI"). [R: 87]. AWI is an agency of the State of Florida. *See* § 20.04, Florida Statutes (2001); § 20.171, Florida Statutes (2001) (Department of Labor and Employment Security); § 20.50, Florida Statutes (2001) (Agency for Workforce Innovation). The recitation of the nature of the case in Maggio's Initial Brief is inaccurate to the extent that the Record does not show that AWI engaged in employment discrimination against Maggio, only that Maggio alleged that it did. [R: 94].

C. Statement of the Facts

The recitation of the facts in Maggio's Initial Brief is not accurate. For example, although Maggio, in her Initial Brief, states that "acts of discrimination" by AWI occurred within four years of Maggio's filing of her complaint, and that AWI continued in its "acts of employment discrimination" up until Maggio's resignation, the Record supports only that Maggio alleged that these acts occurred, not they actually occurred. [R: 7; 93]. Similarly, the Record does not show that Maggio is a person with a disability or is legally blind, or that AWI knew that she was legally blind when it hired her. Rather, the Record shows only that Maggio has made these allegations. [R: 89; 318].

Regardless, it is undisputed that Maggio never filed any pre-suit notice with either AWI or Department of Financial Services pursuant to § 768.28(6), Florida Statutes. [R: 77, T8]. It is also undisputed that, at the time the lower court dismissed this action with prejudice, more than three (3) years had passed from the occurrence of the alleged acts of discrimination. [R: 77, T8].

D. Course of the Proceedings

AWI is in agreement with Maggio's description of the course of the proceedings with the following additions and clarifications:

1. In her Initial Brief, Maggio asserts that AWI "filed a motion to dismiss and summary judgment on the basis that Maggio had still not complied with the presuit notice requirements contained in § 768.28." In fact, AWI's motion for summary judgment was based upon the fact that Maggio failed to bring her suit within the applicable four-year statute of limitations period. [R: 119]. AWI's January 6, 2003 motion to dismiss was based upon the fact that Maggio, in her amended complaint, had not complied with, nor had she alleged that she complied with, the pre-suit notice requirements of § 768.28(6). The trial court granted both motions.

2. The Second District Court of Appeal affirmed the portion of the trial court's order which dismissed Maggio's amended complaint on the basis that "Maggio's claim, filed pursuant to the FCRA, was a tort claim that was subject to the section 768.28(6)(a) presuit notice requirements." *Maggio*, 869 So. 2d at 692. The Second District Court of Appeal did not consider the summary judgment portion of the order on appeal.

4. In its Amicus Brief, the National Employment Lawyers Association ("NELA") asserts that "[t]he trial court decided the case on summary judgment. . . ." [Amicus Brief, at 4]. This is not accurate. Instead, the trial court decided the present issue on AWI's motion to dismiss.

SUMMARY OF THE ARGUMENT

DISCRIMINATION IS A TORT, THEREFORE DISCRIMINATION ACTIONS FILED PURSUANT TO THE FLORIDA CIVIL RIGHTS ACT OF 1992 ARE SUBJECT TO THE PRESUIT NOTICE REQUIREMENTS OF SECTION 768.28(6), FLORIDA STATUTES (2003).

Discrimination claims, including those filed pursuant to the Florida Civil Rights Act ("FCRA"), are torts. Section 768.28(6), Florida Statutes, as part of § 768.28's limited waiver of sovereign immunity, requires a plaintiff seeking

damages in tort against the state or its political subdivisions to provide written notice of the claim to the appropriate state agency and the Department of Financial Services within three (3) years of the accrual of the claim. Therefore, a plaintiff asserting discrimination claim(s) under FCRA against the state or its political subdivisions must provide written notice of the claim(s) to the appropriate state agency and the Department of Financial Services within three (3) years of the accrual of the claim(s). As Maggio failed to do so, the Second District Court of Appeal correctly affirmed the trial court's order dismissing Maggio's amended complaint with prejudice.

ARGUMENT

DISCRIMINATION IS A TORT, THEREFORE DISCRIMINATION ACTIONS FILED PURSUANT TO THE FLORIDA CIVIL RIGHTS ACT OF 1992 ARE SUBJECT TO THE PRESUIT NOTICE REQUIREMENTS OF SECTION 768.28(6), FLORIDA STATUTES (2003).

A. Discrimination In Violation Of The Florida Civil Rights Act Is A Tort.

This Court has held that wrongful discharge is a tort, regardless of whether the cause of action was statutorily created. In *Scott v. Otis Elevator Co.*, 572 So. 2d 902 (Fla. 1990) (*Scott II*), this Court quoted with approval *Cagle v. Burns & Roe, Inc.*, 726 P.2d 434, 436 (Wash. 1986), for the premise that "'wrongful termination of employment in violation of public policy can be accurately characterized as an intentional tort.'" *Id.* at 903. The Court reasoned that "'[w]rongful termination of employment in violation of public policy evidences an intent on the part of the employer to discharge an employee for a reason that contravenes a clear mandate of public policy.'" The Court concluded:

> Section 440.205 reflects the public policy that an employee shall not be discharged for filing or threatening to file a workers' compensation claim. We hold that an employer who violates this statute has committed an intentional tort, thereby exposing itself to liability for damages for emotional distress.

Id. See also Scott v. Otis Elevator Co., 524 So. 2d 642, 643 (Fla. 1988) (*Scott I*) (holding that "[r]etaliatory discharge is tortious in nature").

With respect to Maggio's purported hostile work environment "harassment" claim, this Court has left little doubt that claims for "harassment" based upon a "hostile work environment" are tortious in nature, regardless of whether such claims are brought as statutory torts or common law torts. For example, in *Byrd v. Richardson-Greenshields Secur., Inc.*, 552 So. 2d 1099 (Fla. 1989), this Court held that "[p]ublic 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." *Id.* at 1104 (emphasis added). The *Byrd* Court reasoned that common law tort causes of action, such as assault, intentional infliction of emotional distress, or battery involving unlawful intrusion upon personal rights protected by the Florida Human Rights Act, "address the very essence of the policies against sexual harassment - an injury to intangible personal rights." *Id.* Harassment is simply a form of discrimination. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986).

Like retaliatory discharge claims and claims for sexual harassment, other discrimination claims sound in tort, regardless of whether the cause of action was statutorily created. In *Meyer v. Holley*, 537 U.S. 280 (2003), the United States Supreme Court recently explained that a discrimination claim brought under the Fair Housing Act is a tort claim. *Id.* at 285. The Court unequivocally expressed that "an action brought for compensation by a victim of housing discrimination is,

in effect, a tort action." *Id.* at 285. The Court specifically observed that traditional tort principles such as vicarious liability applied to discrimination claims. *Id.*.

Earlier, in *Curtis v. Loether*, 415 U.S. 189 (1974), the Court explained that "[a] damages action under [Title VIII of the Civil Rights Act of 1968] sounds basically in tort -- the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Id.* at 195. The *Loether* Court, observing that discrimination actions "are analogous to a number of tort actions recognized at common law" such as defamation and intentional infliction of emotional distress, accepted that "'discrimination might be treated as a dignitary tort.'" *Id.* at 195 & n.10 (quoting C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 961 (2d ed. 1969)). The Court stressed that "[m]ore important, the relief sought here -- actual and punitive damages -- is the traditional form of relief offered in the courts of law." *Id*. at 196. *See also City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999) ("there can be no doubt that claims brought pursuant to [42 U.S.C] § 1983 sound in tort. . . . [W]e have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability, and have interpreted the statute in light of the background of tort liability.") (internal citations and marks omitted).

Here, likewise, the FCRA reflects public policy, and defined a new legal duty under state law, that an employer shall not discriminate against an individual

because of her race, color, religion, sex, national origin, age, handicap, or marital status. § 760.10, Florida Statutes. Thus, discrimination constitutes an intrusion upon intangible personal rights prohibited by the FCRA. More importantly, the FCRA authorizes the courts to compensate a plaintiff for the injury caused by a defendant's wrongful breach of its duty not to discriminate. §§ 760.07 & 760.11(5), Florida Statutes. Specifically, relief available under the FCRA includes compensatory damages for mental anguish, loss of dignity, and any other intangible injuries, and punitive damages, which are traditional forms of relief available in tort actions. § 760.11(5), Florida Statutes. Additionally, the vicarious liability principles applicable under the FCRA are clearly based upon tort concepts and reinforce the conclusion that discrimination claims under the FCRA sound in tort. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) ("'A master is subject to liability for the torts of his servants committed while acting in the scope of their employment'") (quoting RESTATEMENT (SECOND) OF AGENCY, § 219(1)(1957); *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1348 (11th Cir. 2000) (analyzing damages for discrimination under the FCRA in terms of tort law).

Maggio inaccurately argues that "there has been only one other Florida circuit court case that held that notice of a tort claim must be given prior to suing under the FCRA." Initial Brief, at 20. In fact, lower Florida courts have consistently held that discrimination claims under the FCRA sound in tort and

therefore are subject to the presuit notice requirements of § 768.28 (6). For example, in *Bearelly v. Department of Corrections*, 9 Fla. L. Weekly Supp. 463 (8th Jud. Cir. Apr. 10, 2002), [A. 1], as here, plaintiff alleged handicap discrimination in violation of the FCRA. The court specifically found that a civil rights claim under the FCRA is a tort that is subject to the presuit notice requirements of § 768.28(6). On review, the trial court's decision was *per curiam* affirmed. *Bearelly v. State, Dep't of Corr.*, 845 So. 2d 186 (Fla. 1st DCA 2003) (table decision), *reh'g denied*, 2003 Fla. App. LEXIS 8072 (Fla. 1st DCA Apr. 29, 2003). Likewise, in *Campbell v. State of Florida, Dep't of Banking & Finance*, No. 02-CA 268, 9 Fla. L. Weekly Supp. 663 (2nd Jud. Cir. Aug. 16, 2002) [A. 2], the court held that plaintiff's constructive discharge and handicap harassment claims brought under the FCRA "sound in tort" and were subject to the pre-suit notice requirements of § 768.28(6). Subsequently, the *Campbell* court similarly held that FCRA failure to accommodate claims sound in tort and are also subject to the pre-suit notice requirements of § 768.28(6). *Campbell v. State of Florida, Dep't of Banking & Finance*, No. 02-CA 268, 10 Fla. L. Weekly Supp. 29a (2nd Jud. Cir. Nov. 12, 2002) [A. 3]. On review, the trial court's decision was *per curiam* affirmed. *Campbell v. State of Florida, Dep't of Banking & Finance*, 854 So. 2d 195 (Fla. 1st DCA 2003). Similarly, in *Phillips v. Department of Children & Families*, No. 01-3090 (2d Jud. Cir. Nov. 25, 2002) [A. 4], the court held that claims of wrongful

discharge and denial of accommodation for handicap/disability in violation of FCRA sound in tort and therefore are subject to the § 768.28(6) presuit notice requirements. On review, the trial court's decision was *per curiam* affirmed. *Phillips v. Dep't of Children & Families*, 854 So. 2d 198 (Fla. 1st DCA 2003). *See also Floyd v. Board of Regents, State of Florida*, No. 1996-CA-00064 (2d Jud. Cir. June 27, 2002) [A. 5] (plaintiff's discriminatory and retaliatory discharge claims brought under the FCRA were subject to the pre-suit notice requirements of § 768.28(6)).

Maggio compares the FCRA to § 40.271, Florida Statutes, the Florida corollary of the federal Jury System Improvements Act ("Jury Act") for the proposition that FCRA discrimination claims are not torts. [Initial Brief, at 21-22]. However, like claims under the FCRA, claims under § 40.271 and the Jury Act have been recognized as torts. For example, in *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1524 (11th Cir. 1991), the Eleventh Circuit held that an action pursuant to the Jury Act is analogous to "an action *in tort* to redress discrimination. . . ." *Id.* at 1524 (emphasis added). The court relied upon the fact that the Jury Act's civil penalty provision, which authorized a civil penalty up to $ 1,000 for each violation, and the punitive damages available under Title VIII of the Civil Rights Act of 1968 (as analyzed in *Loether*) both "serve the same function of placing the victim in a position superior to that in which he found himself prior to the statutory

violations." *Id.* Remedies available under § 40.271 are even more tort-like than those available under the federal Jury Act because they include, as in *Loether*, compensatory and punitive damages. *See* § 40.271(3), Florida Statutes. Therefore, under the *Hill* reasoning, claims under § 40.271, like claims under the FCRA, are torts because both statutes, by providing for compensatory and punitive damages, serve the same function of placing the victim in a position superior to that in which he found himself prior to the statutory violations.

Maggio also cites *Dahl v. Eckerd Youth Alternatives, Inc.*, 843 So. 2d 956 (Fla. 2d DCA 2003) for the proposition that FCRA claims are not torts. Maggio's reliance on *Dahl* is misplaced. In *Dahl*, plaintiff filed suit under the Florida Private Whistleblower Act, §§ 448.101-105, Florida Statutes ("Whistleblower Act"). *Id.* at 957. The lower court dismissed the complaint on the basis that Dahl's exclusive remedy was Florida's Public-Sector Whistleblower Act, §§ 112.3187-.31895, Florida Statutes. *Id.* The Second District Court of Appeal, through Judge Casanueva, reversed, finding that nothing in either statute suggested that the Public-Sector Whistleblower Act was plaintiff's exclusive remedy. In *dicta*, Judge Casanueva addressed defendant's argument on cross-appeal that the circuit court failed to consider its defense of sovereign immunity under § 768.28. Judge Casanueva (who later concurred in the Second District Court of Appeal's decision in the instant case) stated that § 768.28 had "no application in this context,

because Ms. Dahl is exercising a right of action under statute; she is not suing in tort." *Id.* at 959.

For several reasons, *Dahl* is inapposite. First, the *Dahl* comment was *dicta*. Second, any inference that can be drawn from *Dahl* that the court would have come to the same conclusion with regard to an FCRA claim is obviated by the fact that Judge Casanueva concurred in the underlying appellate decision in the instant case. Third, and most importantly, the FCRA and the Whistleblower Act are not comparable. Whereas the FCRA provides tort-like remedies such as compensatory damages for mental anguish, loss of dignity and other intangible injuries and punitive damages (both of which are traditional forms of relief available in tort actions), relief available under the Whistleblower Act is strictly limited to equitable or "make whole" remedies. § 448.103(2)(e), Florida Statutes. Specifically, the Whistleblower Act gives the court the discretion to order only: (a) injunctive relief; (b) reinstatement; (c) reinstatement of benefits; (d) "[c]ompensation for lost wages, benefits, and other remuneration"; and (e) "[a]ny *other* compensatory damages allowable at law." § 448.103(2), Florida Statutes (emphasis added). Of these available remedies, subsections (a) through (d) provide only equitable or make whole remedies. *See* 29 FLA. JUR. 2D, *Injunctions* § 1 (1981) (injunction); *Andujar v. National Property & Casualty Underwriters*, 659 So. 2d 1214, 1217 (Fla. 4th DCA 1995) (reinstatement and back pay).

Pursuant to the doctrine of *ejusdem generis*, the phrase "other compensatory damages" in subsection (e) likewise refers solely to "make whole" relief intended to merely restore, or "compensate," the parties to the *status quo ante*. §448.103(2)(e), Florida Statutes. Under the *ejusdem generis* doctrine, "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (quoting 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION §47.17 (1991)). *See also Soverino v. State*, 356 So. 2d 269, 273 (Fla. 1978).

In *Washington State Dep't of Social & Health Serv. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 383-84 (2003), the Court applied the principle of *ejusdem generis* where, like in the Whistleblower Act, a general term modified by the term "other" followed several specific terms. The Court found that the general words following the term "other" were to be construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. *Id.* Similarly, under the Whistleblower Act, the general phrase "other compensatory damages" must be read to embrace only objects similar in nature to the "make whole" or equitable remedies specifically enumerated in the preceding subparts. Because the relief available under the Whistleblower Act is limited to equitable or

"make whole" remedies, even if the *Dahl* court correctly concluded that a claim under the Whistleblower Act was not a "tort" action, the Whistleblower Act is not comparable to the FCRA, which provides for recovery of tort-like compensatory and punitive damages. Regardless, the *Dahl dicta* is inconsistent with this Court's conclusion in *Scott II* that claims for wrongful discharge of employment in violation of public policy, even of statutory creation, are tort claims. 572 So. 2d at 903.

Moreover, to the extent Maggio implies that tort and statutory actions are mutually exclusive and that a statutory cause of action cannot sound in tort, her argument is inconsistent with blackletter law that tort causes of action may be created by the legislature (e.g., "statutory torts"). For example, CORPUS JURIS SECUNDUM 86, at 627 (1997) states "[t]he legislature possesses a broad authority both to establish and to abolish tort causes of action." Likewise, RESTATEMENT (SECOND) OF TORTS 874A cmt. b (1979) explains "[e]xamples of legislative provisions creating new tort rights are civil rights acts, dram shop laws and dog-bite statutes." *See also* DAN DOBBS, THE LAW OF TORTS 1, 312 (2001) (citing Title VII and the ADA as examples of statutes creating tort causes of action); *Scott*, 572 So. 2d at 903; *Byrd*, 552 So. 2d at 1104; *Meyer*, 537 U.S. at 285; *Loether*, 415 U.S. at 195-196.

B. Because A Discrimination Claim Is Governed By Civil Rights Act, Maggio Was Required To Comply With The Pre-Suit Notice Requirements Of Section 768.28(6), Florida Statutes.

It is well settled, and undisputed in this case, that compliance with § 768.28 (6)(a) is clearly and expressly a condition precedent to maintaining a cause of action in tort against a state agency or political subdivision. § 768.28(6)(b), Florida Statutes. *See also Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1022 (Fla. 1979); *Levine v. Dade County School Bd.*, 442 So. 2d 210, 212 (Fla. 1983); *Menendez v. North Broward Hospital Dist.*, 537 So. 2d 89, 91 (Fla. 1988). Therefore, given that discrimination claims are torts, and pursuant to the plain language of § 768.28(6), Maggio was required to comply with the presuit notice requirements of § 768.28(6).

Maggio contends, however, that she should be excused from the § 768.28(6) presuit notice requirements because, she argues, the FCRA provides a separate waiver of sovereign immunity wholly independent of §768.28. Maggio reasons: (1) the FCRA's definition of "person" includes the state and its subdivisions; (2) the FCRA cross-references § 768.28(5), but not § 768.28(6), therefore the inclusion of one must mean the exclusion of the other; and (3) the FCRA contains its own administrative exhaustion requirements and therefore is a "self-contained" statute. As explained below, Maggio's arguments are inconsistent with the statutory text and established rules of statutory construction and, therefore, are without merit.

1. Section 768.28 Must Be Strictly Construed.

Section 768.28, as a statutory waiver of sovereign immunity, "must be strictly construed." *Levine*, 442 So. 2d at 212. Strict construction is required because the immunity of the state and its agencies from liability for claims arising under Florida law or common law is "absolute . . . absent waiver by legislative enactment or constitutional amendment." *See Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources*, 339 So. 2d 1113, 1114 (Fla. 1976). The Florida Constitution preserves the State's sovereign immunity, but authorizes the Legislature to make provision "by general law for bringing suit against the state." FLA. CONST. art. X, § 13.

Pursuant to this constitutional authority, the Legislature, in 1973, enacted § 768.28, which provides a limited waiver of the State's sovereign immunity. *See* Ch. 73-313, § 1, Laws of Fla.; see also Ch. 74-235, § 3, Laws of Fla. (modifying the effective date of § 768.28). Through § 768.28, the State waived its sovereign immunity from suit with respect to actions based in tort up to a threshold amount, but not until certain statutory conditions precedent are met. *See* §§ 768.28(1), (5) and (6), Florida Statutes. Section 768.28(6) requires, *inter alia*, that all claimants present their claim in writing to both the appropriate agency and the Department of Financial Services. Section 768.28, provides, in relevant part:

> (1) 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 . . . may be prosecuted subject to the limitations specified in this act.
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> * * *
>
> (6)(a) An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also . . . presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency denies the claim in writing. . . .

This Court has held that § 768.28(6)(a)'s presuit notice requirement, as a mandatory condition precedent to bringing a civil action, must be strictly construed. *Commercial Carrier*, 371 So. 2d at 1022; *Levine*, 442 So. 2d at 212; *Menendez*, 537 So. 2d at 91. In *Levine*, this Court stressed:

> 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 Insurance 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 or need for the notice requirement is a matter wholly within the legislative domain.

442 So.2d at 212-13 (citations omitted).

Given that discrimination is a tort, the state's waiver of sovereign immunity for discrimination claims is subject to the presuit notice requirements of

§768.28(6). As there is no language in § 768.28 excluding discrimination claims from coverage, and, in light of the strict construction accorded statutory waivers of sovereign immunity, the plain language of § 768.28 cannot be construed as to exclude discrimination claims from its presuit notice requirements.

2. The FCRA must be read in *pari materia* with Section 768.28, not as an independent waiver of sovereign immunity.

Here, both the FCRA, generally and incidentally, and § 768.28, specifically, address the amenability of the state and its political subdivisions to suit for claims sounding in tort. Consistent with established rules of statutory construction, the FCRA must be read in *pari materia* with § 768.28, which it specifically incorporates. Statutes which relate to the same thing or to the same subject or object are in *pari materia*, although they were enacted at different times, and it is a fundamental rule of statutory construction that such statutes should be construed together so as to preserve the force of both and giving effect to the entire legislative intention. *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992); *Ellis v. Winter Haven*, 60 So. 2d 620, 623 (Fla. 1952).

The Legislature's intent that the FCRA be read in *pari materia* with § 768.28, which was enacted 19 years earlier, is expressly evidenced by the FCRA's cross-reference to § 768.28. Specifically, § 760.11(5) of the FCRA, which addresses the damages awardable under the FCRA, provides, with respect to state public entities: "Notwithstanding the above, the state and its agencies and

subdivisions shall not be liable for punitive damages. The total amount of recovery against the state and its agencies and subdivisions shall not exceed the limitation as set forth in s. 768.28(5)." § 760.11(5), Florida Statutes. Section 768.28(5) in turn prohibits punitive damages or pre-judgment interest and places monetary limits on compensatory damages recovered in actions against the State, its agencies and subdivisions. The fact that the Legislature, in the FCRA, expressly cross-referenced § 768.28 reflects its intention that both statutes be read as a cohesive whole.

Indeed, courts that have found that the state has waived sovereign immunity for FCRA discrimination claims have explicitly reasoned that the FCRA specifically cross-references § 768.28. For example, in *Klonis v. Department of Revenue*, 766 So. 2d 1186 (Fla. 1st DCA 2000), the First District Court of Appeal found that the Legislature, when it enacted the FCRA, "contemplated and intended the possibility that the State of Florida and its subdivisions would be sued [under the FCRA]." *Id.* at 1190. The court reasoned:

> the Florida Legislature expressly provided that 'the state and its agencies and subdivisions shall not be liable for punitive damages,' while 'the total amount of recovery against the state and its agencies and subdivisions shall not exceed the limitation as set forth in s. 768.28(5).' § 760.11(5), Fla. Stat. (1997) (emphasis added). The cross-referenced provision, Section 768.28(5), Florida Statutes (1997), immunizes 'the state and its agencies and subdivisions' from punitive damages and places limits on compensatory damages.

Id..

Likewise, in *Jones v. Brummer*, 766 So. 2d 1107 (Fla. 3d DCA 2000), the Third District Court of Appeal concluded:

> we believe that a fair reading of Florida's Civil Rights Act as a whole, together with Section 768.28, Florida Statutes, which is cross-referenced in the Act, evidences a sufficiently clear legislative intent that sovereign immunity for public employers, such as the appellee in this case, is waived for causes of action brought in state court under the Act.

Id. at 1108-09. *See also Diaz v. Florida Highway Patrol*, 775 So. 2d 389, 389 (Fla. 3d DCA 2000) ("a fair reading of FCRA, together with Section 768.28, Florida Statutes (1999) which is cross-referenced in the Act, evidences a sufficiently clear legislative intent that sovereign immunity for public employers is waived for causes of action brought in state court under the Act.").

Moreover, contrary to Maggio's argument that the FCRA's inclusion of the state and its subdivisions in its definition of "person" reflects a waiver of sovereign immunity independent of § 768.28, the FCRA's inclusion of the state and its subdivisions in its definition of "person" merely provided that the state and its agencies are subject to suit under the statute; it contains no suggestion that litigants bringing suit under the FCRA are exempt from the presuit notice requirements of §768.28(6)(a) or the other provisions of § 768.28, or that the statutes should not be read in *pari materia*. In fact, the Workers Compensation Statute, which Maggio attempts to contrast, similarly defines "employer" to include "the state and all political subdivisions thereof, all public and quasi-public corporations therein. . . ."

§ 440.02(16)(a), Florida Statutes. Yet, courts have consistently held that claims by employees for retaliatory discharge brought under § 440.205 of the Florida Workers' Compensation Law sound in tort and therefore that plaintiffs must comport with the mandatory condition precedent set forth in Section 768.28(6). *Osten v. City of Homestead*, 757 So. 2d 1243, 1244 (Fla. 3d DCA 2000); *Kelly v. Jackson County Tax Collector*, 745 So. 2d 1040, 1040-41 (Fla. 1st DCA 1999), *rev. denied*, 763 So. 2d 1043 (Fla. 2000). Both *Osten* and *Kelly* held that retaliation claims under the Florida Workers' Compensation Law were "tortious in nature" and, as such, the notice requirement of § 768.28(6) was applicable to those claims. *Osten*, 757 So. 2d at 1244; *Kelly*, 745 So. 2d at 1040-41.

Accordingly, the FCRA and § 768.28 must be construed together so as to preserve the force of both without destroying the evident intent of either statute.

3. The FCRA does not clearly and unequivocally waive the Section 768.28(6) presuit notice requirements.

This Court has established that "statutes purporting to waive the sovereign immunity must be clear and unequivocal." *Spangler v. Florida State Turnpike Authority*, 106 So. 2d 421, 424 (Fla. 1958). Accordingly, "[w]aiver will not be reached as a product of inference or implication." *Id.* Through § 768.28(6)(a), the Legislature clearly and unequivocally expressed its intention that all actions against the state sounding in tort are subject to its presuit notice requirements.

In contrast, nothing in the FCRA, including its provisions relating to administrative exhaustion requirements, makes any mention of excluding discrimination claims from § 768.28(6) presuit notice requirements. Yet, Maggio suggests that such waiver can nonetheless be inferred from the fact that the FCRA contains its own administrative procedural requirements and therefore is "self-contained." However, to read the FCRA in this way would be tantamount to expanding the scope of the state's existing waiver of sovereign immunity (e.g., by eliminating a necessary condition precedent to such waiver) by implication or inference, in direct contravention of the rule that statutory waivers of sovereign immunity must be "clear and unequivocal."

Moreover, Maggio's argument that the FCRA provides a separate waiver of sovereign immunity independent of § 768.28 because the FCRA contains its own administrative exhaustion requirements, and therefore is "self-contained," ignores the fact that courts have recognized that other legislatively-created torts with similar separate pre-suit administrative schemes also require compliance with the notice requirements set forth in § 786.28(6). For example, claimants in statutory medical malpractice claims brought pursuant to Chapter 766, Florida Statutes, must engage in pre-suit screening and investigatory procedures (similar to those which transpire before FCHR) and must also satisfy the mandatory conditions precedent set forth in Section 768.28(6)(a). *See Clark v. Sarasota County Public Hospital*, 65

F. Supp. 2d 1308, 1312 (M.D. Fla.), *reconsideration denied*, 65 F. Supp. 2d 1308 (M.D. Fla. 1998). Indeed, this Court, in *Menendez*, held that a plaintiff suing a state agency for medical malpractice must follow the presuit notice requirements of § 768.28(6), despite the separate presuit notice, screening, investigation and informal discovery requirements of Section 766. 537 So. 2d at 91; *see* §§ 766.106, 766.203, 766.206, Florida Statutes.

Similarly, Maggio relies on *Grice v. Suwannee Lumber Mfg. Co.*, 113 So. 2d 742 (Fla. 1st DCA 1959), for the proposition that when a statute is self-contained, it covers only those subjects within its self-contained limitations and does not affect rights outside its purview. This argument misses the point. First, even if the FCRA is "self-contained," *Grice* stands only for the proposition that a self-contained statute would not affect *rights* outside its purview, not that limitations or conditions precedent to suit set forth in other statutes would not apply. This point was made clear in *Joshua v. City of Gainesville*, 768 So. 2d 432, 439 (Fla. 2000), in which this Court applied the four-year statute of limitations from § 95.11(3)(f), Florida Statutes, to claims under FCRA when the FCHR fails to make reasonable cause determination within 180 days. *See also Ross v. Jim Adams Ford, Inc.*, 871 So. 2d 312 (Fla. 2004) (applying § 95.051(2), Florida Statutes in concluding that there was no basis for tolling the statute of limitations for FCRA claim). Moreover, although the *Grice* court characterized the Florida Workers'

Compensation Statute as "self-contained," courts, as discussed *supra*, have consistently held that the presuit notice requirements of § 768.28 apply to retaliation actions under the Workers' Compensation Statute, regardless of its self-contained nature.

In short, even if the FCRA could be accurately characterized as "self-contained" or otherwise construed as containing a separate waiver of sovereign immunity, the FCRA does not clearly and unequivocally waive the state's sovereign immunity beyond the scope of § 768.28 and, therefore, does not preempt or override the presuit notice requirements of § 768.28(6)(a).

4. Maggio improperly applies the doctrine of *expressio unius est exclusio alterius.*

Maggio and NELA argue that because the Legislature specifically incorporated § 768.28(5) into § 760.11(5) of the FCRA, the Legislature must have meant to exclude every other portion of § 768.28. This is a misapplication of the *expressio unius* doctrine. The canon *expressio unius est exclusio alterius* "has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (the expressio unius canon applies only where it is "fair to suppose that Congress considered the unnamed possibility and meant to say no to it" and "does not apply to every statutory listing or grouping"). *See also Lowe v. Broward*

County, 766 So. 2d 1199, 1208 (Fla. 4th DCA 2000) (*expressio unius* doctrine does not operate to exclude "domestic partners" where statutory terms "employees" and "dependents" connoted "a general concept without precise definition"), *rev. denied*, 789 So. 2d 346 (Fla. 2001). The Court explained this point in *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73, 81 (2002):

> "Just as statutory language suggesting exclusiveness is missing, so is that essential extrastatutory ingredient of an expression-exclusion demonstration, the series of terms from which an omission bespeaks a negative implication. The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which are abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded. E. CRAWFORD, CONSTRUCTION OF STATUTES 337 (1940) ("'expressio unius properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference'" (quoting *State ex rel. Curtis v. De Corps*, 134 Ohio St. 295, 299, 16 N.E. 2d 459, 462 (1938)); *United States v. Vonn*, 535 U.S. 55, 65, 152 L. Ed. 2d 90, 122 S. Ct. 1043 (2002))."

Here, the Legislature's cross-reference to § 768.28(5) in the damages provision of the FCRA does not constitute an enumerated list or a "series of terms" from which the omission of all other subsections bespeaks a negative implication. Rather, § 768.28(5) is mentioned only in the context of a statement that recovery of damages against the State is subject to the caps contained in §768.28(5). *See* § 760.11(5), Florida Statutes. The Legislature had good reason to include this provision, for had it not, a plaintiff bringing suit against the state under the FCRA would be faced with two different potential damage remedies: the limited damages

under § 768.28(5) or the potentially unlimited damages available under the FCRA. The fact that the Legislature decided to forestall such ambiguity by including a cross-reference to § 768.28(5) in the subsection addressing remedies available to a plaintiff under the FCRA cannot be read as reflecting an intent on the part of the Legislature to exclude the remainder of § 768.28. Rather, the more reasonable interpretation of the Legislature's cross-reference to § 768.28(5) is, in light of the strict construction accorded statutory waivers of sovereign immunity, that both statutes were intended to be read in *pari materia,* as a cohesive whole.

Moreover, the *expressio unius* doctrine must be disregarded when its application would thwart or frustrate legislative intent. *P. W. Wilkins & Co. v. Stoer*, 26 So. 2d 662, 665 (Fla. 1946); *Grant v. State*, 832 So. 2d 770, 773 (Fla. 5th DCA 2002) (the *expressio unius* doctrine "is an aid to help us determine legislative intent'"), *rev. denied*, 835 So. 2d 266 (Fla. 2002), *cert. denied*, 538 U.S. 980 (2003); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, § 47.23, at 324 (6th ed. 2000). Maggio's argument that the Legislature intended to exclude all other provisions of § 768.28, by specifically incorporating § 768.28(5) in the FCRA would lead to absurd results that could not reasonably be seen as consistent with the intent of the Legislature. For example, § 768.28(3), Florida Statutes, accords state agencies the discretion to "request the assistance of the Department of Financial Services in the consideration, adjustment, and settlement"

of claims. Section 768.28(4), Florida Statutes, grants state agencies "the right to appeal any award, compromise, settlement, or determination to the court of appropriate jurisdiction." Section 768.28(7), Florida Statutes, requires that process be served upon both the agency and the Department of Financial Services. It is implausible to infer from the Legislature's insertion of § 768.28(5) in the damages provision of the FCRA that the Legislature intended to strip the state of its appeals rights and its right to request assistance from the Department of Financial Services, or eliminate the Department of Financial Services' right to be served with process in cases brought under the FCRA. In short, Maggio's application of the *expressio unius* doctrine would thwart legislative intent reflected in §§ 768.28(3), (4), (6), and (7).

5. *Generalia specialibus non derogant.*

Under the canon of statutory construction *generalia specialibus non derogant*, a subsequent statute, treating a subject in general terms and not expressly contradicting the provisions of a prior specific act, is not to be considered as intended to affect the more particular and specific provisions of the earlier statute, unless it is absolutely necessary so to construe it in order to give its words any meaning at all. *American Bakeries Co. v. Haines City*, 180 So. 524, 528 (Fla. 1938) ("a general Act will not be held to repeal or modify a special one embraced within the general terms of the general Act, unless the general Act is a general

revision of the whole subject, or unless the two Acts are so repugnant and irreconcilable as to indicate a legislative intent that the one should repeal or modify the other"); *Rodgers v. United States*, 185 U.S. 83, 87-89 (1902) ("It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute").

Here, in 1973, the Legislature specifically and expressly addressed the state's waiver of sovereign immunity for claim sounding in tort against the state or its political subdivisions and set forth explicit limits and conditions precedent for such waiver. *See* § 768.28, Florida Statutes. In contrast, in 1992 the Legislature enacted the FCRA as a part of an extensive statutory scheme intended "to secure for all individuals within the state freedom from discrimination" in the areas of education, employment, housing and public accommodations. §§ 760.01(2) & 760.07, Florida Statutes. The sweep of the employment provisions of the FCRA is extremely broad, prohibiting discrimination and retaliation by all employers (public and private), employment agencies, labor organizations, and joint labor-management committees on the basis of "race, color, religion, sex, national origin, age, handicap, or marital status." §§ 760.01(2) & 760.10, Florida Statutes. The FCRA does not specifically address the issue of sovereign immunity, but rather only incidentally references the state's amenability to suit by including the state

and its political subdivisions within its definition of "persons" and by specifically cross-referencing § 768.28(5). These general references to the state's amenability to suit under the FCRA do not expressly contradict the specific provisions of § 768.28 relating to the state's waiver of sovereign immunity. Both statutes can stand together, and a plaintiff can easily comply with the requirements of both statutes without fear that complying with one will result in non-compliance with the other. Therefore, the statutes are not irreconcilable or repugnant, and the FCRA cannot be considered as intended to affect the particular and specific provisions of § 768.28, including its presuit notice requirements.

6. *Leges posteriores priores contrarias abrogant* is inapplicable.

Maggio argues that the FCRA should be regarded as the "specific" statute, and therefore must control § 768.28, which Maggio contends is more general. This argument is off the mark. First, even if the FCRA could accurately be characterized as a "specific" statute because it covers a single topic, discrimination, and even if § 768.28 could be accurately characterized as a "general" statute, the FCRA would not abrogate § 768.28(6)'s presuit notice requirement because the FCRA and § 768.28(6) are not in conflict. Pursuant to the rule of statutory construction, *leges posteriores priores contrarias abrogant,* later specific statutes may abrogate prior general statutes only where "the two are manifestly inconsistent with and repugnant to each other." *Smith v. Milton*, 54 So. 719, 764 (Fla. 1911).

See also Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1287 (Fla. 2000); *Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80, 84 (Fla. 2000) ("Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another") (quoting *Forsythe*, 604 So. 2d at 455); *Howarth v. City of DeLand*, 158 So. 294, 298 (Fla. 1934) ("where the courts can, in construing two statutes, preserve the force of both without destroying their evident intent it is their duty to do so").

Here, there is no relevant repugnancy or conflict between the FCRA and §768.28(6). Aside from the issue of available damages, § 768.28 does not purport to take away any rights granted under the FCRA, nor does the FCRA contain any provisions that prevent the state from exercising its right to sovereign immunity as set forth in § 768.28. *See Milton*, 54 So. at 765 (explaining that a conflict between legislative provisions occurs when "they cannot stand together"). Moreover, a complaining party can comply with the requirements of both statutes without fear that compliance with one statute will result in failure to comply with the other. *See Lowe*, 766 So. 2d at 1207 (defining conflict between two legislative enactments as occurring when "one must violate one provision in order to comply with the other"). Accordingly, the Court has a duty to preserve the force of both the FCRA and § 768.28. This can only be accomplished by finding that the presuit notice requirements of § 768.28(6) apply to discrimination claims under the FCRA. Any

alternative construction would improperly result in a repeal by implication of the presuit notice requirements of § 768.28(6). *See Butler v. State*, 838 So. 2d 554, 556 (Fla. 2003) ("[i]t is presumed that statutes are passed with the knowledge of existing statutes, so courts must favor a construction that gives effect to both statutes rather than construe one statute as being meaningless or repealed by implication"); *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 250 (Fla. 1987) ("[i]t is well settled in Florida that the courts will disfavor construing a statute as repealed by implication unless that is the only reasonable construction"); *Woodgate Development Corporation v. Hamilton Investment Trust*, 351 So. 2d 14 (Fla. 1977) ("The courts presume . . . that the legislature does not intend to . . . effect so important a measure as the repeal of a law without expressing an intention to do so").

Second, Maggio's argument mischaracterizes the nature of the relevant provisions of the statutes. The issue in the instant case is waiver of sovereign immunity. The FCRA does not specifically address sovereign immunity, but rather only makes general and incidental reference to the state's amenability to suit through its inclusion of the state and its political subdivisions within its definition of "persons" and its cross-reference to § 768.28(5). In contrast, § 768.28, specifically and expressly addresses the state's waiver of sovereign immunity and the conditions precedent and limitations to such waiver. Therefore, even if the

FCRA, as a whole, could be properly characterized as a "specific" or "special" statute (which it cannot), it does not "specifically" address the pertinent issue – waiver of sovereign immunity. This Court has long held that "'the maxim of *leges posteriores priores contrarias abrogant* is not applicable to cases where the precedent Act is special or particular, and the subsequent Act is general, the rule being that a later general Act does not work any repeal of a former particular statute.'" *American Bakeries Co.*, 180 So. at 528 (quoting *Stewart v. De Land-Lake Helen Special Road & Bridge Dist.*, 71 So. 42, 47 (Fla. 1916)). Because §768.28, the precedent statute, is specific and particular with regard to waiver of sovereign immunity, and the FCRA, the subsequent statute, is general and only incidentally references the state's amenability to suit, the maxim *leges posteriores contrarias abrogant* is not applicable and the FCRA does not work a repeal of § 768.28(6) presuit notice requirements.

C. Presuit Notice Is Not Inconsistent With The Purpose Of The Florida Civil Rights Act

1. FCRA charge filing and administrative procedures do not satisfy § 768.28(6).

Maggio argues that "[t]he FCRA's administrative claims process mirror and serves the very same purpose as the notice requirement in § 768.28(6)." This is incorrect. At the outset, § 768.28(6) requires three things prior to instituting an action against a state agency. First, the claimant must present the claim to the agency in writing. Second, the claimant must present the claim to the Department of Financial Services in writing. Third, the claim proffered to the Department of Financial Services must be presented within three years after it accrues and the agency or the Department must deny the claim in writing. *See Menendez*, 537 So. 2d at 91. Filing a charge with the Florida Commission of Human Relations ("FCHR") satisfies none of these requirements. First, the FCRA does not require a complaining party to provide notice to the Department of Financial Services. Indeed, filing a charge of discrimination with the FCHR prior to the initiation of litigation in court does nothing to place Department of Financial Services on notice of a claim. Second, a complaining party is not even required to notify the relevant agency of the charge; rather such notification is provided to the agency by the FCHR, the federal Equal Employment Opportunity Commission ("EEOC") or myriad county or municipal human rights commissions with whom the charging

party has the option of filing claim. Third, the FCRA charge filing and administrative procedures do not give the Department of Financial Services the opportunity to review or deny the claim in writing.

Moreover, the FCRA's administrative claims process serves a different purpose than § 768.28(6)(a)'s presuit notice requirement. The purpose of §768.28(6)(a)'s presuit notice requirement is to ensure that the Department of Financial Services has an early opportunity to decide whether to resolve or challenge demands against the state before such claims become civil actions. Thus, the presuit notice requirement serves to control the citizens' exposure to the expense of litigation by settling and/or litigating lawsuits brought against the state, its agencies and subdivisions. In contrast, the purpose of the FCHR administrative process is "to eliminate discrimination against, and antagonism between, religious, racial, and ethnic groups and their members," by providing the FCHR an opportunity to investigate and conciliate complaints of discrimination against all employers (public and private) and to determine if there is reasonable cause supporting a violation of the FCRA. *See* §§ 760.05, 760.11(3), Florida Statutes. Accordingly, § 768.28(6) and the FCRA's administrative procedures serve different purposes.

In light of their different purposes, the type of information that § 768.28(6) requires be provided to the Department of Financial Services is not the same

information that would necessarily be provided to the FCHR, EEOC or local agency in an administrative charge of discrimination or during an administrative investigation. For example, under § 760.11(1), a complaining party must file a complaint with the FCHR which "nam[es] the employer, employment agency, labor organization, or joint labor-management committee, or, in the case of an alleged violation of s. 760.10(5), the person responsible for the violation and describe[es] the violation." In contrast, under § 768.28(6)(a), presuit notice must identify a "claim" and must include the claimant's date and place of birth, social security number or federal identification number, the case style and tribunal and the nature and amount of "adjudicated penalties" owed by the claimant to the state. § 768.28(c), Florida Statautes. A charge of discrimination does not necessarily constitute a "claim" for purposes of §768.28(6) for, although a "claim" under §768.28 need not necessarily be a lawsuit, a claim must be "a demand for something due as a matter of right." *Kuper v. Perry*, 718 So. 2d 859, 860 (Fla. 5th DCA 1998). A charge of discrimination does not serve as a demand, as a complaining party is not entitled to money damages during the administrative process. Therefore, the FCRA's administrative procedures do not satisfy the presuit notice requirements of § 768.28.

2. Constructive or third party notice does not satisfy the requirements of § 768.28(6).

Even if the Department of Financial Services is put on notice of a claim by the FCHR, EEOC or local agency (which it is not) or by the agency alleged of wrondoing, such notice would be insufficient because it would be provided through a third party and not by a claimant, as expressly required by § 768.28(6). This Court has rejected the notion that § 768.28(6) can be satisfied through constructive notice or through notice provided by a third party. For example, in *Menendez*, the Court rejected the contention that § 768.28(6) presuit notice requirements were satisfied where plaintiff alleged the Department of Insurance (now Department of Financial Services) received constructive notice of the claim through the Florida Board of Medical Examiners and the Department of Health and Rehabilitative Services. 537 So. 2d at 91. The Court reasoned that strict compliance with the notice requirement of § 768.28(6) is necessary in order to maintain an action against the state, its agencies or subdivisions. *Id. Cf. Metropolitan Dade County v. Reyes*, 688 So. 2d 311, 312 (Fla. 1996) (in light of strict construction of legislative waivers of sovereign immunity, spouse required to give separate notice of her derivative loss of consortium claim). Therefore, even if the FCHR were inclined to notify the Department of Financial Services (which it is not statutorily empowered to do), or even if the agency alleged of wrongdoing were to forward the FCHR notification of a charge to the Department of Financial

Services, this third party notice would not comport with the explicit requirement of § 768.28(6) that the notice be provided directly from the claimant.

3. Presuit Notice Requirements of § 768.28(6) do not interfere with the FCRA administrative process.

Only an "action[] at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages" triggers the requirement of presuit notice under § 768.28(6)(a). *See* § 768.28(1), Florida Statutes. Therefore, only when the complaining party feels that the administrative process did not satisfactorily resolve her concerns, and her rights need to be vindicated through a lawsuit, do the presuit notice requirements of § 768.28(6) apply. At that point, the Department of Financial Services is entitled to know whether the complaining party will assert her claims in court, so that an appropriate valuation of the case can be made, with due regard for the state's financial resources. If, on the other hand, the FCHR determines that there is not reasonable cause to believe that a violation of the FCRA has occurred, the FCHR must dismiss the complaint and, absent administrative reversal, the claim is barred and the presuit notice requirements of § 768.28(6) never apply. *See* § 760.11(7), Florida Statutes.

Moreover, the timeframe for giving presuit notice to the Department of Financial Services under § 768.28(6) – 3 years from the accrual of the claim – does not interfere with the complaining party's right to file a charge of discrimination

with the FCRA. Because a charge of discrimination must be filed with the FCHR within 365 days of the alleged violation, *see* § 760.11(1), Florida Statutes, it is implausible to conclude that complying with § 768.28(6)'s three-year deadline will somehow prevent a complaining party from filing a timely charge with the FCHR.

Yet, Maggio argues that the presuit notice requirements serve "only as a trap for the unwary." Maggio's argument ignores the fact that this theory applies with equal force to all tort claims, including medical malpractice claims, against the state, yet, as this Court recognized in *Levine*, the Legislature has already weighed this and similar arguments when it decided to waive the state's sovereign immunity subject to the conditions and limitations set forth in § 768.28, therefre, a plaintiff's or a court's "views about the wisdom or propriety of the notice requirement are irrelevant because the requirement is so clearly set forth in the statute." 422 So. 2d at 212.

Furthermore, the presuit notice requirement of § 768.28(6), which is by now a well-established condition precedent to suit against the state, is no more of a "trap for the unwary" than the requirement that an FCRA plaintiff must comply with the general limitations period for statutory claims for statutory claims in § 95.11(3)(f), *see Joshua*, 768 So. 2d at 439; rules requiring timely service of process, FLA.R.CIV.P. 1.070(j), FED.R.CIV.P. 4(m), and the rule requiring timely

prosecution of claims, FLA.R.CIV.P 1.420(c). However, Maggio could not seriously argue that these conditions to suit do not apply to FCRA claims on the basis that they constitute "traps for the unwary," despite the fact that they constitute additional prerequisites to suit.

4. Complying with presuit notice requirements of § 768.28(6) requires little additional effort by complaining parties.

Although the administrative process of the FCRA is not a substitute for the presuit notice requirements of § 768.28(6), both statutes can easily be satisfied by any party asserting a claim of discrimination under the FCRA. For example, when a party files a charge of discrimination with the FCRA, all that person must do to satisfy the requirements of § 768.28(6) is to forward the charge to the Department of Financial Services together with the small amount of additional information required by § 768.28(6). Indeed, courts have held that no particular form is required to satisfy the presuit notice requirements of § 768.28(6), and a letter will do. *Metropolitan Dade County v. Coats*, 559 So. 2d 71, 72 (Fla. 3d DCA), *rev. denied*, 569 So. 2d 1279 (Fla. 1990). This is not onerous, and ensures that the person would meet the three-year deadline in § 768.28(6)(a). It adds very little to a complaining party's burden, while giving the state a fair opportunity to reduce the effect of meritorious claims on the public fisc.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative and affirm the Second District Court of Appeal's decision that discrimination claims under the FCRA are torts and therefore Maggio was required to comply with the presuit requirements of § 768.28(6).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that Respondent's Answer Brief on the Merits is in compliance with the font requirements of FLA.R.APP.P. 9.210(a)(2).

Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits has been furnished by U.S. Mail to Gary Lee Printy, Esquire, The Law Office of Gary Lee Printy, 1804 Miccosukee Commons Drive, Suite 200, Tallahassee, FL 32308-5471, John W. Bakas, Jr., Esquire, 201 E. Kennedy Blvd., Suite 400, Tampa, FL 33602, John C. Davis, Esquire, Law Office of John C. Davis, 623 Beard Street, P. O. Box 3855, Tallahassee, FL 32303, and Damon Kitchen, Esquire, Constangy, Brooks, & Smith LLC, 200 W Forsyth St., Ste 1610, Jacksonville, FL 32202-4349 this ____ day of June, 2004.

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