IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-2330
Lower Tribunal No(s).: 1D08-1424

FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES	vs.	WILLIAM HERNANDEZ
Petitioner		Respondent

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

The issues, as presented by Respondent in his Answer Brief, are not those of the certified questions of the First District Court of Appeal in this case. Rather, Respondent has attempted to reframe the certified questions in a manner, it is presumed, that benefit his argument that s. 322.2615 **must** be read *in pari materia* with s. 316.1932.

Respondent's argument boils down to its claim that s. 322.2615 and s. 316.1932 **must** be read *in pari materi*, and therefore, a hearing officer must consider whether there has been compliance with s. 316.1932, including whether the driver was lawfully arrested prior to being asked to submit to any test. It is submitted that the First District Court of Appeal should have held that the provisions of s. 322.2615 are sufficiently certain on their face so that there is no need to read it *in pari materia* with s. 316.1932, and thus create an ambiguity that does not exist in the plain language of s. 322.2615. Section 322.2615(7)(b), which relates to the suspension of a driver's license for refusal to submit to a breath, blood or urine test, explicitly limits the hearing officer's scope of review to the three issues enumerated in that statute.

Respondent has inappropriately interjected throughout his Answer Brief the issue of a license suspension for an unlawful blood-alcohol level or breath-alcohol level [s. 322.2615(7)(a)] in the limited scope of the hearing officer's review, with

the issue of a license suspension for refusal to submit to a breath, blood or urine test [s. 322.2615(7)(b)]. This case involves refusal to submit to a breath test.

Respondent's unsupported assertions, that "notwithstanding the removal of the specific reference to s. 316.1932 in the amended statute, s. 322.2615 remains inextricably intertwined with s. 316. 1932" and that "[i]f the hearing officer is not permitted to consider compliance with s. 316.1932, then s. 322.2615 would fail to afford the right to a meaningful review as required" ignore and denigrate the Legislature's clear intent to divest and distinguish what is a purely administrative function of suspending the privilege of possessing a driver's license from the clear deprivation of liberty flowing from the penal consequences of ss. 316.193 and 316.1932, the criminal statutes at issue pertaining to driving under the influence, implied consent and refusal.

Respondent simply ignores the ramification of the fact that the Legislature amended s. 322.2615 in 2006 and unabashedly asserts that, "notwithstanding the removal of the specific reference to a lawful arrest **for DUI** from the scope of review, issues regarding the lawfulness of the seizure and subsequent arrest of the driver must still be considered at a formal review hearing under the scope of review regarding a test result obtained pursuant to s. 316.193, or refusal to submit to a test authorized under s. 316.1932." Rather than give force and effect to the Legislature's clear expression to divest the administrative suspension process from

the criminal standards applicable to ss. 316.193 and 316.1932, Respondent would have this Court determine that the plain language of the amended statute [s. 322.2615] is 'inextricably intertwined" with s. 316.1932 and require this Court to resort to reading the distinctly separate statutes *in pari materia*. This Court should resoundingly reject this attempt to create conflict where none exists.

Respondent obviously aligns himself with the Fifth District Court of Appeal's decision in Dep't of Highway Safety and Motor Vehicle v. Pelham, 979 So.2d 304 (Fla. 5th DCA 2008) rev. denied, 984 So.2d 519 (Fla. 2008) and conveniently ignores and remains mute as to the decision of the Second District Court of Appeal in McLaughlin v. Dep't of Highway Safety and Motor Vehicles, 2 So.3d 988 (Fla. 2d DCA 2008). The Court in Pelham, relied upon the Fifth District Court of Appeal's decision in State, Dep't of Highway Safety and Motor Vehicles v. Whitely, 846 So.2d 1163 (Fla. 5th DCA 2003), a decision that predates the Legislature's 2006 amendment to s. 322.2615.

Respondent asserts that the Court in Pelham considered the house staff report, however, a review of the Court's opinion establishes that the Court did not "overlook" the legislative staff report; rather, the Court was "reluctant to accept this staff analysis as evidence of what the legislature intended by making decisions in the statute." The Court relied upon Justice Cantero's dissent in Am. Home Assur. Co. v. Plaza Materials Corp., 908 So.2d 360, 375-376 (Fla. 2005) to hang

its hat on its incorrect position that staff analysis is not reliable evidence of legislative intent, a position decidedly rejected by this Court in Massey v. David, 979 So.2d 931 (Fla. 2008) wherein this Court specifically stated that "this history is an 'invaluable tool' in construing the provisions of a statute." Citing Ivey v. Chicago Ins. Co., 410 So.2d 494, 497 (Fla. 1982); see also White v. State, 714 So. 2d 440, 443 n.5 (Fla. 1998) (noting that legislative staff analyses are "one touchstone of the collective legislative will" (quoting Sun Bank/South Florida, N.A. v. Baker, 632 So.2d 669, 671 (Fla. 4th DCA 1994))). Consistent with this Court's most recent enunciated precedent, this Court acknowledged that it has utilized legislative history on numerous occasions in attempting to discern the intent of the Legislature. Citing Gulfstream Park Racing Ass'n v. Tampa Bay Downs, 948 So.2d 599 (Fla. 2006); State v. Goode, 830 So.2d 817 (Fla. 2002); Mays v. State, 717 So.2d 515 (Fla. 1998); Magaw v. State, 537 So.2d 564 (Fla. 1989); Roberson v. Fla. Parole & Probation Comm'n, 444 So.2d 917 (Fla. 1983); Alford v. Finch, 155 So.2d 790 (Fla. 1963). The majority of this Court accordingly found Justice Cantero's dissenting view in Massey contrary to longstanding Florida jurisprudence.

Respondent attempts to side-step the effect of the staff analysis prepared for the 2006 amendment to s. 322.2615 and its pronouncement of the collective legislative will by attempting to downplay the clear intent by asserting "[t]he **only**

intention set out in the staff analysis was to remove the requirement that hearing officer (sic) must find a lawful arrest for a violation of s. 316.193." (Emphasis added). Even assuming this argument were correct, Respondent acquiesces to the clear legislative intent that by amending s. 322.2615, the legislature intended to take the lawfulness of the arrest outside the limited scope of review of the hearing officer. This is the very crux of the issue before this Court. If this Court determines that the legislature intended to remove this requirement from the hearing officer's scope of review, then there is no need for the Court to read the statutes *in pari materia.* The language of s. 322.2615, as amended, is plain on its face. The previous requirement, that the hearing officer must determine "whether the person was placed under lawful arrest for a violation of s. 316.193," was removed. See §§ 322.2615(7)(a) and (b), Fla. Stat. (2005). As this Court reiterated in Kasischke v. State, 991 So.2d 803 (Fla. 2008), "[i]t is a basic rule of statutory construction that 'the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.'" (citing Martinez v. State, 981 So.2d 449, 452 (Fla. 2008), quoting State v. Bodden, 877 So.2d 680, 686 (Fla. 2004))). As this Court recognized in Martinez, "[w]e cannot construe the plain language of the statute in a manner that renders this language superfluous." Kasischke, 991 So.2d at 808. Respondent's

entire argument invites this Court to construe the amended language of s. 322.2615 in a manner that renders the language superfluous.

Contrary to Respondent's assertion, the amended language to s. 322.2615 is clear and unambiguous and does not result in a situation whereby "this Court would have to essentially rewrite s. 322.2615 to include these missing provisions in order to find that the Department's argument is correct." Sections 322.2615(7)(a)1. and (b)1., Florida Statutes, as amended in 2006 by the Legislature, delineate that a breath, urine or blood test would be requested when "a law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances."

CONCLUSION

For the foregoing reasons, the Department respectfully requests this Court answer the First District Court of Appeal's first certified question in Hernandez in the affirmative and consequently find the second certified question to be moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been mailed by United States mail to Tony C. Dodds, Esquire, 1628 S. Florida Avenue, Lakeland, Florida, 33803 and Susan Z. Cohen, Esquire, 233 East Bay Street, Suite 1125, Jacksonville, Florida 32202, on this ____ day of June, 2009.

I HEREBY CERTIFY that the font size used in the Department's Reply Brief is Times New Roman 14 point.

_____
DOUGLAS DEREK SUNSHINE
Assistant General Counsel