IN THE FLORIDA SUPREME COURT
STATE OF FLORIDA

Charlene M. Bifulco
Petitioner

Case No.: **SC09-172**
DCA Case No.: 5D08-98

v.

Patient Business & Financial Services, Inc.
Respondents

Florida Worker's Advocates, inc.
Amicus for Petitioner

BRIEF OF AMICUS CURIAE
FLORIDA WORKERS' ADVOCATES
FILED ON BEHALF OF PETITIONER CHARLENE M. BIFULCO

MARK L. ZIENTZ, ESQUIRE
Law Offices of Mark L. Zientz, P.A.
Two Datran, Suite 1619
9130 South Dadeland Boulevard
Miami, Florida 33156
(305) 670-6275
Fla. Bar No: 150168
Counsel for Amicus
Florida Workers' Advocates

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INTRODUCTION

This brief is filed on behalf of a Florida Workers' Advocates, Inc., amicus curiae for Petitioner Charlene M. Bifulco. Florida Workers' Advocates, Inc. is a non-profit corporation dedicated to preserving and enhancing the rights of those unfortunate enough to be injured while employed in occupations covered by the Florida Workers' Compensation Act, Chapter 440 F.S. Chapter 440 ordinarily provides the exclusive remedy for redress of losses caused by injury arising out of and in the course and scope of employment.

All emphasis added will be that of amicus, unless designated otherwise.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal reversed the ruling of the trial court finding that government entities that are ordinarily entitled to "pre-suit" notice of tort actions pursuant to s.768.28(6) Fla. Stat. are not entitled to such notice when the action arises from allegations that the defendant violated s.440.205 Fla. Stat. (2003) entitled "Coercion of Employees". Petitioner did not prevail in the trial court on the ground that pre-suit notice was required. The 5th District Court of Appeal reversed on this issue by finding that violations of s.440.205 were 'statutory torts' not 'common law' torts. The 5th DCA certified conflict with decisions of two other District Courts of Appeal on the same point of law.

As Amicus, Florida Workers' Advocates (FWA) believes that the trial court and the district court below in this matter, as well as the district courts in the two cases forming the basis for the conflict certification were unaware of or overlooked the provisions of s.440.55 Fla. Stat. (1940) "Proceedings Against State". Amicus will attempt to inform the court of the import of this forgotten section of the Workers' Compensation Act and the history related to this provision. Sovereign immunity arising out of workers' compensation related matters was not waived by s.768.28. It was waived decades before by s.440.55 Fla. Stat. (1940)

ARGUMENT

THE LEGISLATURE HAS WAIVED ALL SOVEREIGN IMMUNITY RIGHTS, SUBSTANTIVE AND PROCEDURAL, IN MATTERS RELATED TO WORKERS' COMPENSATION

STANDARD OF REVIEW: De Novo. Questions related to the interpretation of the law are reviewed *de novo*, Bay County v. Town of Cedar Grove, 992 So. 2d 164 (Fla. 2008).

The 5th DCA had to use circuitous reasoning to provide the legal basis necessary to rule in favor of petitioner on the issue of whether or not petitioner was required to give 'pre-suit' notice to the respondents before an action could proceed

to enforce petitioners right to damages as the result of an alleged violation of s.440.205 Fla. Stat. (2003)(Retaliatory Discharge). Petitioner did not contest that Respondent was a governmental entity protected by the language of s.768.28 Fla. Stat. Petitioner only contested the defense that pre-suit notice was required. The DCA reasoned that even though s.440.205 provided damages like a tort action and had the same statute of limitations as a tort action, that for purposes of s.768.28 pre-suit notice, the action was not a "common law" tort claim.

Amicus believes the court below did not have to reach the issue of what the nature of the tort is because the legislature had waived all immunity from all actions at law against the State when it passed s.440.55 (still in its original version) in 1940, Comp. Gen. Laws Supp. 1940 s.5966(55).

> Section 440.55 "PROCEEDINGS AGAINST STATE" states: "Any person entitled to compensation benefits by reason of the injury or death of an employee of the state, its boards, bureaus, departments, agencies, or subdivisions employing labor, may maintain proceedings and actions at law against the state, its boards, bureaus, departments, agencies, and subdivisions, for such benefits, said proceedings and action at law to be in the same manner as provided herein with respect to other employers".

At the time of its passage in 1940, s.440.55 mentioned "actions at law against the state". In 1940 employees had the option to reject the workers' compensation act as a remedy for injuries at work and could elect to sue their employers in tort. The sovereign was not immune from these suits by reason of s.440.55. The 'opt out'

rights granted by s.440.07 and s.440.08 enacted by the Laws of 1935, c. 17481, s.7 were repealed by Laws 1970, c.70-148 s.4. Nevertheless, the waiver of sovereign immunity for 'actions at law against the state' remained a viable part of chapter 440.

There are situations where the employer, even if the sovereign, can be sued in tort for the effects of an injury on the job. First, government is included in the definition of "Employer" in chapter 440. "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein... s.440.02(16)9a) Fla. Stat. (2007).

Depending on the circumstances, the employer, even if a sovereign, may be estopped to raise as a defense to a tort action brought by an employee that the exclusive remedy is under workers' compensation, City of Miami v. Gutierrez, 979 So. 2d 1028 (Fla. 3 DCA 2008)(City defended workers' compensation claim by decedents estate on grounds death was caused by recreational activities and was estopped to raise workers' compensation immunity as a defense). See also, Francoeur v. Pipers, 560 So. 2d 244 (Fla. 3 DCA 1990)(Employers wrongful conduct may estop employer from raising workers' compensation immunity defense to tort action), Byerley v. Citrus Publications,725 So. 2d 1230 (Fla.5 DCA 1999)(Employer estopped to raise workers' compensation immunity defense to tort action when employer, through its workers'

compensation carrier denied the injury arose out of the employment).

There are no decisions in this state to guide the court in the area of legislative intent. Suffice it to say, the apparent intent of s.440.55 was that in matters of injury or death arising out of the employer/employee relationship, the state and its subdivisions are to be treated as any other private employer.

We know that there are no 'caps' on workers' compensation recoveries against the state as there are in other actions against the state. Sovereign immunity is only partially waived pursuant to , s.768.28. For an on the job injury or death, the waiver is total. No caps.

Not only is the waiver total, the procedural requirements related to actions against the state are included in the waiver, "...*to be in the same manner* as...with respect to other employers" s.440.55. No pre-suit notice is required for filing a petition for workers' compensation benefits.

This court first recognized in Smith v. Piezo Technology and Professional Administrators, 427 So. 2d 182 (Fla. 1983), employees whose employers violated s.440.205(1979) had a right but no remedy under chapter 440 or before a deputy commissioner (now Judge of Compensation Claims). Justice Overton, specially concurring with Justice Adkins would have established a *common law tort of retaliatory discharge*, Smith at p.184. Later the 1st DCA extended the reach of

s.440.205 to *subsequent employers* in Bruner v. GC-GW, inc, 880 So. 2d 1244 (Fla. 1DCA 2004)[1]. Had the defendant been the state, would pre-suit notice have been required? We think not, in light of s.440.55(Fla. Stat.)

Other tort actions in the courts of general jurisdiction exist where the underlying injury arose out of the employment relationship and an injury on the job but the immunity from suit usually afforded employers who provide workers' compensation coverage under s.440.11 is overcome. This court in Aguilera v. InServices, inc, etc., 905 So. 2d 84 (Fla. 2005) described one such situation. Had the defendant been the state, would pre-suit notice have been required? We think not, s.440.55 (Fla. Stat.).

In Kelley v. Jackson County Tax Collector, 745 So. 2d 1040 (Fla.1 DCA 1999) the court concluded that s.440.205 was a tort action and, without any mention of s.440.55, allowed the trial courts dismissal of the complaint *with prejudice* to stand for failure of the Plaintiff to give pre-suit notice. The 5th DCA was correct in holding Kelley, infra. was "wrongly decided". Correct, but for the wrong reason. Florida Workers' Advocates, inc. believes that had the 1st DCA or the 5th DCA considered s.440.55, both cases would have been decided without resort to determining if the action sounded in tort or not, or common law tort versus statutory tort. The legislative

[1] Florida Workers Advocates, inc. participated as Amicus in Bruner

waiver of sovereign immunity for 'actions at law' arising from on the job injuries is absolute.

In Osten v. City of Homestead, 757 So 2d 1243 (Fla. 3 DCA 2000), the 3rd DCA affirmed a dismissal with prejudice against the employee who alleged retaliatory discharge. The dismissal was for failure to give pre-suit notice under s.768.28. The 3rd DCA also enforced the requirement that pre-suit notice be given separately by a spouse who seeks to proceed on a derivative action, Osten, infra at p.1244. A spouses derivative action for injuries arising out of the employment relationship is 'covered' by chapter 440:

> "The liability of an employer proscribed in s.440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third party tortfeasor, and to the employee, the legal representative thereof, *husband or wife*, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death..." s.440.11(1) (Fla. Stat. 2007).

Had the 3rd DCA been made aware of s.440.55, neither the claim of Mr. Osten

nor Mrs. Osten could have been dismissed with prejudice for lack of pre-suit notice.

This court has held that where a specific statute covering a particular subject matter and a general statute conflict, the statute covering the specific subject matter controls, Maggio v. Florida Department of Labor and Employment Security, 899 So 2d 1074 (Fla. 2005). The very specific waiver of sovereign immunity in s.440.55

(since 1940), controls over the more limited waiver in Chapter 768. Section 440.55 does not require a spouse to proceed in a different manner. Nor does it set caps on damages. Nor does it require pre-suit notice. The legislative intent is obvious, "...said proceedings and action at law to be in the same manner as provided herein with respect to other employers.", s.440.55 (Fla. Stat.2007).

In Maggio, the court declined to rule on the correctness of Osten, supra. and Kelley, supra. because the issue was not before the court. It is now. The court also declined to reach the broader issue of whether s.768 requirements are only applicable to 'common law torts', Maggio, at 1081. That issue need not be reached if s.440.55 controls all actions arising out of an injury on the job covered by chapter 440.

CONCLUSION

Florida Workers' Advocates, inc. on behalf of the Petitioner, respectfully requests the court to Affirm the 5th District Court's result, but for the reasons stated herein. That

in actions at law arising out of the rights and responsibilities granted to and required of, all employers by Chapter 440, the sovereign must be treated the same as any private employer.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing has been furnished by US Mail this _____ day of_____ 2009, to: Frederick C. Morello, Esq. 111 N. Frederick Ave., 2nd Floor, Daytona Beach, Fl. 32114, Thomas J. Leek, Esq. 150 Magnolia Ave, PO Box 2491, Daytona Beach, Fl. 32115-2491, Florida Workers. Advocates, inc., 223 S. Gadsden St. Second Floor, Tallahassee, Fl. 32302.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the font requirements of Rule 9.210(a) Rules of Appellate Procedure have been complied with in this Amicus Brief on this ___ day of , 2009.

LAW OFFICES OF MARK L. ZIENTZ, P.A.
9130 SOUTH DADELAND BOULEVARD
SUITE 1619
MIAMI, FLORIDA 33156
(305) 670 6275

By: _____

Mark L. Zientz, Esq.
Florida Bar No.: 150168
Amicus Attorney for
Florida Worker's Advocates, inc.