

**IN THE SUPREME COURT OF FLORIDA**

**CHARLENE M. BIFULCO**

**CASE NO: SC09-172**

**Petitioner,**

**v.**

**PATIENT BUSINESS & FINANCIAL SERVICES, INC.**

**Respondent.**

---

---

**PETITIONER'S FIRST AMENDED\* JURISDICTIONAL BRIEF**

---

**FREDERICK C. MORELLO, P.A.**  
**Frederick C. Morello, Esq.**  
**Fla. Bar No. 0714933**  
**Michael G. Howard, Esq.**  
**Fla. Bar No. 0636541**  
**111 N. Frederick Ave., 2<sup>nd</sup> Floor**  
**Daytona Beach, FL 32114**  
**(386) 252-0754**  
**Fax (386) 252-0921**  
**Attorneys for Petitioner**

\* Amended pursuant to Supreme Court Order of February 9, 2009.

**TABLE OF CONTENTS**

**PAGE NUMBERS**

Table of Citations.....ii

Statement of Case and Facts.....1-3

Summary of the Argument.....3

Argument.....4-7

Conclusion.....7-8

Certificate of Service.....8

Certificate of Compliance.....9

Appendix.....9

**TABLE OF CITATIONS**

**PAGE NUMBERS**

*Bifulco v. Patient Business & Financial Services, Inc.*, No. 5D08-98, 2009  
Fla. DCA, LEXIS 8, at \* 1 (Fla. 5<sup>th</sup> DCA Jan. 2, 2009)..... 4, 5, 6, 7

*Hill v. Department of Corrections*, 513 So. 2d 129 (Fla. 1987)..... 6

*Kelley v. Jackson Co. Tax Collector*, 745 So. 2d 1040  
(Fla. 1<sup>st</sup> DCA 1999) ..... 4, 5, 6, 7

*Maggio v. Fla. Dept. of Labor and Employment Security*, 899 So. 2d 1074  
(Fla. 2005)..... 6

*Osten v. City of Homestead*, 757 So. 2d 1243  
(Fla. 3d DCA 2000) ..... 4, 5, 6, 7

*Scott v. Otis Elevator Co.* 524 So. 2d 642 (Fla. 1988)(“Scott I”) ..... 5

*Scott v. Otis Elevator Co.* 572 So. 2d 902 (Fla. 1990)(“Scott II”) ..... 5

*Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912  
(Fla. 1985)..... 6

**OTHER AUTHORITIES**

Fla. R. App. P. 9.030 (a)(2)(A)(iv) ..... 3, 7

Fla. R. App. P. 9.120 (d)..... 3

Fla. Stat. §440.55 ..... 7

Fla. Stat. § 440.205 ..... 2, 3, 4, 5, 6, 8

Fla. Stat. § 448.102(3) ..... 2

Fla. Stat. § 768.28 ..... 5, 6

Fla. Stat. § 768.28(6) ..... 2, 3, 4, 5, 6, 7

**I. Statement of the Case and Facts:**

On or about April 19, 2004, Petitioner, CHARLENE BIFULCO (“Ms. BIFULCO”), while working as an admitting registrar at PATIENT BUSINESS & FINANCIAL SERVICES, INC. (“PBFS”), injured her back while stocking the admitting office when she picked up a full box of paper from a pallet. (Vol. 1, pp. 85-86, ¶¶ 5, 9). Upon picking up the box, she felt a sharp, burning pain in her lower back and subsequently dropped the box. (Vol. 1, p. 86, ¶ 9) On or about April 19, 2004, Ms. BIFULCO filled out an employee incident report and notified her employer of her injury. (*Id.* at ¶¶ 10-12). On or about April 21, 2004, Ms. BIFULCO asked to see a doctor about her injury as soon as possible. (Vol. 1, p. 88, ¶ 12). Ms. BIFULCO was terminated from PBFS on or about April 24, 2004. (*Id.* at ¶ 22). Ms. BIFULCO was finally seen by a doctor on or about April 30, 2004. (*Id.* at ¶ 19).

On or about December 10, 2004, Plaintiff’s counsel sent a privileged letter to David J. Davidson, Esq. (“Mr. Davidson”), general counsel and registered agent for PBFS and Halifax Hospital Medical Center (“Halifax Hospital”). (Vol. 4, p. 539, ¶ 5). This letter addressed Ms. BIFULCO’s claims against PBFS for workers’ comp retaliation and whistleblowing. Mr.

Davidson was also general counsel for Halifax Hospital and it was unknown precisely how PBFS and Halifax Hospital were related. (Vol. 4, p. 566).

On December 21, 2004, Mr. Davidson denied any wrongdoing on the part of PBFS. (Vol. 4, p. 662). On November 18, 2005, Ms. BIFULCO filed a two count complaint against PBFS. (Vol. 1, pp. 85-91). Count I was for violation of the Florida Whistleblower Act, Fla. Stat. § 448.102(3) as Ms. Bifulco had objected to her supervisor instructing an admitting registrar to forge a prescription of a Schedule IV Narcotic. (Vol. 1, pp. 86, ¶ 8, Vol. 1, pp. 88-90). Count II was for Retaliatory Discharge in Violation of Fla. Stat. § 440.205. (*Id.*, pp. 90-91). PBFS Answered the Complaint and did not raise the affirmative defense of Fla. Stat. § 768.28(6), claiming that PBFS was part of Halifax Hospital, a special taxing district subject to this notice requirement. (Supp. Vol. 2, pp. 724-733).

On February 27, 2007, after the trial court heard argument concerning Ms. BIFULCO's motion to amend the Complaint for punitive damages, the trial court denied amendment without prejudice. (Vol. 1, p. 178, ¶ 2). On March 8, 2007, PBFS served notice of filing the affidavit and exhibits of general counsel, Mr. Davidson, attesting that PBFS was created and controlled by Halifax Hospital, a special taxing district. (Vol. 2, pp. 185-196). Without any supporting documentation, Mr. Davidson attested and

concluded that the Internal Revenue Service had determined that PBFS was an “instrumentality of the state.” (*Id.* at 186, ¶ 9). On May 17, 2007, PBFS filed its first motion for summary judgment claiming that Ms. BIFULCO failed to comply with pre-suit notice under Fla. Stat. § 768.28 (6) and that summary judgment was warranted because such notice could not be satisfied when more than three (3) years elapsed. (Vol. 2, pp. 261-64, ¶¶ 2, 9, 14, 15). After hearing, the trial court dismissed Count II, violation of Fla. Stat. § 440.205 for lack of § 768.28 (6) notice. (Vol. 3, pp. 532-535).

Defendant sought summary judgment on Count I and a hearing was held. Final summary judgment was entered for the Defendant on both Counts. (Vol. 4, pp. 678-679). Plaintiff timely appealed. (Vol. 4, pp. 680-682).

## **II. Summary of the Argument:**

In accordance with Fla. R. App. P. 9.120 (d), Petitioner, Ms. BIFULCO, hereby submits “Petitioner’s brief limited solely to the issue of the supreme court’s jurisdiction . . .”. *Id.* This Honorable Court has discretionary jurisdiction of this case under Fla. R. App. P. 9.030 (a)(2)(A)(iv) because of an express and direct conflict with decisions of other district courts of appeals.

### III. Argument:

On January 2, 2009, the Fifth DCA issued its opinion in the case of *Bifulco v. Patient Business & Financial Services, Inc.*, No. 5D08-98, 2009 Fla. DCA, LEXIS 8, at \* 1(Fla. 5<sup>th</sup> DCA Jan. 2, 2009)(“*Bifulco*”). This opinion affirmed the trial court’s decision of the private whistle blower claim without discussion but reversed the lower court’s decision regarding the applicability of Fla. Stat. § 768.28(6) to a claim under Fla. Stat. § 440.205. *Id.* at \* 1.

The Fifth DCA reversed the trial court’s finding that “Appellant’s failure to provide presuit notice pursuant to section 768.28(6), *Florida Statutes* was fatal to Appellant’s claim.” *Id.* at \* 2. The Fifth DCA further stated, “Appellant argues that *Kelley* was wrongly decided. We agree and reverse. In doing so, we acknowledge conflict with *Kelley*. . .” . *Id.* at \* 2-3. Conflict was also acknowledged by the Fifth DCA with *Osten v. City of Homestead*. (“We also acknowledge conflict with the Third District’s opinion in *Osten v. City of Homestead*, 757 So. 2d 1243, 1244 (Fla. 3d DCA 2000).”) *Id.* at \*3, FN 1.

In *Kelley v. Jackson Co. Tax Collector*, 745 So. 2d 1040 (Fla. 1<sup>st</sup> DCA 1999)(“*Kelley*”), the First DCA affirmed the lower court’s dismissal with prejudice of the claim under Fla. Stat. § 440.205 because notice under Fla.

Stat. § 768.28(6) was not provided. *Id.* The First DCA found that, “An action for retaliatory discharge under section 440.205 is clearly a ‘tort’ within the meaning of section 768.28. . .” . *Id.* (Citing *Scott v. Otis Elevator Co.* 524 So. 2d 642 (Fla. 1988)) (“Scott I”) and held that 768.28(6) notice is required before filing suit under Fla. Stat. § 440.205. *Id.*

In *Osten v. City of Homestead*, 757 So. 2d 1243 (Fla. 3<sup>rd</sup> DCA 2000) (“*Osten*”), the Third DCA affirmed the trial court’s dismissal of the amended complaint because the plaintiff did not comply with Fla. Stat. § 768.28(6) notice requirements. *Id.* at 1243. The *Osten* Court, citing to *Kelley*, agreed with the *Kelley* Court’s analysis and cited to *Scott I*, *supra*, for the proposition that retaliation under Fla. Stat. § 440.205 is a tort and therefore, presuit notice is required under Fla. Stat. § 768.28(6). *Id.* at 1244.

The Fifth DCA in *Bifulco* noted a distinction in *Scott v. Otis Elevator Co.* 572 So. 2d 902 (Fla. 1990) (“*Scott II*”), that the *Kelley* and *Osten* courts did not. *Id.* at \* 4, FN 2. The Fifth DCA, referring to *Scott II*, stated:

In that case, our high court concluded that damages for emotional distress were available in a *section 440.205* claim. Although it labeled the 440.205 claim as an ‘intentional tort,’ we interpret that reference to mean nothing more than a *section 440.205* claim is analogous to an intentional tort for purposes of determining what damages may be awarded. (*Id.* at \*4, FN 2).



In *Maggio v. Fla. Dept. of Labor and Employment Security*, 899 So. 2d 1074 (Fla. 2005) (“*Maggio*”), this Honorable Court recognized that the *Kelley* and *Osten* courts held that notice under Fla. Stat. § 768.28(6) was required for a Fla. Stat. § 440.205 claim. *Maggio* at 1081, FN 4. This Court did not decide in *Maggio* whether *Kelley* and *Osten* were correct because that issue was not before the Court. *Id.* In *Maggio*, this Court reiterated the purpose of Fla. Stat. §768.28(6):

However, we have previously stated that **the "sole purpose [of the enactment of section 768.28] was to waive [sovereign] immunity[,] which [previously] prevented recovery for breaches of existing common law duties of care."** *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 917 (Fla. 1985) (emphasis added); see also *Hill*, 513 So. 2d at 133 (agreeing with a federal court's conclusion that section 768.28 "was limited to traditional torts; specifically, those in which the state would be liable if it were a private person"). *Maggio* at 1081. (Emphasis added).

In *Maggio*, this Honorable Court declined to decide whether the requirements of Fla. Stat. § 768.28(6) applied only to common law torts. *Id.* *Bifulco* is a post-*Maggio* decision, while the First DCA opinion in *Kelley* and the Third DCA opinion in *Osten* are both pre-*Maggio*. The Fifth DCA relied upon this Court’s decision in *Trianon Park* in reaching its holding in *Bifulco*. *Bifulco v. Patient Bus. & Fin. Servs.*, No. 5D08-98, 2009 LEXIS, at \*3 (Fla. 5<sup>th</sup> DCA Jan. 2, 2009).

If this Honorable Court exercises its jurisdiction to resolve this conflict, amicus counsel intends to petition this Court for leave to argue that the holdings of *Kelley* and *Osten* are in derogation with the statutory language of Fla. Stat § 440.55 and are tantamount to error as a matter of law.

Fla. Stat. §440.55 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 benefit, said proceedings and action at law to be in the same manner as provided herein with respect to other employers.** (Emphasis added).

The express statutory language contained in Chapter 440 at section 55 may be an additional consideration for this Honorable Court to exercise its discretionary jurisdiction. The resolution of the conflict is vital to all lawyers practicing employment law.

#### **IV. Conclusion:**

For the above stated reasons, Petitioner requests this Honorable Court to invoke its discretionary jurisdiction under Fla. R. App. P. 9.030 (a)(2)(A)(iv) because of the express and direct conflict of *Bifulco* from the Fifth DCA with decisions of the First DCA in *Kelley* and Third DCA in *Osten* and decide whether notice under Fla. Stat. § 768.28(6) is mandated for



**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this response complies with the font requirements (Times New Roman 14-point font) of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

---

Frederick C. Morello, Esq.

APPENDIX