IN THE SUPREME COURT OF FLORIDA

CHARLENE M. BIFULCO

Petitioner,

v.

PATIENT BUSINESS & FINANCIAL SERVICES, INC.

Respondent.

CASE NO.: SC09-172
5th DCA Case No.: 5D08-98

PETITIONER'S REPLY 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., 2nd Floor
Daytona Beach, FL 32114
(386) 252-0754
Fax (386) 252-0921
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

CASE LAW

RULES

STATUTES

OTHER AUTHORITIES

SYMBOLS AND ABBREVIATIONS

(Vol.)	Refers to the volume of the Index to Record on Appeal
(p. or pp.)	Page number(s)
§	Section
¶	Paragraph
PUBWA	Public Whistle-Blower Act, Fla. Stat. § 112.3187
PWA	Private Whistle-Blower Act, Fla. Stat. § 48.101 et. seq.
5th DCA R.	5th DCA Record Cite

ARGUMENT

I. PBFS IS NOT A CREATION OF THE FLORIDA LEGISLATURE AND THEREFORE IS NOT ENTITLED TO SOVEREIGN IMMUNITY.

A. PBFS is a nonprofit corporation created by Halifax Hospital Medical Center, not by the legislature.

It is undisputed that PATIENT BILLING & FINANCIAL SERVICES, INC. ("PBFS") is a creation of Halifax Hospital Medical Center ("Halifax Hospital"). (5th DCA R. p. 18; Vol. 1, p. 185, §§ 3, 6). It is undisputed that Halifax Hospital is an independent taxing district created by the Legislature. (Vol. 1, p. 185, § 2; see *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567-568 (Fla. 1999)). However, PBFS is not a creation of the Legislature but rather a creation of Halifax Hospital, which means that PBFS is not a special taxing district.[1] Counsel for Ms. BIFULCO requested that the Fifth DCA take judicial notice of the Official List of Special Districts in Florida, which was maintained by the Department of Community Affairs, State of Florida, and provides the Official List of Special Districts Online, which does not show PBFS as a special district. (5th DCA R. p. 5-8). The Fifth DCA declined to take judicial notice. (5th DCA R. p. 16).

[1] There is a significant discrepancy between Fla. Stat. § 768.28(6) with its three year statute of limitations requirement to notify the Department of Finance and the four year statute of limitations provided by filing an action under Fla. Stat. § 440.205. See *Scott v. Otis Elevator Co.*, 524 So. 2d 642, 643 (Fla. 1988) ("The legislature, however, enacted section 440.205 after *Goehring*, creating a distinct limited statutory cause of action for retaliatory discharge in the area of worker's compensation. Claims under section 440.205 must be brought within the four-year statute of limitations set forth in

Respondent relies upon the affidavit of Halifax Hospital General Counsel for the proposition that the, "Internal Revenue Service [has] determined that PFBS is an 'instrumentality of the state.'" (Vol. 1, p. 186, § 9; Answer Brief, pp. 2, 20). PBFS's General Counsel makes nothing but an unsupported allegation that the Internal Revenue Service ("IRS") stated that PBFS is an instrumentality of the state. However, that being said, being an "instrumentality of the state" for IRS purposes applies to taxation. See *Salery v. Comm'r*, No. 08-14225, 2009 U.S. App. LEXIS 5181at *3 (11th Cir. March 6, 2009)("*Salery*")[2] (IRS has authority to determine amount of taxes due); see also *Ross v. Bank South, N.A.*, 885 F.2d 723, 732, FN 17(11th Cir. 1989)(IRS determination letter evinced tax exempt status); and *Sly v. United States*, 318 B.R. 194, 197 (N.D. Fla. 2004)(application required to IRS for tax exempt status). Special taxing districts are local governmental entities established through the State Constitution, not by the IRS, and are created for the public good. See *Eldred v. North Broward Hospital Dist.*, 498 So. 2d 911, 914 (Fla. 1986)("*Eldred*"). See also *State v. Anna Maria Island Erosion Prevention Dist*., 58 So. 2d 845, 846 (Fla. 1952) (special taxing districts are created by the Legislature for public purposes); and *North Brevard Co. Hospital dist. V. Roberts*. 585 So. 2d 1110, 1112, FN 4 (Fla. 5th DCA 1991) (special taxing districts

---

section 95.11(3)(f) for statutory causes of action.").

[2] *Salery* is an unpublished decision. According to Fed. R. App. P. 32.1, citations are permitted to unpublished opinions issued after January 1, 2007. See Fed. R. App. 32.1(a)(i)(ii).

created by legislature when necessary, "to serve an important, and usually specialized public purpose.").

The issue in *Eldred* was, "whether the provisions of *section 768.28* waiving sovereign immunity and limiting liability for governmental entities were intended to apply to special taxing districts." *Eldred* at 913. This Honorable Court was faced with a certified question of;

> Is North Broward Hospital District, by its operation of the hospitals within said district, a corporation primarily acting as an instrumentality or agency of the state? (*Id.* at 912).

This Court stated,

> In our view, the legislature clearly intended the provisions of *section 768.28(2)* to include special taxing districts within the phrase "independent establishments of the state." (*Id.* at 914).

This Court approved the decision of the district court which found that the hospital district was a special taxing district and added a ". . .qualification that a special taxing district is an 'independent establishment of the state' under the provisions of *section 768.28(2)*." *Id.* at 912.

B. Halifax Hospital sought and received an opinion from Florida's Attorney General about the ramifications it would face if it created a nonprofit corporation and application of Florida's retirement system (Op. Att'y. Gen. Fla. 93-83 (1993)). The Attorney General analyzed that a nonprofit corporation, like PBFS, created by Halifax was not "a special district of the State".

In the instant case, PBFS is a creation of Halifax Hospital and does not rise to the level of a special taxing district. Therefore, Fla. Stat. § 768.28 does not apply. Op. Att'y Gen. Fla. 93-83 (1993), at p. 3.[3] In an opinion rendered to Halifax Hospital Corporate Counsel, Attorney General, Robert A. Butterworth, opined that Halifax Hospital could establish a not for profit corporation. *Id.*, at p. 3. This opinion went on to state that the not-for-profit corporation created by Halifax Hospital would not be a special district as defined by Fla. Stat. § 189.403(3). *Id*.

Three (3) questions were directed to the Attorney General by Halifax Hospital corporate counsel: 1). "Does Halifax Hospital Medical Center have the authority to establish a not-for-profit corporation to provide employee staffing and management services?"; 2). "Is the Halifax Hospital Medical Center required to take competitive bids for the staffing and management of the hospital?"; and 3). "Are the employees of the not-for-profit corporation required to participate in the Florida Retirement System?" *Id.* at p. 1. In answer to question 3, the Attorney General stated, in part,

> In light of the provisions of Ch. 121, F.S., and the rules of the Division of Retirement of the Department of Management Services implementing the chapter, the employees of the not-for-profit corporation would not appear to be covered by the Florida Retirement System. (*Id.*

[3] According to this Honorable Court in *Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp*., 908 So. 2d 459, 474 (Fla. 2005) "Although an opinion of the Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive." (Citing *State v. Family Bank of Hallandale*, 623 So. 2d 474, 478 (Fla. 1993)).

at pp. 1-2).

In coming to the opinion that a non-profit corporation created by Halifax Hospital was not an "special district" of the State, the Attorney General performed the following analysis

> "[A]ny agency, branch, department, institution, university, institution of higher education, or board of the state, or any county agency, branch, department, board, district school board, or *special district* of the state . . . ." Section 121.021(9), F.S., provides that a "special district" refers to an independent special district as defined in s. 189.403(3), F.S., *i.e.*, a local unit of special-purpose government within a limited boundary, created by general law, special act, local ordinance, or rule of the Governor and Cabinet, which is not a dependent special district. . . . . A not-for-profit corporation, although created by the Center [Halifax Hospital], would not appear to constitute a special district under the above definitions. While the enabling legislation for the Center [Halifax Hospital] recognizes the Center's authority to create such a corporation, the act does not create the not-for-profit corporation. (*Id.* at pp. 3-4).

Notably, the Attorney General completely dispelled the issue that the nonprofit corporation created by Halifax could be an "agency, branch, department, institution…" and instead, went directly to an analysis of whether Halifax's nonprofit corporation would be a "special district of the state". Later in the opinion, the Attorney General concluded:

> The Division of Retirement has advised this office it is of the opinion that the employees of the not-for-profit corporation are not covered by the Florida Retirement

> System. . .it appears that the employees of a not-for-profit corporation . . . would not be required to participate in the Florida Retirement System. (*Id.* at p. 4).

The Attorney General, in an earlier opinion to another entity, stated that,

> Until legislatively or judicially determined otherwise, the Commission on Hispanic Affairs is an agency of state government for the purposes of chs. 120, 440, 443, and 650 . . . and the commission's personnel are state employees under the Career Service System . . . and the Florida Retirement System, ch. 121, F.S. (Op. Att'y Gen. Fla. 80-29 (1980)).

The Attorney General, in the Halifax Hospital opinion opined that the not-for-profit corporation that Halifax Hospital would establish could not receive retirement under the Florida Retirement Act because it was not a special district where the Florida State Commission on Hispanic Affairs could.

PBFS, in its Answer Brief to the 5th DCA and again to this Honorable Court argued that PBFS was an agency of the state due to its relationship to Halifax Hospital. (5th DCA R., Exhibit B, pp. 3, 4,18-19, 2, 23; Sup. Ct. Answer Brief, pp. 3, 4, 7, 19-20, 22). PBFS bases its argument on the fact that the trial court, in its order dated October 16, 2007, stated that, "This Court has previously determined that Defendant, by virtue of its subsidiary relationship to Halifax Hospital Medical Center, is a state agency for purposes of section 768.28". (Vol. 3, p. 533; see also Vol. 4, pp. 678-79, §§ 2-3).

According to Fla. Stat. § 768.28(2)

> (2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.

Neither the trial court nor the Defendants have explained, other than in a conclusory manner, why PBFS should be considered an agency or an instrumentality of the state. The Attorney General Opinion to Halifax Hospital established that a not-for-profit corporation created by Halifax Hospital, such as PBFS, is not a special district. Op. Att'y Gen. Fla. 93-83 (1993), at p. 3. Because PBFS is a not-for-profit corporation and not a special district, Fla. Stat. § 768.28 does not apply.

II. PBFS IS NOT AN AGENCY UNDER PUBWA AND EVEN IF THE DAHL ANALYSIS IS IGNORED, THAT EACH ACT IS NOT MUTUALLY EXCLUSIVE, PBFS FALLS UNDER PWA.

If this Court ignores the *Dahl* analysis and considers the Private Whistle-Blower Act ("PWA") and the Public Whistle-Blower Act ("PUBWA") as mutually exclusive acts, for the sake of argument PBFS has not established as a matter of law that it is an agency under the PUBWA. The PUBWA defines an agency as;

> "Agency" means any state, regional, county, local, or municipal government entity, whether executive, judicial, or legislative; any official, officer, department, division,

> bureau, commission, authority, or political subdivision therein; or any public school, community college, or state university. (Fla. Stat. § 112.3187(3)(a)).

PBFS is not a "state, regional, county, local or municipal government entity" or, "any official, officer, department, division, bureau, . . . commission . . . or any public school, community college, or state university." PBFS is also not a political subdivision as defined by Fla. Stat. § 1.01(8) which states, "(8) The words "public body," "body politic," or "political subdivision" include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state."

PBFS appears not to be an "authority" as used in the definition of the term "agency" under Fla. Stat. § 112.3187(3)(a). While apparently not specifically defined, a closer reading of Fla. Stat. § 112.3187 suggests that "authority" means ". . . any agency or federal government entity having the authority to investigate, police, manage, or otherwise remedy the violation or act. . . ." Fla. Stat. § 112.3187(6). "Authority" could mean, as suggested in Fla. Stat. § 112.3187(8)(b), an "appropriate local governmental authority, if that authority has established by ordinance an administrative procedure for handling such complaint. . .". Either way, PBFS does not meet the definition of an "authority". PBFS has not advanced the argument that it is an "appropriate local government authority", which has an established administrative

procedure for handling whistle blower complaints.

PBFS is not a “state agency” for PUBWA purposes as defined by Fla. Stat. § 216.01. A “state agency” is defined as:

> "State agency" or "agency" means any official, officer, commission, board, authority, council, committee, or department of the executive branch of state government. For purposes of this chapter and chapter 215, "state agency" or "agency" includes, but is not limited to, state attorneys, public defenders, criminal conflict and civil regional counsel, capital collateral regional counsel, the Justice Administrative Commission, the Florida Housing Finance Corporation, and the Florida Public Service Commission. Solely for the purposes of implementing s. 19(h), Art. III of the State Constitution, the terms "state agency" or "agency" include the judicial branch.
> (Fla. Stat. § 216.011(qq)).

A non-profit corporation which is not a special district, such as PBFS does not appear to fit any of the criteria of the PUBWA as an “agency” or “state agency”. In fact, the definition of “agency” under Fla. Stat. § 112.3187(3)(a) is a broader definition of “agency” than that in Fla. Stat. § 216.011(qq). *Caldwell v. Board of Trustees Broward Community College*, 858 So. 2d 1199, 1201-02 (Fla. 4th DCA 2003)(definition of college not being included as “state agency” is not inconsistent with “agency” under Fla. Stat. § 112.3187(3)(a) because the “agency” definition is broader than “state agency”). PBFS logically falls under the auspices of the Private Whistle-Blower Act (PWA).

The PWA defines Employer: “means any private individual, firm, partnership, institution, corporation, or association that employs ten or more persons.” Fla. Stat. § 448.101(3). PBFS argues that the word, “private” modifies each of the descriptors following the word “private” so that the PWA can only apply to strictly private entities.

The Petitioner has already analyzed the legislative history of the PWA and when it comes to statutory construction, this Honorable Court has stated in *Metropolitan Casualty Ins. Co. V. Tepper*, 2 So. 3d 209, 213 (Fla. 2009)(“*Metropolitan”*), that;

> We have repeatedly stated that the central purpose of statutory interpretation is deciphering and giving effect to legislative intent. *State v. J.M.*, 824 So. 2d 105, 109 (Fla. 2002) ("It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis."); *Carlile v. Game & Fresh Water Fish Com'n*, 354 So. 2d 362, 364 (Fla. 1977) ("In determining the meaning of a statute we must look to the intent of the Legislature in enacting that statute."). That legislative intent is chiefly derived from the language of the statute itself. *Tropical Coach Line, Inc. v. Carter*, 121 So. 2d 779, 782 (Fla. 1960) ("If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended."); *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000) ("When interpreting a statute and attempting to discern legislative intent, courts must first look at the actual language used in the statute.").
>
> When a statute's language is plain and unambiguous, there can be no resort to statutory construction. *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452,

> 454-55 (Fla. 1992) (citing numerous cases and concluding that "[t]he sum of these cases is that this Court is without power to construe an unambiguous statute"). This Court does not question the wisdom of a statute but instead applies the statute according to the Legislature's direction. Finally, this Court will only override the plain language of a statute "when there are cogent reasons for believing that the letter [of the statute] does not accurately disclose the [legislative] intent." *Stave ex rel. Hanbury v. Tunnicliffe*, 98 Fla. 731, 124 So. 279, 281 (Fla. 1929).

If a statute is unambiguous, courts cannot change it. *Metropolitan* at 213; see also *Wagner v. Botts*, 88 So. 2d 611, 613 (Fla. 1956) ("*Wagner*") (courts are bound by the definite language of a statute and without power to change the statute). When looking at the meaning of the word used in the statute, a court first looks to the ordinary definition of the word. *Metropolitan*, at 214 (citing *State ex rel. Hanbury v. Tunnicliffe*, 124 So. 279, 281 (Fla. 1929).

However, punctuation is considered the least reliable indicator of legislative intent to decipher the interpretation of a statute. *Wagner*, 88 So. 2d at 613. While historically, statutes contained no punctuation, legislatures have now been following grammatical rules in the punctuation of statutes prior to their enactment. *Id.* Rules concerning punctuation are treated as equals along with other interpretive rules. *Id.*

The grammatical rule is that when there is a series of three or more items of equal importance, a comma is used between them. (See H. Ramsey Fowler, The Little,

Brown Handbook 279 (Little, Brown and Company 1980)("Little, Brown"); Patricia T. O'Conner, Woe Is I: The Grammarphobe's Guide to Better English in Plain English 137, 220 (Riverhead Books 2004)(2003)("Woe is I").[4] However, the modifier in this case is the word "any", which modifies "any private individual", "any firm", "any partnership", "any institution", "any corporation" or "any association that employs ten or more persons". (Little, Brown; Woe is I, and Fla. Stat. § 448.101(3)). A "private individual" is distinguished from an "individual" by the meaning of the word "private". According to Black's Law Dictionary 1213 (7th Edition 1999), the adjective, "private", means, among other things, "1. Relating or belonging to an individual, as opposed to the public or the government. . . ."

Regarding the word "individual", according to Bryan A. Garner, A Dictionary of Modern Legal Usage 291 Oxford University Press 1987, "Still, *individual* is best confined to contexts in which the writer intends to distinguish the single (noncorporate) person from the group or crowd." Black's Law Dictionary 777 (7th Edition 1999), defines "individual" as, "1. Existing as an indivisible entity. 2. Of or relating to a single person or thing, as opposed to a group."

The word "individual" is a concrete noun because it names something tangible

[4] "Woe is I", is a book on English usage, which was recommended by U.S. Supreme Court Justice Antonin Scalia and Bryan A. Garner in their book, Making Your Case The Art of Persuading Judges. (Antonin Scalia & Bryan A. Garner, Making Your Case The Art of Persuading Judges 62 (Thompson/West 2008).

such as “ink, porch, [or a] bird.” (Little Brown at 524; also see Woe is I at 225). The word “private” is an attributive adjective appearing next to the noun which modifies only the word, “individual”. (Little, Brown at 515; see Woe is I at 200-201; 219).[5] The rule is, “Adjectives also can be classified according to position. Attributive adjectives appear next to the nouns they modify.” (Little, Brown at 515). As an attributive adjective, “private” only modifies the word “individual” where the word “any” modifies everything after it. The word “any” is an adjective meaning “every- used to indicate one selected without restriction . . .”. Webster’s Seventh New Collegiate Dictionary 40 (1971).

Additionally, the Legislature has used the phraseology, “private individual” numerous times in statutes. Examples include: Fla. Stat. §§ 97.052(1)(c); 112.313(16)(c); 125.031; 253.141(2); 267.0617(2); 395.15(1); 408.15(3); 448.101(3); and 760.29(1)(a)(1). For example, Fla. Stat. § 408.15, the Health Facility and Services Development Act, Fla. Stat. § 408.031, states that the agency may, “(3) Enter into agreements with any federal, state, or municipal agency, or other public institution, or with any private individual, partnership, firm, corporation, association, or other entity.” (Emphasis added).

Putting the two words together, “private individual” , in this manner, means a

[5] Adjectives can be descriptive, limiting, demonstrative, proper, attributive, and predicate. (Little Brown at 515).

non-corporate, non-public, non- governmental single person as opposed to an individual in their corporate or governmental capacity. Just as Fla. Stat. § 408.15(3) states in part, ". . . or with any **private individual, partnership, firm, corporation, association or other entity**", Fla. Stat. § 448.101(3) states that "'Employer' means **any private individual, firm, partnership, institutions, corporation, or association that employs ten or more persons**." (Emphasis added).

Had the Legislature intended for Fla. Stat. § 448.101(3) to apply purely to private employers, it could have done so by changing the punctuation of the statute to read, "'Employer' means any private: individual, firm, partnership, institution, corporation, or association that employs ten or more persons".[6] However, the Legislature did not choose to punctuate the definition of "employer" this way. The modifier of the series of items in Fla. Stat. § 448.101(3) is the word, "any" and therefore, PBFS is defined as an employer under Fla. Stat. § 448.101(3).

Nothing in the Legislative history suggested that the PWA only pertained to private employers. Instead, the Legislative history strongly supports that the PWA applies equally to public sector employers who have ten (10) or more employees (Vol. III, pp. 364, 376, 381). (*Id.* and at p. 364). This is also consistent with the analysis in *Dahl v. Eckerd Family Youth Alternatives, Inc.*, 843 So.2d 956 (Fla. 2d DCA 2003)

[6] A colon is used to introduce, among other things, summaries, explanations, and series. (Little, Brown, p. 309).

and *Hutchison v. Prudential Insurance Co. of America, Inc.*, 645 So. 2d 1047, 1050 (Fla. 3d DCA 1994).

Wherefore, the Petitioner prays to this Honorable Court for the following relief: 1.) Approve the Fifth DCA's opinion on its holding that Chapter 768.28(6) notice is not required for a Fla. Stat. § 440.205 claim and disapprove the decisions in *Kelly* and *Osten*; and 2.) Reverse the Fifth DCA's decision that PBFS is not subject to application of the PWA and the PUBWA is not the exclusive remedy under these facts; and 3.) Render a decision finding that employment statutes in Florida are not at all subject to Fla. Stat. § 768.28 unless and until the Legislature specifies its applicability in each such statute, in whole or in part, as the Legislature so determines.

Respectfully submitted,

/s/ Frederick C. Morello, Esq.
Frederick C. Morello, Esq.

/s/ Michael G. Howard, Esq.
Michael G. Howard, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing to Thomas J. Leek, Esq., and Kelly Parsons, Esq., 150 Magnolia Ave., P.O. Box 2491, Daytona Beach, FL 32115-2491 on this 14th day of September, 2009 by U.S. Mail.

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

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this response complies with the font requirements (Times New Roman 14-point font) of Rule 9.100(1), Florida Rules of Appellate Procedure.

/s/ Frederick C. Morello, Esq.
Frederick C. Morello, Esq.