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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-2315

PEGUY DELVA

Petitioner/Plaintiff,

vs.

THE CONTINENTAL GROUP, INC.

Respondent/Defendant.

On Appeal from the District Court of Appeal of The State of Florida
Third District
DCA CASE NO.: 3D11-2964

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER

BRIEF IN SUPPORT OF PETITIONER ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

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Identity And Interest of Amicus Curiae and Statement of Consent

The National Employment Lawyers Association, Florida Chapter (Florida NELA) has set forth its interest and identity in the accompanying motion for leave to file this brief. Instead of repeating that, the Amicus offers this short summary.

The roughly 200 employment lawyers affiliated with Florida NELA and their thousands of employee clients share an interest in the rights of pregnant employees under the Florida Civil Rights Act (FCRA), since they represent employees throughout the state in claims under the FCRA and pregnancy related employment litigation. The Amicus has an interest in the FCRA being liberally construed, and in allowing established precedent under the FCRA to remain undisturbed so that the law will be more certain and predictable.

SUMMARY OF ARGUMENT

The Court should determine that employment discrimination based on pregnancy is unlawful pursuant to Florida's general prohibition of "sex" discrimination. The Florida Civil Rights Act (FCRA) requires courts to construe the statute liberally, which this Court has repeatedly recognized. If there is more than one reasonable interpretation of the statute, then the Court should choose the one that grants access to the remedy. The decision of the lower court, and similar judicial opinions, contain many flaws and represent the minority view, which cannot be reconciled with the FCRA's requirement of liberal construction.

When the FCRA was reenacted in 1992, U.S. Supreme Court caselaw did not establish that pregnancy discrimination must be considered legal under a general prohibition of "sex" discrimination. However, some have focused on one particular Supreme Court case, while ignoring other Supreme Court decisions related to this matter. This fails to comply with the liberal construction requirement.

Finally, the lower Court failed to apply liberal construction by relying on a Florida appellate decision that directly contradicts its conclusion. It is fundamental that lawyers owe a duty of candor toward the courts. The lower court's decision in this case, as well as similar decisions by federal district courts, are based on a misstatement of legal precedent. Arguments that are based on such misstatements

should be discouraged, and most certainly should not be sustained, by Florida courts. The Court should be mindful of this issue when ruling in this case, and should rule in a way that encourages scrupulous behavior while fostering respect for the legal profession and for the judiciary.

ARGUMENT

I. THE COURT SHOULD ADHERE TO THE STATORY REQUIREMENT OF LIBERAL CONSTRUCTION

Under the predecessor statute to the Florida Civil Rights Act (FCRA), this Court endorsed the spirit of liberal construction of employment discrimination laws. The Court noted that "overwhelming public policy" mandates legal interpretations that permit access to the remedies embodied in such laws, rather than alternative statutory constructions that would deny such access. *Byrd v. Richardson-Greenshields Sec., Inc.*, 522 So.2d 199 (Fla. 1989). The law was reenacted in 1992, and the Florida legislature stated:

> The Florida Civil Rights Act of 1992 shall be construed according to the fair import of its terms and shall be *liberally construed* to further the general purposes stated in this section and the special purposes of the particular provision involved.

Fla. Stat. 760.01(3). (Emphasis added). Accordingly, the FCRA "is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature." *Joshua v. City of Gainesville,* 768 So.2d 432, 435 (Fla. 2000). In *Woodham v. Blue Cross and Blue Shield of Fla., Inc.,* 829 So.2d

891, 896 (Fla. 2002), this Court again emphasized FCRA's requirement of liberal construction, citing *Joshua*.

When considering the correct interpretation of the FCRA with regard to exhausting administrative remedies with the Florida Commission on Human Relations, this Court acknowledged that the District Courts of Appeal had arrived at different conclusions but ruled in favor of the plaintiff stating that it is "guided by the Legislature's stated purpose for enacting this chapter and its directive that the Act be liberally construed in reaching our decision." *Id.* at 897, quoting *Joshua*, 768 So.2d at 435. In 2005, this Court again relied upon the statutory requirement of liberal construction while citing to *Joshua* and *Woodham*. See *Maggio v. Florida Dept. of Labor and Employment Security,* 899 So.2d 1074, 1077 (Fla. 2005).

This Court has also recognized in the context of the Florida Whistleblower Law that remedial statutes must be liberally construed. *Golf Channel v. Jenkins,* 752 So.2d 561, 565-66 (Fla. 2000) ("This interpretation also comports with the principle of statutory construction that remedial statutes should be liberally construed in favor of granting access to the remedy provided by the Legislature," . . . "[A]ny ambiguities in [the statutory provision] should be liberally construed in favor of granting access to the remedy provided by the Legislature.").

Of course, the Amicus does not suggest that the requirement of liberal construction dictates that FCRA plaintiffs must always win or that courts must sustain untenable positions advanced by plaintiffs. However, if there is more than one *reasonable* interpretation of the statute, then courts that follow the requirement of liberal construction will choose the interpretation that grants access to the remedy. To do otherwise would render the statutory requirement of liberal construction meaningless.

In the instant case, even if it is assumed *arguendo* that excluding pregnancy from the general prohibition of "sex" discrimination is a *reasonable* approach, this is obviously not the only reasonable interpretation of the statute. It is also reasonable to recognize that pregnancy is inherently related to sex, and it is reasonable to view the ability to become pregnant as one of the defining characteristics that distinguishes male from female. Indeed, the reasonableness of this alternative view is illustrated by the fact that the controversial case of *General Elec. Co. v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed. 2d 343 (1976) was a divided opinion.[1] Also indicative of the reasonableness of this alternative view is the fact that federal courts had unanimously determined that pregnancy discrimination constituted unlawful sex discrimination, until the majority opinion

[1] *Gilbert* is the controversial U.S. Supreme Court decision which is often cited for the proposition that discrimination based on pregnancy can never be unlawful "sex" discrimination. Actually, the holding of *Gilbert* is more limited, as shown in the Petitioner's brief. (See pp. 11-13 of the Petitioner's principal Brief).

in *Gilbert*.[2] The Equal Employment Opportunity Commission (EEOC), before *Gilbert*, had reached the same conclusion.[3] Numerous state courts have also considered whether pregnancy discrimination should be excluded from the states' general prohibition of "sex" discrimination, and the vast majority of these jurisdictions have rejected the controversial *Gilbert* decision.[4] Indeed, the decision of the court below represents the minority view, and is not consistent with the liberal construction requirement. Moreover, relying upon a misstatement of legal precedent in order to dismiss Florida pregnancy discrimination claims is not consistent with the statutory requirement of liberal construction either.[5]

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[2] These federal court opinions are referenced in the Petitioner's principal Brief, p. 11, footnote 5.

[3] 29 C.F.R. §1604.10 (1975).

[4] See pp. 28-33 of Petitioner's principal Brief.

[5] The court below, as well as other federal district court opinions which have found that the FCRA does not prohibit pregnancy discrimination, have relied upon the 1992 Florida appellate decision of *O'Loughlin v. Pinchback*, 579 So.2d 778 (Fla. 1st DCA 1991). This is troubling in light of the indisputable truth that Ms. O'Loughlin prevailed on her Florida pregnancy discrimination claim arising under the FCRA's predecessor statute. (See Section III of this brief, and see Petitioner's Brief, pp. 33-43). However, even if one were to assume *arguendo* that citing to *O'Loughlin* for the exact opposite proposition was one *reasonable* approach, it is clearly not the only reasonable alternative. It would also be reasonable to recognize that Ms. O'Loughlin prevailed on her Florida pregnancy discrimination claim in front of the Florida Commission on Human Relations, which does not have the jurisdiction or authority to entertain a federal claim, and that the victory was upheld by the First District. Indeed, this view of *O'Loughlin* is reasonable since it is based on what the appellate decision actually says, if one reads the full text opinion. Therefore, courts that adhere to the statutory requirement of liberal construction should consider this reality, instead of concluding that Ms. O'Loughlin somehow lost her Florida pregnancy discrimination claim. Not only is it inappropriate to cite *O'Loughlin* for the opposite proposition for which it stands, but to do so in order to reach the conclusion that there is no such thing as a Florida pregnancy discrimination claim is radically at odds with the FCRA's requirement of liberal construction.

Interestingly, although most courts that have considered the question of pregnancy discrimination under the FCRA have made no mention of liberal construction, a federal district court has recently emphasized liberal construction while rejecting the Third District's opinion in the instant case, and anticipating that this Court will do the same. *Wright v. Sandestin Investments, LLC,* No. 3:11-cv-256/MCR/EMT, 2011 U.S. Dist. LEXIS 175837, *20-21 (N.D. Fla. Dec. 12, 2012). The Court stated:

> Absent express guidance by the Florida Supreme Court and in light of the conflict among the intermediate courts, this court must do its best to anticipate how the Florida Supreme Court will rule on the issue.....
>
> **The term "sex" is not explicitly defined. However, the Florida legislature expressly declared that the FCRA "shall be liberally construed to further the general purposes stated in this section."** Fla. Stat. § 760.01(3)....
>
> Guided by these principles, this court anticipates that the Florida Supreme Court will agree with the decision of *Carsillo,* which reasons, because "Congress made clear in 1978 [through the Pregnancy Discrimination Act] that its intent in the original enactment of Title VII in 1964 was to prohibit discrimination based on pregnancy as sex discrimination, it was unnecessary for Florida to amend its law to prohibit pregnancy discrimination." *Carsillo,* 995 So. 2d at 1120 (citing *Newport News Shipbuilding and Dry Dock Co. v. EEOC,* 462 U.S. 669, 678-79, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983).

Id. (Emphasis added; Citations and internal footnotes omitted).

Even if discrimination based on pregnancy is not the primary purpose behind the prohibition of "sex" discrimination, this is still no reason to exclude pregnancy from the general prohibition of sex discrimination. As Justice Scalia explained, in the context of a same-sex sexual harassment case, "statutory prohibitions often go beyond the principal evil to cover comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.,* 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed. 2d 201 (1998). As a matter of common sense, one might view the obvious connection between pregnancy and "sex" as even more apparent than same-sex harassment.

Even Chief Justice Rehnquist, several years after having authored the majority opinion in *Gilbert*, seemed to recognize the connection between pregnancy and sex discrimination in 2003 when he wrote the majority opinion in *Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed. 2d 953 (2003). That case held that Eleventh Amendment immunity did not shield states from claims under the Family and Medical Leave Act because the statute was designed to eliminate gender discrimination. *Id.* Although *Hibbs* was not a pregnancy discrimination case, the Court acknowledged that historically there have been discriminatory practices regarding maternity and paternity leave that have been based upon gender-related stereotypes and the perceived role of women as

mothers trumping their role as employees. *Id.* at 731. Justice Rehnquist commented on the legislative history indicating that female employees have been denied employment opportunities based on the presumption that "women are mothers first and workers second" and that this stereotype had "justified discrimination against women when they are mothers or mothers-to-be." *Id.* at 736. Indeed, it is hardly a stretch to recognize that attitudes about pregnant women and new mothers have held back women in the workplace. Moreover, if Florida courts are to adhere to the FCRA's requirement of liberal construction, it is hard to imagine how one can not consider this reality.

II. THE FLORIDA LEGISLATURE COULD NOT HAVE VIEWED *GILBERT* AS A VALID AND CONTROLLING PRECEDENT WHEN IT REENACTED THE FCRA IN 1992

General Electric Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976), is the controversial U.S. Supreme Court case that has caused the controversy over whether it is appropriate to exclude pregnancy from a general prohibition of "sex" discrimination. Of course, the Petitioner in its principal brief has explained the limited holding of *Gilbert* and has explained that the U.S. Supreme Court actually sustained a pregnancy discrimination claim in another context prior to the enactment of the Pregnancy Discrimination Act (PDA).[6] However, even if it is assumed *arguendo* that the factual scenario in *Gilbert* is

[6] See pages 19-25 of Petitioner's Brief, which explains *Nashville Gas Co. v. Satty*, 434 U.S. 136, 98 S.Ct. 347, 54 L. Ed. 2d 356 (1977) .

analogous to the instant case, there are still other U.S. Supreme Court decisions relating to this matter that existed when the Florida Legislature enacted the Florida Civil Rights Act (FCRA) in 1992. Since these other Supreme Court decisions relate to whether *Gilbert* still had precedential value in 1992, courts should consider them.[7]

In the 1978 case of *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978), the majority found it was unlawful for an employer to take into account different life expectancies between males and females with regard to employee medical benefits. Justice Blackmun wrote in his concurring opinion that "[g]iven the decisions of *Geduldig* [*v. Aiello, 417 U.S. 484 (1974)*] and *General Electric* [*v. Gilbert*] – the one constitutional, the other statutory – the present case just cannot be an easy one for the Court to decide." *Id.* at 725. Justice Blackmun explained that the Court could have easily reached a different conclusion based on these precedents. *Id.* He criticized the majority's attempt to distinguish *Gilbert*, stating that "it does not serve to distinguish the case on any principled basis." *Id.* The *Manhart* decision therefore "cuts back on *General Electric,* and inferentially on *Geduldig*, the reasoning of

[7] As explained Section I, if there is more than one reasonable way to interpret the FCRA, then the statutory requirement of liberal construction obligates courts to choose the interpretation that grants access to the remedy. Even if it is assumed *arguendo* that focusing solely on *Gilbert* is one reasonable approach, there is still another reasonable way of looking at this. It would also be reasonable for courts to consider the other Supreme Court decisions existing in 1992 that relate to the continuing precedential value of *Gilbert*. To ignore these other decisions would not be consistent with the statutory requirement of liberal construction.

which was adopted there, and, indeed, *makes the recognition of those cases as a continuing precedent somewhat questionable." Id* at 725 (Internal citations omitted; Emphasis added).

Then in 1983, the Supreme Court considered a case regarding the pregnant spouses of male employees, as opposed to female employees who are themselves pregnant, which is not addressed in the text of the PDA. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983). The case involved an employee benefits plan that covered the medical expenses of pregnant *employees*. *Id.* It did not cover pregnancy related benefits for pregnant spouses of *male* employees. *Id.* The male employees, who complained of having less complete coverage relative to the female employees (whose husbands had full coverage), sued for sex discrimination. *Id.*

Although the Pregnancy Discrimination Act (PDA) had explicitly overruled the *Gilbert* opinion with regard to pregnant *employees,* there is no language in the Act reversing the reasoning of *Gilbert* with regard to the pregnancies of third parties or the spouses of male employees. 42 U.S.C. 2000e(k). Nevertheless, the majority in *Newport News* found that it was unlawful to discriminate against the male employees by giving them less than complete coverage relative to the female employees. *Id.*

Chief Justice Rehnquist believed that the reasoning used in *Gilbert* should still be considered a valid precedent and that it should still be applied by the Court, except to the limited extent that the *Gilbert* decision had been overruled by Congress. *Id* at 685-695. Justice Rehnquist therefore dissented. *Id.* He explained that, not only had Congress partially overruled *Gilbert* with regard to pregnant employees (as opposed to spouses), but the majority in *Newport News* was judicially overruling the reasoning of *Gilbert* in its entirety. *Id.*

Regardless of whether Chief Justice Rehnquist was right or wrong about whether it was appropriate to judicially overrule *Gilbert*, if it was indeed overruled then the *Newport News* decision is part of the relevant legislative history that existed in 1992 when the FCRA was reenacted by the Florida Legislature. In 1992, *Gilbert* no longer had the same precedential value due to legislation and judicial reexamination.

Finally, the U.S. Supreme Court also decided the case of *International Union v. Johnson Controls, Inc.* 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991), shortly before the 1992 reenactment of the FCRA by the Florida Legislature. In *Johnson Controls*, the Supreme Court found that the employer's fetal protection policy was unlawful since it discriminated against woman of child bearing years who could potentially become pregnant. *Id.* In the *Johnson Controls* decision, the Supreme Court went through an extensive analysis before even

mentioning the Pregnancy Discrimination Act. *Id.* at 197-98. The *Johnson Controls* Court relied upon reasoning that existed independent of the PDA, and even relied upon case law that existed prior to the enactment of the PDA in 1978. *Id.* Eventually, the *Johnson Controls* Court stated that its conclusion of unlawful sex discrimination was merely "bolstered" by the enactment of the PDA. *Id.* at 725. It is apparent from the language of the decision that the court considered discrimination based on pregnancy (or the capacity to become pregnant) to be unlawful under the initial prohibition of "sex" discrimination in Title VII.

Since courts are bound by FCRA's statutory requirement of liberal construction, *Gilbert* should not be considered the one and only relevant Supreme Court precedent that existed when the FCRA was reenacted in 1992. Instead, the Court should consider *all* of the Supreme Court decisions relating to this topic that existed when the FCRA was reenacted.[8] It is difficult to imagine how considering *Gilbert* in a vacuum can possibly be reconciled with the requirement of liberal construction. Frankly, even if there was not a statutory requirement of liberal

[8] To be sure, the Supreme Court did reaffirm the limited holding of the *Gilbert* decision in the 2009 case of *AT&T Corp. v. Hulteen*, 556 U.S. 701, 129 S. Ct. 1962, 173 L. Ed. 2d 898 (2009). That case involved plaintiffs who had been pregnant prior to the enactment of the PDA, although their pension benefits were not calculated until years after the enactment of the PDA, and the Court upheld *Gilbert* while refusing to apply the PDA "retroactively." *Id.* However, the *Hulteen* opinion did not exist in 1992, the 1992 Florida Legislature had no way of knowing that such an opinion would ever exist, and it is not a part of the legislative history relative to the reenactment of the FCRA. In any event, as noted on page 27 of Petitioner's Brief, *Hulteen* recognized that *Gilbert's* holding is limited and that there are still circumstances under which pregnancy discrimination would be unlawful. *Id.* at. 1970, n. 4.

construction, it would still be illogical and improper to focus solely on *Gilbert* to the exclusion of all other Supreme Court decisions that existed in 1992.

The lower court opinion contains no discussion about these other U.S. Supreme Court decisions. The lower court decision does rely in part upon the federal district court case of *DuChateau v. Camp Dresser & McKee, Inc.*, 822 F. Supp. 2d 1325 (S.D. Fla. 2011), which constitutes yet another example of a failure to apply liberal construction. Although the *Duchateau* Court emphasized the *Gilbert* opinion, it contains no mention of *Manhart*, *Newport News* or *Johnson Controls*. *Id.* at 1335. Not surprisingly, the opinion contains no mention of the statutory requirement of liberal construction either, and its characterization of the *O'Loughlin* holding is not correct. *Id.*

III. PURSUANT TO *BOCA BURGER*, THE COURT SHOULD ENCOURAGE SCRUPULOUS ATTORNEY CONDUCT AND SHOULD FOSTER RESPECT FOR THE LEGAL PROFESSION AND FOR THE JUDICIARY

When the Florida Legislature reenacts a statute that already has a judicial construction placed upon it, it is deemed to accept that construction absent a clear expression to the contrary.[9] Pregnancy discrimination defendants seem to acknowledge this fundamental rule of statutory construction, but have put a different spin on it: If one does not like the judicial construction already placed on the statute, then turn it upside down. This is not appropriate since it trivializes the

[9] Petitioner discusses the rule of statutory construction on page 42 of her principal Brief.

concept of legal precedent and *stare decisis*. Indeed, lawyers and the judiciary have an interest in letting decided issues remain undisturbed, without having to worry that the holding of a case will later be misstated to stand for the opposite proposition. It unnecessarily causes uncertainty in the law and a distrust of the legal system.[10]

The holding that has been repeatedly misstated by defense advocates and by some courts is *O'Loughlin v. Pinchback*, 579 So.2d 778 (Fla. DCA 1991), which is discussed at length in Petitioner's principal Brief. Although defense advocates and some courts have claimed the opposite, it is indisputable that Ms. O'Loughlin tried a pregnancy claim under the FCRA's predecessor statute – and *only* under this state statute – to the Florida Commission on Human Relations, a state agency that does not have the authority or jurisdiction to entertain a federal claim. *Id.* It is further indisputable that Ms. O'Loughlin prevailed on her Florida pregnancy discrimination claim, and that the victory was upheld by the First District on appeal. *Id.*

Given the reality of the world, one must acknowledge that not everything can be considered just a matter of opinion or a question of "interpretation." Rather, some things are a matter of objective truth. Two plus two does not equal five, and even if a court sustains the proposition that two plus two equals five, this

[10] Not only is it radically at odds with FCRA's requirement of liberal construction as discussed in Section III, but, even in the absence of such a requirement, it would still not be appropriate.

does not make it true. Even if *several* courts were to sustain such a position, it would still be categorically untrue, and it would still be wrong for a litigant to have advanced such in argument in the first place.

The lower court's opinion in this case does not attempt to reconcile its characterization of the *O'Loughlin* holding with the fact that Ms. O'Loughlin prevailed on her claim and won the appeal. The closest it came was in footnote 4, where the lower court said "Because the issue is not before us, we express no opinion as to the merits of the alternative holding of *O'Loughlin*, that the plaintiff could proceed under the FCRA on a federal preemption analysis." While it is difficult to make sense of this footnote, one must wonder whether the lower court is suggesting that Ms. O'Loughlin prevailed on her claim because the First District allowed her to proceed under federal law. However, the opinion below does not claim that Ms. O'Loughlin attempted to amend her complaint to add a federal claim. Nor does the court below provide any explanation for how the Florida Commission on Human Relations, the tribunal to whom the claim was tried, had the jurisdiction or authority to entertain a federal claim. In the controversial federal district court case of *Boone v. Total Renal Laboratories, Inc.*, 565 F. Supp. 2d 1323, 1326-27 (M.D. Fla. 2008), the federal district court explicitly stated the First District in *O'Loughlin* allowed Ms. O'Loughlin's claim "to proceed as a Title VII claim rather than an FHRA claim." The *Boone* court however made no

mention of the fact that Ms. O'Loughlin sought only to pursue a state claim, nor that it was tried to a state agency without the authority to hear a federal claim. *Id.* In another controversial federal court case, *DuChateau v. Camp Dresser & McKee,* 822 F. Supp. 1325, 1322 n. 4 (S.D. Fla. 2011), the trial court simply adopted *Boone's* "interpretation" of *O'Loughlin*, but still provided no explanation for the notion that a state agency has jurisdiction to entertain a federal claim that was never even asserted by the complainant. None of the other judicial opinions that have "interpreted" *O'Loughlin* as rejecting an FCRA pregnancy discrimination claim have contained any attempt to explain this.[11] FCRA defendants have been misstating the holding of *O'Loughlin* at an alarming rate, perhaps hoping that their motions will be greeted with a wink and a nod. This is disturbing to many in the profession.

Of course, both trial and appellate judges have the unenviable task of answering close questions and making tough decisions that will inevitably make

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[11] Fortunately, there are also courts that have refused to blindly accept the misstatement of the *O'Loughlin* holding, many of which are discussed in Petitioner's Brief. In addition, there are unpublished state court opinions that postdate the lower court's opinion in the instant case and decline to follow it. In *McCole v. H&R Enterprises, LLC*, Case no. 2012 30853 CICI(31)(Seventh Circuit, Volusia County 2012), the trial court correctly cited to *O'Loughlin* and rejected the lower court opinion in the instant case, while predicting that this Court will do the same. (See Appendix A). In *Paltridge v. Value Tech Realty Services, Inc.*, case no. 12-CA-000316 (Thirteenth Circuit, Hillsborough County 2012), the trial court rejected the Third District's opinion, while stating that it was *Carsillo* that correctly stated the holding of *O'Loughlin*. (See Appendix B). Finally, in *Savage v. Value Tech Realty Services, Inc.*, Case no. 11-014454 (Thirteenth Circuit, Hillsborough County 2012), the trial Court found the Third District "misread" *O'Loughlin*, and the trial court followed *Carsillo* and *O'Loughlin* instead. (See Appendix C).

someone unhappy. When there is no gray area, however, FCRA litigants and the general public have a right to expect that such questions will be answered correctly. Moreover, one has a right to expect that lawyers advocating their client's positions will not misstate the holding of a case. Even if a court (or courts) sustain such a misstatement, it is still not appropriate.

If the opinion of the lower court and similar decisions were to become the new norm, this could significantly affect the profession. One could easily get the impression that lawyers are not bound by sufficient standards in their advocacy, that it is acceptable to play fast and loose with the facts and/or the law, and that doing so may be justified so long as a court sustains it. If this sort of jurisprudence becomes the new norm, there will be little to dissuade lawyers from making untenable arguments. Moreover, lawyers would have an incentive to make such arguments if there is a realistic chance courts will accept them. An increase in specious or frivolous motions would cause more work for everyone, including judges. To the contrary, courts *should* be encouraging scrupulous conduct and fostering respect for the legal profession and for the judiciary.

The Amicus respectfully asserts that support for its concern may be found in the Court's recent opinion in *Boca Burger, Inc. v. Forum*, 912 So.2d 561 (Fla. 2005). The Court seemed to recognize that a categorical misstatement of the law cannot be magically be transformed into legitimate advocacy just because a court

adopts it. *Id.* The majority in *Boca Burger* found that sanctions may be warranted at the appellate court level, even if the argument was actually accepted by the trial court. *Id.* at 569-571. Prohibiting the frivolous defense of a lower court's order is not inconsistent with a lawyer's duty to zealously represent his/her client, and instead emphasizes the duty of lawyers as officers of the court. *Id.* An advocate cannot hide behind the "presumption of correctness" from an order sustaining the argument, if the order itself had been "procured by misrepresentation of the law or facts." *Id.* at 571. The *Boca Burger* majority emphasized that judges tend to be very busy and often rely upon the representations made to them by counsel. *Id.* Therefore, if lawyers are aware of adverse authority, they have an obligation to disclose such authority to the court. *Id.* This obligation exists even if the opponent does not disclose the authority. *Id.*[12] The Court emphasized that accurately representing the law is required by the oath of admission to the Florida Bar,[13] and by the Florida Bar Rules of Professional Conduct.[14]

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[12] In the instant case, one could view the issue as worse than merely failing to disclose adverse authority. The authority, *O'Loughlin*, was disclosed but not presented as adverse authority. Rather, the holding of the case was misstated.

[13] *Oath of admission,* Fla. Bar J., Sept. 2004 at 2 states "I will emplow for the purposes of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by an artifice of false statement of fact or law."

[14] R. Regulating Fla. Bar 4-3.3(a)(1) states "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal." R. 4-3.3(a)(3) prohibits lawyers from knowingly "fail[ing] to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

To summarize, "[t]he heart of all legal ethics is the lawyer's duty of candor to a tribunal." *Id.* at 573. It was acknowledged that the adversary system is supposed to be founded on the rule of law and the outcomes of cases should not depend on who is the "most devious" or "who is able to misdirect a judge." *Id.* Indeed, "the lawyer is required to disclose law favoring his adversary when the Court is obviously under an erroneous impression as to the law's requirements." *Id.*

The Amicus therefore respectfully asserts that FCRA defendants should disclose the actual holding of *O'Loughlin.* Misstating the holding of a case, whether done intentionally or not, is a very serious matter that can affect the rights of litigants in the most direct possible way. It should be discouraged.

Of course, there has been no motion for sanctions in the instant case. Rather, the Amicus respectfully asserts that the Court should be mindful of the policy concerns that it previously expressed in *Boca Burger* and the requirement of liberal construction, when considering the issues in this case. The Court should seek to foster respect for the doctrine of *stare decisis,* and respect for the legal profession and for the judiciary.

CONCLUSION

The Court should reverse the decision of the lower court because, when applying liberal construction, the Court should conclude that the general

prohibition of "sex" discrimination under the Florida Civil Rights Act makes it unlawful to discriminate on the basis of pregnancy. Any ambiguity or uncertainty in this regard should be resolved in favor of granting access to the remedy, pursuant to the statutory requirement of liberal construction. The Court should be mindful of the need for judges and lawyers to rely upon established precedent without it being misstated or misconstrued, and should encourage scrupulous behavior and respect for the legal system.

Respectfully submitted,

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Association, Florida Chapter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave To File Amicus Brief has been furnished by U.S. Mail to Travis R. Hollifield, Esq., Hollifield Legal Centre, 147 East Lyman Avenue, Suite C, Winter Park, Florida 32789, and Andrew Rodman, Esq., and Bayardo Aleman, Esq., Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Museum Tower, Suite 2200, 150 West Flagler Street, Miami, Florida, this 3d day of June 2013.

/s/ P. Daniel Williams
P. Daniel Williams

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.100(*l*), I hereby certify that this brief was prepared using proportionately spaced Times New Roman 14 point font.

/s/ P. Daniel Williams
P. Daniel Williams

APPENDICES

APPENDIX

A

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY

JAMIE MCCOLE,

Plaintiff,

v. Case No. 2012 30853 CICI (31)

H&R ENTERPRISES, LLC
d/b/a SYLVAN LEARNING
CENTERS,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO DISMISS COUNT II OF THE AMENDED COMPLAINT

THIS CAUSE came to be heard on Defendant's Motion to Dismiss Count II of the Amended Complaint. Count II of the Amended Complaint brings a claim for pregnancy discrimination under the Florida Civil Rights Act ("FCRA"). The Court received and reviewed legal memorandums and case law submitted by both parties on the issue of whether the FCRA prohibits pregnancy discrimination and a hearing was held on August 30, 2012.

The Court is aware of and reviewed the certified conflict between the Fourth District Court of Appeal and the Third District Court of Appeal on the issue. In *Carsillo v. City of Lake Worth*, 995 So. 2d 1118 (Fla. 4th Dist. Ct. App. 2008), the Fourth District Court of Appeal held that the FCRA prohibits pregnancy discrimination. *Id.* In *Delva v. Continental Group, Inc.*, 2012 WL 3022986 (Fla. 3rd. Dist. Ct. App. 2012), the Third District Court of Appeal recently held that the FCRA does not prohibit pregnancy discrimination.

Upon review of these decisions, as well as other numerous decisions including *O'Loughlin v. Pinchback*, 570 So. 2d. 788 (Fla. 1st Dist. Ct. App. 1991)(affirming order determining complainant had been discriminated against based upon her pregnancy in violation of Florida law), and Florida federal district court decisions, the Court finds that the FCRA prohibits pregnancy discrimination. In addition, the Court believes that when this issue is brought before the Florida Supreme Court, the Court will uphold that the FCRA prohibits pregnancy discrimination.

Therefore, it is ORDERED AND ADJUDGED that the Defendant's Motion to Dismiss Count II of Plaintiff's Amended Complaint is **DENIED.**

a. The Defendant shall ANSWER the AMENDED COMPLAINT within 20 days of the execution of this ORDER.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida this _____ day of _____.

RICHARD S. GRAHAM
CIRCUIT JUDGE
SEP 14 2012
SIGNED & DATED

The Honorable Richard S. Graham

Conformed copies to:
Kelly H. Chanfrau, Esq.
David N. Glassman, Esq.

APPENDIX

B

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
GENERAL CIVIL DIVISION

VITA PALTRIDGE

CASE NO.: 12-CA-000316

DIVISION: D

Plaintiff,

vs.

VALUE TECH REALTY SERVICES, INC.,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on November 13, 2012 for hearing on Defendant's Motion for Summary Judgment. After considering the arguments of counsel, the pleadings, the record, and the applicable law, the Court finds that the Fourth District Court of Appeal case *Carsillo v. City of Lake Worth,* 995 So.2d 1118 (Fla. 4th DCA 2008) correctly explains the holding of *O'Loughlin v. Pinchback,* 579 So.2d 788 (Fla. 1st DCA 1991). The Court declines to follow the non-binding precedent of *Delva v. The Continental Group, Inc.*, 96 So.3d 956 (Fla. 3rd DCA 2012).

It is therefore **ORDERED AND ADJUDGED** that Defendant's Motion for Summary Judgment is **DENIED**.

DONE AND ORDERED in Chambers in Tampa, Hillsborough County, Florida, this _____ day of December, 2012.

ORIGINAL SIGNED

DEC 18 2012

_____
MICHELLE SISCO, Circuit Judge

MICHELLE SISCO
CIRCUIT JUDGE

Copies to:

P. Daniel Williams
Magi & Williams, P.A.
3100 University Boulevard South, Suite 115
Jacksonville, FL 32216

John W. Campbell
Constangy Brooks & Smith LLC
P.O. Box 1840
Tampa, FL 33601

APPENDIX

C

IN THE CIRCUIT COURT, THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA.

CASE NO.: 11-014454

DIVISION: C

NATASHA SAVAGE,

Plaintiff,

vs.

VALUE TECH REALTY SERVICES, INC.

Defendant.
_____/

ORDER ON MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on Defendant's Motion for Summary Judgment.

Defendant claims in its motion for summary judgment that the prohibition of "sex" discrimination under the Florida Civil Rights Act (FCRA) of 1992 does not apply to claims of discrimination based on pregnancy. In support of its motion, Defendant relies upon the case of *O'Loughlin v. Pinchback,* 579 So.2d 788 (Fla. 1st DCA 1991), where the First District considered this question under the predecessor statute. Defendant also relies on the recent Third District case of *Delva v. The Continental Group, Inc.,* 96 So.3d 956 (3rd DCA 2012), which relies upon *O'Loughlin* for the proposition that the FCRA does not prohibit discrimination based on pregnancy.

In *O'Loughlin, supra*, the claimant brought a claim for pregnancy discrimination solely under Florida law. Ms. O'Loughlin prevailed on her pregnancy discrimination claim in front of the Florida Commission on Human Relations, and this victory was upheld by the First District

Court of Appeals. The case was remanded for the sole purpose of determining the correct amount of damages. *O'Loughlin* does not stand for the proposition that there is no claim for pregnancy discrimination under Florida law. In *Delva, supra,* the Third District determined that pregnancy discrimination is not prohibited by Florida law, and relied upon the precedent of *O'Loughlin.* Therefore, the undersigned concludes that the *Delva* Court has misread the *O'Loughlin* decision.

This Court therefore declines to follow the non-binding precedent of *Delva,* and instead relies upon the precedent of *O'Loughlin* and the Fourth District case of *Carsillo v. City of Lake Worth,* 995 So.2d 1118 (Fla. 4th DCA 2008), which correctly explained the holding of *O'Loughlin* and held that pregnancy discrimination is indeed covered by the general prohibition of "sex" discrimination.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment is DENIED.

DONE AND ORDERED in chambers, at Tampa, Hillsborough County, Florida on this ____ day of November, 2012.

James M. Barton, II, District Court Judge

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