IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
SECOND DISTRICT

ERNIE HAIRE FORD, INC.,

Appellant,

v.

CASE NO. 2D09-1530
LT CASE NO. 06-CA-6350

BENJAMIN ATKINSON,

Appellee.
_____/

BRIEF AMICUS CURIAE BY NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER

BRIEF IN SUPPORT OF APPELLEE
ON APPEAL OF A VERDICT AND JUDGMENT FROM THE
CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

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Identity And Interest of Amicus Curiae and Statement of Consent

Amicus Curiae 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.

The roughly 200 employment lawyers in Florida NELA and their thousands of employee clients share an interest in having this court affirm the judgment of the court below and the jury verdict on which it rests.

Florida NELA addresses only one of the many issues presented in the appeal – the assertion of Appellant that this court should follow the court in City of Hollywood v. Hogan, 986 So. 2d 634 (Fla. 4th DCA 2008), in legislating a range of acceptable jury verdicts for emotional distress in discrimination cases with "garden variety" emotional distress. The court below declined that invitation. In so doing , the trial court followed, as it must, longstanding constitutional doctrines involving the sanctity of jury verdicts and the separation of powers. Because reversing the court below would threaten the legitimacy of Florida courts, would intrude upon legislative prerogatives, and would erode the fundamental right to a jury trial, affirming the decision below is a matter of substantial concern to the amicus curiae and their clients.

Both parties have consented to the amicus curiae brief in this case.

SUMMARY OF THE ARGUMENT

When it enacted the Florida Civil Rights Act (hereinafter "FCRA"), the Florida legislature expressly refused to place a cap on the compensatory damages that a jury could award to FCRA plaintiffs. This is particularly noteworthy in light of the fact that the FCRA was otherwise modeled after federal discrimination laws which do place a cap on such damages. The Florida legislature is capable of developing damage caps. They have done so in other statutes. Here, they chose not to do so. Accordingly, the legitimacy of our state's courts rides on the exercise of restraint in declining to impose a policy regimen that the Legislature has expressly refused.

Determinations by juries hold a special place in our legal system. Jurors are the exclusive evaluators of fact. Such a system demands that courts not "sit as a seventh juror," Laskey v. Smith, 239 So.2d 13, 14 (Fla. 1970), and adjust a jury award to a level that judges would award if they were on the jury. In light of this as well as the legislature's express refusal to place a cap on compensatory damages in FCRA claims, the trial court was correct in its refusal to remit the jury's compensatory damage award in the instant case.

ARGUMENT AND INCORPORATED STANDARD OF REVIEW

I. Remitting Damages Would Usurp The Jury's Proper Role

Jury determinations hold a special place in our legal system, constitutionally and as a matter of common law. Courts must be reluctant to second-guess these determinations. The Florida Constitution mandates that the right to a trial by jury shall remain "inviolate." Art. I, § 22, Fla. Const. Indeed, pure factual determinations are "exclusively the province of the jury." Reed v. Bowen, 503 So. 2d 1265, 1266 (Fla. 2d DCA 1986).

The importance of the jury's role in our legal system is encapsulated by the extreme deference that Florida courts must show to the determinations of juries. In this case, the trial court showed deference to the jury's assessment of damages. The court had a duty to do so. Poole v. Veterans Auto Sales & Leasing Co., Inc., 668 So.2d 189, 191 (Fla.1996). In making a decision to remit damages, trial courts "cannot 'sit as a seventh juror with veto power.'" Laskey v. Smith, 239 So.2d 13, 14 (Fla. 1970).

Appellate courts must observe an additional layer of deference to the trial court that has shown deference to the jury. A trial court's decision regarding remittitur of damages is reviewed for "abuse of discretion." City of Hollywood v. Hogan, 986 So. 2d 634, 647 (Fla. 4th DCA 2008). But this is a particularly demanding formulation

of the "abuse of discretion" standard. In articulating that standard, the Florida Supreme Court has held:

> Discretion . . . is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Conakeris v. Conakeris, 382 So. 2d 1197, 1203 (Fla. 1980). An appellate court reviewing a trial court's refusal to remit compensatory damages must overcome both of these deferential standards. In other words, appellate courts must determine that "no reasonable man," showing deference to the jury's assessment of damages as the exclusive finder of fact, "would take the view adopted by the trial court." See id.

In short, the jury system serves a crucial and dispositive fact-finding role in our legal system. The importance of this role is evidenced by: (1) its place in the Florida Constitution; (2) the precedent of this Court; and (3) the two levels of deference an appellate court must overcome in order to reverse the trial court's refusal to remit the compensatory damages in this case. In light of the important functions of juries in our society, courts should be extremely reluctant to undermine a jury's determination.

II. Courts May Not Abrogate The Florida Legislature's Express Refusal to Impose Caps on Compensatory Damages in Florida Civil Rights Act Claims

The Florida Civil Rights Act (hereinafter "FCRA") is generally modeled after

federal discrimination laws. Castleberry v. Edward M. Chadbourne, Inc., 810 So. 2d 1028, 1030 n.3 (Fla. 1st DCA 2002); Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998). Despite this, the Florida legislature declined to incorporate the compensatory damage cap which is included in the FCRA's federal analogue. Compare 42 U.S.C. § 1981a(b)(3) (imposing a cap on compensatory damages in employment discrimination cases) with Fla. Stat. § 760.11(5) (imposing no cap on compensatory damages in FCRA claims).

The Florida legislature's refusal to impose a cap on damages is further evidenced by the legislative history of the FCRA. For example, in its Fiscal Analysis and Economic Impact Statement, the House of Representatives Committee on Judiciary declared: "[The Act] expands remedies that are presently available in law, and provides that an aggrieved person may receive **unlimited actual damages** and punitive damages with a cap of $100,000." Fla. H.R. Comm. on Judiciary, Final Bill Analysis & Econ. Impact Statement, CS/SB 1368 & 72, at 7 (Fla. 1992) (emphasis added). The Florida Senate held a similar view. See Senate Staff Analysis & Econ. Impact Statement, CS/SB 1368 & 72, at 5 (Fla. 1992) ("The Federal Act caps compensatory and punitive damages . . . . The caps apply to the total of compensatory and punitive damages. The cap in this bill applies only to the amount of punitive damages"). This fact is especially noteworthy in light of the fact that the Senate Staff

Analysis & Economic Impact Statement went to great lengths to analyze the remedies authorized under various Florida discrimination statutes. See id. at 1-3.

III. Respect for Coordinate Branches of Government Is the Foundation of Judicial Legitimacy

As discussed in Part II of this argument, the Florida legislature carefully considered the possibility of placing a cap on compensatory damages in FCRA claims. Nonetheless, they declined to do so, placing only a cap on punitive damages. Florida courts are bound by this choice.

This is, of course, not to say that in rejecting caps on emotional distress in FCRA cases the Legislature created a unique category of jury verdicts immune from remittitur or examination. But it is to say that the Hogan court, for example, erred in implementing a policy for FCRA cases that favors the practices of federal courts applying federal laws that do include such caps.

This court has noted recently that courts cannot ignore the clear intent of the legislature. Jeffrey A. Hunt, D.O., P.A. v. Huppman, 28 So. 3d 989, 992 (Fla. 2d DCA 2010). Relying on longstanding precedent, a sister court stated, "[i]n Florida, it is well settled that '[a]bsent a violation of due process or a specific constitutional guarantee, courts cannot substitute their judgment for that of the Legislature'" Weingrad v. Miles, 29 So. 3d 406, 416 (Fla. 3d DCA 2010) (*quoting* Askew v.

Schuster, 331 So. 2d 297, 300 (Fla.1976)). Indeed, Florida courts should "measure legislative acts only 'with the yardstick of the Constitution' and . . . '[t]he propriety and wisdom of legislation are exclusively matters for legislative determination.'" Weingrad, 29 So. 3d at 416 (*quoting* In re Apportionment Law, Senate Joint Resolution No. 1305, 263 So.2d 797, 806 (Fla.1972)). To ignore these principles is to risk "violating the separation of powers doctrine." Weingrad, 29 So. 3d at 416 (*citing* Trianon Park Condo. Ass'n v. City of Hialeah, 468 So.2d 912, 918 (Fla.1985)); see also Courson v. State, 24 So. 3d 1249, 1251 (Fla. 1st DCA 2009) ("Regardless, [t]his court is without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." (internal citations omitted)).

In City of Hollywood v. Hogan, the Fourth District Court of Appeal, relying in part upon the federal damage cap, attempts to establish a range of damages it felt was appropriate for "garden variety" claims. City of Hollywood v. Hogan, 986 So. 2d 634, 648-50 (Fla. 4th DCA 2008). Hogan involved a verdict where the jury awarded two police officers $83,544 each in back wages and $1,000,000 each--or 1196% of their lost wages--in emotional damages for their age discrimination claims. Id. at 640. In reviewing this verdict, the Hogan court noted "there was little if any

evidence of any emotional injury" and held a range of $5,000 to $30,000 would be more appropriate in such a "garden variety" claim. Id. at 649.

The deference owed to jury determinations in our legal system as well as the separation of powers doctrine, discussed in Parts I and II of this argument respectively, militate against the reasoning of Hogan. As noted above, this court has held that factual determinations are exclusively the province of the jury. The path of Hogan punishes plaintiffs who may simply be inarticulate or inadequately-prepared to testify by limiting their potential recovery. The jury, applying their collective knowledge and experience, is in the best position to evaluate the severity of the emotional damage suffered by a plaintiff. Over the last three decades, majorities of the U.S. Supreme Court have often repeated an observation first voiced in a 1977 dissent:

> The Judiciary, including this Court is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.

Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (Stewart, J., dissenting).

It may well be that our state courts come nearest to illegitimacy when they ignore duly enacted statutes and substitute their own policies to serve as gatekeepers protecting the privileged from democratic institutions such as legislatures and juries.

The judicial branch, no less than the legislative and executive, does not exist to serve any particular class of society or to bend the law to "protect" the elite from the masses. That is, however, a deformity that has afflicted at least some courts through the ages. The doctrine arising from Hogan is a step in that direction. The jury and the trial court were wise to resist those blandishments. This court should follow that lead.

CONCLUSION

In order to effectuate the Florida legislature's express refusal to place a cap on compensatory damages in Florida Civil Rights Act claims and to safeguard the longstanding principles inherent in the jury trial system, the Court should affirm the trial court's refusal to remit the compensatory damages awarded by the jury.

Respectfully submitted,

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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 Robert Biasotti, Carlton Fields, P.A., P.O. Box 2861, St. Petersburg, Florida 33731-2861, Geoffrey Todd Hodges, G.T. Hodges PA, 905 Shaded Water Way, Lutz, Florida 33549; Angela E. Outten and Tyrone Zdravko, Reeser, Rodnite, Outten & Zdravko P A, 3411 Palm Harbor Boulevard, Suite A, Palm Harbor, Florida 33683, and Celene H. Humphries and Tyler K. Pitchford, BRANNOCK & HUMPHRIES, 400 N. Ashley Drive, Suite 1100, Tampa, Florida 33602, this 29th day of June 2010.

_____
Richard E. Johnson

CERTIFICATE OF COMPLIANCE

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

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Richard E. Johnson