SUPREME COURT
STATE OF FLORIDA

CHARLENE M. BIFULCO

CASE NO: SC09-172
DCA CASE NO.: 5D08-98

Petitioner,

v.

PATIENT BUSINESS & FINANCIAL SERVICES, INC.

Respondent.

BRIEF OF AMICUS CURIAE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION FLORIDA CHAPTER IN SUPPORT OF PETITIONER/APPELLANT CHARLENE BIFULCO

THIS BRIEF IS FILED BY CONSENT OF ALL PARTIES

JOHN C. DAVIS
Fla. Bar No. 827770
Law Office of John C. Davis
623 Beard Street
Tallahassee, Florida 32303
(850) 222-4770
(850) 222-3119
john@johndavislaw.net

Counsel for Amicus Curiae
National Employment Lawyers
Association, Florida Chapter

TABLE OF CONTENTS

CITATION OF AUTHORITIES

CASES PAGES(S)

FLORIDA STATUTES

STATEMENT OF IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

The National Employment Lawyers Association (NELA) is an organization of approximately 3,000 attorneys around the nation who represent employees in civil rights and other employment-related litigation. NELA has filed numerous amicus briefs in the United States Supreme Court and in the United States Courts of Appeals.

The Florida Chapter was founded in 1993 and has approximately 200 participating attorneys around the state. The Florida Supreme Court has previously accepted seven amicus briefs from the Florida Chapter, Joshua v. City of Gainesville, 767 So. 2d 432 (Fla. 2000), The Golf Channel v. Jenkins, 752 So. 2d 561 (Fla. 2000), Allstate v. Ginsburg, 863 So.2d 156 (Fla. 2003); Poer v. Calder Race Course, Inc., 775 So.2d 970 (Fla. 3d DCA 2000), rev. dism'd 823 So.2d 739 (Fla. 2002); Woodham v. Blue Cross and Blue Shield of Florida, Inc., 829 So.2d 891 (Fla. 2002); Bach v. United Parcel Service, Inc., 837 So.2d 395 (Fla. 2002) and Maggio v. Florida Department of Labor & Economic Security, 899 So. 2d 1074 (Fla. 2005). Florida NELA has also filed amicus briefs in the District Courts of Appeal throughout Florida and in the U.S. Court of Appeals for the Eleventh Circuit. Florida NELA has filed more than 30 amicus briefs in Florida.

Florida NELA seeks to address the issue in this case whether the notice of claim requirements of § 768.28(6), Florida Statutes, apply to claims brought under § 440.205 of Florida's Workers' Compensation Law, which protects claimants against retaliation "by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law." This issue is one of statewide importance in that it concerns the contours of the sovereign immunity wavier under the Workers' Compensation Law. The outcome of this case will determine the access to court and access to remedies for unlawful retaliation for a large number of the clients of NELA members and an even larger number of initially unrepresented parties who seek to exercise their rights under Florida's Workers' Compensation Law.

SUMMARY OF ARGUMENT

The District Court correctly determined that § 768.28(6), Florida Statutes, does not apply to causes of action brought under § 440.205, Florida Statutes. The decision is consistent with this Court's decision in Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So.2d 912 (Fla.1985), that § 768.28(6) only applies to common law causes of action. Section 440.205 is a statutory creation that did not exist at common law. The decision is further fully consistent with the Court's decision in Maggio v. Fla. Dept. of Labor and Employment Security, 899 So.2d 1074 (Fla. 2005), where the Court considered the instant issue without deciding it. As with Chapter 760,

the statutory scheme at issue in Maggio, Florida's Workers' Compensation Law is a comprehensive statutory scheme containing an express waiver of sovereign immunity. The absence of any reference or incorporation of § 768.28 in this scheme evinces a legislative intent that it does not govern causes of action under it. Further, like Chapter 760, the Workers' Compensation Law is remedial and should be liberally construed to effectuate its purposes. Section 440.205 plays an integral role in ensuring its enforcement and guaranteeing its protections to the citizens of Florida. Application of § 768.28(6) to § 440.205 causes of actions is inconsistent with the sovereign immunity waiver in the Workers' Compensation Law and unnecessarily trammels the rights and remedies conferred on employees by the Law and defeats its remedial purposes. The Court should, therefore, affirm the District Court's holding that § 768.28(6) does not apply to causes of action under § 440.205

ARGUMENT

ISSUE: WHETHER CLAIMANTS SUING UNDER § 440.205, FLORIDA STATUTES, MUST COMPLY WITH § 768.28(6), FLORIDA STATUTES

The trial court decided the case on summary judgment; thus, the applicable standard of review is de novo. Major League Baseball v. Morsani, 790 So.2d 1071 (Fla.2001).

1. Section 440.205 Is A Statutory Cause of Action And §768.28(6) Does Not Apply To Statutory Causes of Action

The District Court of Appeal correctly decided the case on grounds that § 768.28(6) does not apply to statutory causes of action, and thus, claims under § 440.205, a creature of statute, are not subject to its pre-suit notice requirements. This result is foretold by this Court's decision in Maggio v. Fla. Dept. of Labor and Employment Security, 899 So.2d 1074 (Fla. 2005).

In Maggio, the Court considered whether the pre-suit notice requirement of § 768.28(6) applied to claims under the Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes. The Maggio Court answered the question in the negative. While the Court decided the issue on different grounds, it addressed the issue of the application of § 768.28(6) to statutory causes of action, stating that the district court had decided the case for application based on a civil rights violation being a "tort." The Court noted that in Trianon Park Condo. Ass'n, Inc. v. City of Hialeah, 468 So.2d 912, 917 (Fla.1985), it had found 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.'" Id. at 1081.

> Under this narrow reading, only those claimants bringing common law tort claims would be subject to the pre-suit notice requirements of section 768.28(6). However, because we have determined that the Legislature did not intend for civil rights claimants to be required to comply with the pre-suit notice requirements of section 768.28(6) in addition to the pre-suit requirements of the Act itself, we decline to reach the broader issue of whether the notice requirements of section 768.28(6) are applicable only

to common law torts.

Id.

The Court further discussed its twin decisions in Scott v. Otis Elevator Co., 572 So.2d 902 (Fla.1990) (Scott II), and Scott v. Otis Elevator Co., 524 So.2d 642, 643 (Fla.1988) (Scott I), in which the Court found claims under § 440.205 to be "tortuous in nature" and, therefore, to entitle claimants to emotional distress damages. Id. at 1080. The Court distinguished these cases as having no precedential value because neither involved the issue whether § 440.205 claims were subject to § 768.28(6)'s pre-suit notice requirements. Id. The Court then addressed briefly the two decisions upon which the conflict in this case rests: Osten v. City of Homestead, 757 So.2d 1243, 1244 (Fla. 3d DCA 2000); Kelley v. Jackson County Tax Collector, 745 So.2d 1040, 1040-41 (Fla. 1st DCA 1999), stating in footnote 4:

> We recognize that the First and Third District Courts of Appeal have concluded that because a retaliatory discharge claim brought pursuant to section 440.205 is tortious in nature under Scott I, it is subject to the pre-suit notice requirements of section 768.28. See Osten v. City of Homestead, 757 So.2d 1243, 1244 (Fla. 3d DCA 2000); Kelley v. Jackson County Tax Collector, 745 So.2d 1040, 1040-41 (Fla. 1st DCA 1999). We do not determine the correctness of these decisions because that issue is not before us.

Id. at 1082.[1]

[1] Since the decision in Maggio, the Second District decided McCoy v. Pinellas County, 920 So.2d 1260 (Fla. 2nd DCA 2006), which, citing Osten and Kelly,
(Footnote continued.)

The issue is now squarely before the Court. The conflict should be resolved against application of § 768.28(6) to § 440.205 on the grounds stated in the District Court's decision below. Both Osten and Kelly were decided before Maggio.[2] Neither case analyzes the issue from the standpoint of whether, under the principles of Trianon Park, § 768.28(6) was meant to apply to statutory causes of action. They should be rejected. As stated in Trianon Park and reiterated in Maggio, the "sole purpose" of § 768.28(6) was to waive sovereign immunity for common law causes of action. Section 440.205 is a statutory creation. Smith v. Piezo Technology, 427 So. 2d 182, 183 (Fla. 1983) (§ 440.205 "creates a statutory cause of action for wrongful discharge in retaliation for an employee's pursuit of a workers' compensation claim.") The fact that it may be "tortuous in nature" does not alter, nor is it inconsistent with, the fact that it is a statutory cause of action that did not exist at common law. Accordingly, § 768.28(6)'s pre-suit notice requirements do not apply to it.

2. Florida's Workers' Compensation Law Contains A Separate And Independent Waiver of Sovereign Immunity Which Preempts § 768.28(6)

---

assumes without analysis that § 768.28(6) applies to § 440.205.

[2] Indeed, the First District in its decision in Fla. Dept. of Education v. Garrison, 954 So.2d 84 (Fla. 1st DCA 2007), suggests that it might well recede from its position in Kelly in light of this Court's decision in Maggio. While holding on other grounds § 768.28(6) inapplicable to claims under the Public Whistle-blower's Act, it noted the Maggio Court's recognition that § 768.28(6) was never intended to apply to statutory causes of action.

The Florida Workers' Compensation Law contains a separate and independent waiver of sovereign immunity which preempts § 768.28(6). Section 440.02(16)(a), Florida Statutes, defines an "employer" to "mean[] the state and all political subdivisions thereof, all public and quasi-public corporations therein." Section 440.02(16)(b) further defines "employment" to include "[e]mployment by the state and all political subdivisions thereof and all public and quasi-public corporations therein, including officers elected at the polls." Section 440.205 specifically prohibits an "employer" from retaliating against an employee because of the employee's valid or attempted claim for workers' compensation. As in Maggio, this express inclusion of the state and its subdivisions within the definition of an employer "evidences a clear, specific and unequivocal intent to waive sovereign immunity." Maggio, 899 So.2d at 1078-79; Hodges v. State Road Dept., 171 So.2d 523, 525 (Fla.1965) (state agencies expressly made subject to workers' compensation laws). Application of § 768.28(6) to § 440.205 would be superfluous and in conflict with the express waiver in the Workers' Compensation Law.

3. Florida's Workers' Compensation Law Is A Comprehensive Statutory Scheme Remedial In Purpose And Application of § 768.28(6) Defeats Its Purposes

Like Chapter 760 at issue in Maggio, Florida's Worker Compensation Law is a remedial statute and should be liberally construed to effectuate its purposes. Sunshine

Jr. Food Stores, Inc. v. Thompson, 409 So.2d 190, 191 (Fla. 1st DCA 1982). Indeed, the Workers' Compensation Laws could be characterized as one of the most comprehensive legislative schemes contained within the laws of Florida. Like Chapter 760, it is a "stand-alone statutory scheme" designed to address workplace injuries. Id. at 1078 (Chapter 760 is a "stand-alone statutory scheme" compelling conclusion that the pre-suit notice requirement of § 768.28(6) are inapplicable to it.). Section 440.205 is part and parcel of this scheme and plays an integral role in its operation and enforcement. Because of this and because the immunity the Workers' Compensation Law provides all employers, including state agencies, from suit except in accordance with its provisions, employees should be secure in their confidence that the can invoke its remedies without fear of retaliation. Requiring employees of the State to meet the pre-suit notice requirements of § 768.28(6) at peril of losing the law's protections unnecessarily trammels their rights under the law and defeats the remedial purposes it is designed to serve.

4. The Workers' Compensation Law Does Not Expressly Incorporate All Or Any Part of § 768.28 And Thus § 768.28 Does Not Govern Claims Brought Under It.

The absence of any express reference or incorporation of § 768.28(6) or, for that matter, any part of § 768.28 in the Workers' Compensation Law of Chapter 440 evinces a legislative intent that it does not apply to causes of action brought under

the Law. This is the teaching of Maggio. In Maggio, the Legislature had made a specific reference to subsection (5) of § 768.28 in Chapter 760. The court held that this single reference precluded any larger incorporation of § 768.28, particularly its pre-suit notice requirements. See Bd. of Trustees of Fla. State Univ. v. Esposito, 991 So.2d 924 (Fla. 1st DCA 2008) (employing Maggio's statutory analysis to find subsection (8) of § 768.28 inapplicable to claims under Chapter 760). Absent any such reference in a "stand-alone statutory scheme" like the Workers' Compensation Law, § 768.28 has no application to it.

CONCLUSION

The Court of Appeal's decision is fully consistent with the Court's decision in Trianon Park that § 768.28(6)'s pre-suit notification requirements and sovereign immunity waiver apply only to common law torts. Further, the express wavier of sovereign immunity contained in the Workers' Compensation Law coupled with the Law's comprehensive stand-alone statutory scheme designed with the specific purpose of remedying workplace injuries evinces a clear legislative intent that § 768.28(6) does not apply to causes of action under § 440.205. Accordingly, the Court should affirm the District Court's holding that§ 768.28(6) does not apply to causes of action under § 440.205.

Respectfully submitted,

_____
JOHN C. DAVIS
Law Office of John C. Davis
623 Beard Street
Tallahassee, Florida 32303
(850) 222-4770
(850) 222-3119

Counsel for Amicus Curiae
National Employment Lawyers
Association, Florida Chapter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served this 6th day of August, 2009, by U.S. Mail to Thomas J. Leek, Esq. & Kelly Parsons, Esq., 150 Magnolia Ave., P.O. Box 2491, Daytona Beach, FL 32115-2491.

_____
JOHN C. DAVIS

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using Times New Roman 14 point font.

_____
JOHN C. DAVIS