IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FIRST DISTRICT

MANOHER R. BEARELLY, M.D.,

Appellant,

v. Case No.: 1DO2-2139

STATE OF FLORIDA,
DEPARTMENT OF CORRECTIONS,

Appellee.
_____/

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

ON APPEAL FROM THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT IN AND FOR UNION COUNTY, FLORIDA

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SUMMARY OF ARGUMENT

The trial court erred in ruling that "aggrieved persons" bringing claims under the Florida Civil Rights Act of 1992 ("FCRA") against the state must comply with the notice requirements of § 768.28(6). The FCRA contains a separate and independent waiver of sovereign immunity by the state. The provisions of § 768.28 do not apply to suits brought under the FCRA except to the limited extent that the FCRA incorporates subsection (5), which limits total amount of recovery against the state. Application of the principles of statutory construction lead to the conclusion that the Florida Legislature carefully considered the issue of sovereign immunity when it enacted the FCRA in 1992 and chose to put the waiver of immunity in the FCRA itself. And, further, that it clearly considered § 768.28 when it made the waiver contained in the FCRA because it chose to incorporate only a single provision of § 768.28, subsection (5). Its decision not to incorporate any more evinces a clear ntention that no other provisions of § 768.28 apply to the FCRA.

This construction is consistent with other established principles of statutory construction. Chapter 760 is a self-contained special statute that covers a particular subject. It's provision should control over the general provision of § 768.28 relating to the waiver of sovereign immunity. The FCRA has a comprehensive and specific administrative claims procedure that

mirrors and serves the very purpose of the notice requirement in § 768.28(6). The FCRA establishes the Florida Commission On Human Relations ("FCHR") and empowers it to investigate, determine and conciliate all FCRA claims. §§ 760.03 and 760.06. FCRA claimants must file claims with the FCHR as a condition precedent to filing suits in the courts under the FCRA. § 760.11(7) and (8).

Finally, to hold that § 768.28 applies to the FCRA is inconsistent with its remedial purposes and undermines its effectiveness by adding another layer of administrative exhaustion and notice requirements. The notice requirements of § 768.28 serve no salutary purpose. Rather, they defeat and undermine the remedial purpose of the FCRA. They complicate the administrative process for lay persons and allow the state to interpose satisfaction of a superfluous additional administrative notice requirement when confronted by its own agency with a charge of discrimination.

ARGUMENT

4. Chapter 760 Contains A Separate And Independent Waiver of Sovereign Immunity Which Preempts § 768.28

In Klonis v. Dept. of Revenue, 766 So.2d 1186 (Fla. 1st DCA 2000), the Court considered whether the FCRA contained a waiver of sovereign immunity. Analyzing the language of the FCRA, the Court held that the FCRA contains a "clear and unambiguous

legislative" waiver of sovereign immunity. Bell v. Board of Regents, State of Florida, 768 So.2d 1244 (Fla. 1st DCA 2000); Longman v. City of Tallahassee, 776 So.2d 1130 (1st DCA 2001); Williams v. School Board of Palm Beach County, 770 So.2d 706 (4th DCA 2000); Jones v. Brummer, 766 So.2d 1107 (3rd DCA 2000). The Court's analysis makes clear that the waiver is a separate and independent waiver in that it does not depend upon § 768.28.

Section 760.11(5) of the FCRA incorporates by reference subsection (5) of § 768.28. Subsection (5) of § 768.28 places limits on recoveries against the state. There is no other reference to § 768.28. Because the FCRA contains an independent waiver of sovereign immunity, it is clear that when the legislature incorporated a single subsection of § 768.28 it meant to incorporate no more than that; that is, given the waiver in the FCRA the other provisions of § 768.28 are unnecessary and serve no purpose.

5. When Chapter 760 Is Construed In Accordance With Established Principles Of Statutory Construction, § 768.28 Has No General Application to Chapter 760

This conclusion is consistent with the principles of statutory construction applied by the Florida courts. Under the familiar principle of statutory construction expressio unius est exclusio alterius, which holds that "if a statue enumerates the things on which it is to operate, or forbids certain things, it is ordinarily construed as excluding from its operation all those

matters not expressly mentioned," the specific reference to § 768.28(5) excludes all other provisions of § 768.28. Sun Coast International, Inc. v. Dept. of Bus. Regulation, 596 So.2d 1118 (1st DCA 1992).

The trial court's application of expressio unius est exclusio alterius stands the principle on its head. The trial court reasons that the specific exclusion of §§ 768.72 and 73 of Chapter 768 shows a legislative intent to incorporate § 768.28. The logic of this argument means that the legislature meant to incorporate every other provision of Chapter 768 as well. Why, then, if the legislature meant to incorporate every other provision of Chapter 768, did it take the care to incorporate subsection (5) of § 768.28? Why did it make a clear and unambiguous waiver of sovereign immunity in the FCRA? Why not incorporate all of § 768.28? It is far more reasonable to infer that the care with which the legislature incorporated a single provision of § 768.28 coupled with the clear and unambiguous waiver of sovereign immunity in the FCRA evinces an intent that only this single provision of § 768.28 applies to the FCRA.[1]

Further, Chapter 768 is titled "Negligence." It provides for everything from wrongful death to the measure for damages for

[1] The trial court's argument by analogy with Chapter 766, Florida's Medical Malpractice statute, is equally flawed. Medical malpractice is a negligence tort and there is nothing even approximating an intent to waive sovereign immunity in the Medical Malpractice statute.

"pits and holes" to the state-of-the-art defense for products liability. It has no application to claims of discrimination which are controlled entirely by the comprehensive statutory scheme set out in the FCRA.

This conclusion that the notice requirement of § 768.28 does not apply to the FCRA is buttressed by the comprehensive and specific administrative exhaustion procedure contained in the FCRA. The FCRA's administrative claims process mirrors and serves the very purpose of the notice requirement in § 768.28(6). The FCRA further establishes the Florida Commission On Human Relations ("FCHR"), a state entity assigned to the Florida Department of Management Services, and empowers it to investigate, determine and conciliate all FCRA claims. §§ 760.03 and 760.06. FCRA claimants are required to file claims with the FCHR as a condition precedent to filing suits in the courts under the FCRA. § 760.11(7) and (8). The existence of these complex administrative notice procedures makes the application of expressio unius est exclusio alterius particularly appropriate: "[A] legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way." Sun Coast International, Inc., 596 So.2d at 1121 (emphasis in original).

Other general principles of statutory construction require the same result. As the Court has held: "When a statute is

self-contained, it covers only those subjects within its self-contained limitations and does not affect rights which are not within its purview or specifically excluded from its provisions. See Grice v. Suwannee Lumber Manufacturing, 113 So.2d 742, 742 (Fla. 1st DCA 1959); Laborers' Int'l Union of North America v. Burroughs, 541 So.2d 1160, 1164 (Fla. 1989). Further, "It is well settled . . . that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms." Adams v. Culver. 111 So. 2d 665, 667 (Fla. 1959).

Chapter 760 is a self-contained, special statute that covers a particular area of law. Section § 768.28, by contrast, is a general statute dealing generally with the waiver of sovereign immunity for torts. The specific statute should control, particularly where it contains an independent waiver of sovereign immunity and a carefully articulated notice procedure.

6. General Application of § 768.28 To Chapter 760 Defeats Its Express Remedial Purpose

Finally, as the Court stated in Klonis, courts must look to "' the provisions of the whole law, and to its object and policy,' rather than consider various statutory subsections in isolation from one another and out of context." Id. at 1189. The courts should further consider whether a statutory interpretation is reasonable in light of the purpose of the statute. Young v. Progressive Southeastern Ins. Co., 753 So.2d

80, 85 (Fla. 2000).

Section 760.01(3) of the FCRA states: "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." (Emphasis added). 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)

Far from liberally construing the FCRA, the trial court's interpretation of the statute defeats the remedial purpose of the FCRA. The trial court adds another layer of administrative exhaustion for FCRA claimants, which is not only redundant and serves no purpose, but lays additional snares and traps for unwary FCHR claimants to negotiate. Like those in Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., upon which it is modeled, the remedial administrative provisions of the FCRA were not designed for the "sophisticated or the cognoscenti" but rather for "ordinary people unschooled in the technicalities of the law." Sanchez v. Standard Brands, 431 F.2d 455, 463 (5th Cir. 1970).

The trial court's interpretation also undermines the FCHR's mandate to promote and encourage fair treatment of employees and

eliminate discrimination. § 760.05, Fla. Stat. The state should not be permitted to interpose or rely upon the exhaustion of the notice requirements of § 768.28(6) when confronted by the FCHR with a charge of discrimination. The FCRA provides and intends that the FCHR be the sole state agency with jurisdiction to investigate, conciliate and determine charges of discrimination.

CONCLUSION

The trial court's decision is inconsistent with the waiver of sovereign immunity in Chapter 760 and established principles of statutory construction, is an unreasonable construction of the FCRA, and defeats the remedial purposes of the FCRA. It should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served this 29th day of July, 2002, by U.S. Mail to P. Daniel Williams, 1301 Riverplace Boulevard, Suite 1640, Riverplace Tower, Jacksonville, FL 23307 and F. Damon Kitchen, Constangy, Brooks & Smith, LLC, Post Office Box 41099, Jacksonville, Florida 32203.

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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 Courier 12 point font.

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JOHN C. DAVIS