DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

JEFFREY GALLAGHER

Appellant/Cross-Appellee,

v. **CASE NO. 2D04-3724**

MANATEE COUNTY

Appellee(s)/Cross-Appellant(s).
_____/

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

ON APPEAL FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR MANATEE COUNTY, FLORIDA

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SUMMARY OF ARGUMENT

The trial court erred in holding that the ***total*** amount of possible recovery against a Florida governmental entity – including all back pay, front pay, compensatory damages, attorneys fees and costs – is limited to no more than the **$100,000** limitation on damages against state agencies contained in the Florida Tort Claims Act, §768.28(5), Florida Statutes, which is made applicable to actions against state agencies under the Florida Civil Rights Act (FCRA) by §760.11(5), Florida Statutes.

The Legislative history of the FCRA proves conclusively that the damages cap in Section 760.11(5) was intended to be limited to "compensatory" damages only, not the separate affirmative equitable relief of back pay and front pay. Furthermore, the FCRA specifically provides for the award of attorneys fees and costs and that the attorneys fees provision is to be "interpreted in a manner consistent with federal case law involving a Title VII action." Under Title VII, attorneys fees and costs have always been available against state agencies as a separate obligation.

ARGUMENT

THE STATUTORY CAP IN §760.11(5), FLORIDA STATUTES, APPLIES ONLY TO COMPENSATORY DAMAGES

A. Introduction

The issue raise in this appeal has serious implications for litigants under the Florida Civil Rights Act and for the administration of justice. The old Chinese proverb, "One person tells an idle story; ten thousand repeat it as truth," reflects a truth relevant to the interpretation of laws as well. Repeat a fallacious argument often enough and people will begin to believe it is true. Like the story-telling individual in this proverb, Manatee County and many other Florida governmental entity defendants have begun in recent years to maintain in discrimination litigation under the Florida Civil Rights Act (FCRA) that a FCRA Plaintiff's ***total*** amount of possible recovery against a Florida governmental entity – including all back pay, front pay, compensatory damages, attorneys fees and costs – is limited to no more than the **$100,000** limitation on damages against state agencies contained in the Florida Tort Claims Act, §768.28(5), Florida Statutes, which is made applicable to actions against state agencies under the Florida Civil Rights Act by §760.11(5), Florida Statutes. If

the successful plaintiff wants to be paid his judgment in excess of the $100,000 cap, he is told that he must seek a claim bill from the legislature.[1]

This position is taken regardless of how much more than $100,000 a Plaintiff is able to prove in lost back pay, front pay, or compensatory damages for mental anguish, loss of dignity, and any other intangible injuries, as well as attorneys fees and costs. Unfortunately, the court below bought the County's "idle story" and erroneously opined it as truth. A reasoned analysis of the Florida Civil Rights Act, however, reveals that the statutory cap was intended to be applicable only to compensatory damage claims and that the expansive application asserted by Manatee County and other governmental defendants is a misreading of the statute which has stymied many cases from settling and forced the parties to take otherwise resolvable cases to trial unnecessarily.

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[1] " A claim bill seeks compensation for a person injured by an act or omission of the state, its subdivisions, agencies, officers, or employees when there is no other available remedy. Claim bills involve two types of claims: excess judgment claims filed pursuant to section 768.28(5), Florida Statutes, and equitable claims filed without an underlying excess judgment. Fla. S. Rule 4.8 (1992). Claim bills may also be either local bills or general bills. Local bills make claims against a municipality, county, special district, or local constitutional officer, while general bills make claims against a state agency. D. Stephen Kahn, *Legislative Claim Bills, A Practical Guide to a Potent(ial) Remedy*, Fla. B.J., Apr. 1988, at 23. *The Fla. S. Office of the President & The Fla. H.R. Comm. on Judiciary, Legislative Claim Bills Handbook, Policies, Procedures, and Information Concerning Introduction and Passage 1* (1992)."

B. The Statutory Cap

Section 760.11(5), Florida Statutes, provides, in pertinent part:

In any civil action brought under this section, the court may issue an order prohibiting the discriminatory practice and **providing affirmative relief** from the effects of the practice**, including back pay.** The court may also award **compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and any other intangible injuries,** and punitive damages**.** The provisions of ss. 768.72 and 768.73 do not apply to this section. The judgment for the total amount of punitive damages awarded under this section to an aggrieved person shall not exceed $ 100,000. **In any action or proceeding under this subsection, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.** It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action.

* * *

Notwithstanding the above, the state and its agencies and subdivisions shall not be liable for punitive damages. **The total amount of recovery against the state and its agencies and subdivisions shall not exceed the limitation as set forth in s. 768.28(5).** (emphasis added)

Section 768.28(5) provides, in pertinent part:

The state and its agencies and subdivisions shall be liable for **tort claims** in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. **Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000.**

The statute provides for four forms of relief available to a FCRA plaintiff:

(1) affirmative or equitable relief, which includes back pay and front pay, (2) compensatory damages, (3) punitive damages, [2] and (4) attorneys fees and costs. Judicial interpretation of the parameters of these forms of relief and the legislative history of the FCRA confirm that the $100,000 cap in Section 760.11(5) is limited to compensatory damages only.

C. Affirmative Relief

This issue is one of first impression for this court. No Florida appellate court has yet had occasion to specifically interpret Section 760.11(5)'s cap on damages against state agencies as it relates to "affirmative relief." Section 760.11(5) specifically refers to "back pay" as being "affirmative relief," and separates it semantically from compensatory damages. "The determination of the perimeters of affirmative relief . . . is committed to the . . . court . . . in the exercise of its inherent 'equitable power to remedy past wrongs' 'once a right and a violation have been shown.'" ***Rogers v. International Paper Company***, 510 F.2d 1340, 1348 (8th Cir. 1975), quoting ***Swann v. Charlotte-Mecklenburg Board of Education***, 402 U.S. 1, 15 (1971). "Affirmative relief" is simply another term for "equitable relief."

The Florida Civil Rights Act is intended to be interpreted in accordance with the federal courts interpretation of Title VII. See, ***Florida Dept of Community affairs***

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[2] Since punitive damages are specifically not recoverable from a governmental entity, §760.11(5), they are not at issue in this appeal.

v. Bryant, 586 So.2d 1205 (Fla. 1st DCA 1991) ("Because this act is patterned after Title VII of the Civil Rights Act of 1964 . . . , federal case law dealing with Title VII is applicable.").[3] The federal courts in Title VII cases have clearly held that back pay is an equitable remedy:

> Appellant seeks reinstatement, back pay and reimbursement for "other lost professional benefits," all of which are equitable whether sought under Title VII or section 1983.

Sullivan v. School Board of Pinellas County, 773 F.2d 1182, 1187 (11th Cir. 1985), citing ***Harkless v. Sweeny Independent School District***, 427 F.2d 319, 323-24 (5th Cir.1970), *cert. denied*, 400 U.S. 991, 91 S. Ct. 451, 27 L. Ed. 2d 439 (1971); and ***Johnson v. Georgia Highway Express, Inc***., 417 F.2d 1122, 1125 (5th Cir.1969). In ***Harkless,*** for example, the court states:

> **The prayer for back pay is not a claim for damages, but is an integral part of the equitable remedy of injunctive reinstatement.** Reinstatement involves a return of the plaintiffs to the positions they held before the alleged unconstitutional failure to renew their contracts. An inextricable part of the restoration to prior status is the payment of back wages properly owing to the plaintiffs, diminished by their earnings, if any, in the interim. **Back pay is merely an element of the equitable remedy of reinstatement.**

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[3] See also, ***Ranger Ins. Co. v. Bal Harbour Club, Inc***., 549 So.2d 1005, 1009 (Fla. 1989); ***Florida State University v. Sondel***, 685 So.2d 923, 925 n.1 (Fla 1st DCA 1996)("The Florida Civil Rights Act of 1992 ... was patterned after Title VII of the Civil Rights Act of 1964 . . . ."). "In addition to tracking much of the language of Title VII, the stated purpose is also in line with its federal counterpart." ***Green v. Burger King Corp***., 728 So.2d 369, 371 (Fla. 3d DCA 1999).

427 F.2d at 324 (emphasis added). *See also* ***Johnson***, 417 F.2d at 1125 ("The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not by a jury").

Although ***Harkless*** and ***Johnson*** involved only requests for reinstatement and back pay, the reasons given for deciding that back pay is equitable relief are equally applicable to "other lost professional benefits," including front pay. In ***Ramsey v. Chrysler First, Inc***., 861 F.2d 1541, 1545 (11th Cir.1988), the Eleventh Circuit observed that "the award of front pay is a form of equitable relief; as such, 'the decision whether to grant [it] and, if granted, what form it should take, lies in the discretion of the district court.' " [4]

The majority of Circuits that have addressed the question of whether front pay remains an equitable remedy under Title VII after passage of the Civil Rights Act of 1991, have found that front pay, being an alternate remedy to reinstatement, retains its equitable nature. *See*, ***Martini v. Federal Nat'l Mortgage Assoc***., 336 U.S. App. D.C. 289, 178 F.3d 1336, 1348-49 (D.C.Cir.1999) ("Like the majority of circuits, we have regarded front pay as an equitable remedy available under section 706(g) [of Title VII] both before and after the Civil Rights Act of 1991 made compensatory damages

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[4] Quoting ***Castle v. Sangamo Weston, Inc***., 837 F.2d 1550, 1563 (11th Cir. 1988).

available under Title VII."), *cert. dismissed,* 528 U.S. 1147 (2000); ***Williams v. Pharmacia, Inc****.,* 137 F.3d 944, 952 (7th Cir.1998) ("As the equivalent of reinstatement, front pay falls squarely within the statutory language authorizing 'any other equitable relief.'"). [5]

These fundamental principles have also been recognized in Florida in FCRA cases. In ***Laborers' International Union of North America, Local 478 v. Burroughs***, 522 So.2d 852, 854 (Fla. 3rd DCA 1987),[6] the Third DCA, in holding that an administrative agency could not award unquantifiable compensatory damages for violations of the FCRA, recognized the rule that "remedies such as back pay and front pay are generally regarded as equitable in nature," citing ***Sullivan***, *supra*.

Being equitable in nature - and not "damages" as that term is understood in the tort context of 768.28 - back pay and front pay cannot be limited by legislative fiat. To suggest that the $100,000 cap in 760.11(5) applies to these equitable remedies

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[5] *See also* ***Gotthardt v. National R.R. Passenger Corp****.,* 191 F.3d 1148, 1154 (9th Cir.1999) (finding that the §1981a(b)(3) cap does not apply to front pay because it is an equitable remedy); ***McCue v. State of Kansas, Dept. of Human Resources****,* 165 F.3d 784, 791-92 (10th Cir.1999) (holding that "front pay is a form of equitable relief available under 42 U.S.C. § 2000e-5(g), to be awarded by the judge not the jury"); ***Allison v. Citgo Petroleum Corp****.,* 151 F.3d 402, 423 n. 19 (5th Cir.1998) ("The right to a jury trial provided by section 1981a(c) does not include the power to determine the availability of back pay or front pay. These are equitable remedies to which no right to jury trial attaches.").

[6] Rev'd on other grounds on rehearing, 522 So. 2d 852, 856; aff'd in part and rev'd in part, 541 So.2d 1160 (Fla. 1989).

designed to make a employee victim of discrimination whole, flies in the face of established legal principles and the intent of the FCRA to make victims of discrimination "whole" by providing affirmative relief.

D. Statutory Construction and Legislative History Limit the $100,000 Cap to "Compensatory Damages"

The confusion regarding the application of the damage cap in 760.11(5) stems from the use of the phrase "total amount of recovery" in the last sentence of 760.11(5) following the sentences explaining the unavailability of and limitations on punitive damages. The legislature's choice of the word "recovery" creates an ambiguity as to which of the types of relief the phrase is referring to. The court below and Manatee County used this ambiguity to justify expansion of the cap beyond its intended purpose. Fortunately, however, the ambiguity can be removed by reference to the legislative history and intent of the 1992 Act.

"Florida law is well settled that ambiguity is a prerequisite to judicial construction, and in the absence of ambiguity the plain meaning of the statute prevails." ***Martin County v. Edenfield***, 609 So.2d 27, 29 (Fla. 1992). *Accord*, ***Nicoll v. Baker***, 668 So.2d 989 (Fla. 1996); ***Blum v. Tamarac Fairways Ass'n, Inc.***, 684 So.2d 826 (Fla. 4th DCA 1996); ***Kelder v. ACT Corp.***, 650 So.2d 647, 649 (Fla. 5th DCA), review denied, 660 So.2d 713 (Fla. 1995). "Ambiguity exists when a

statute is capable of being understood by reasonably well-informed persons in two or more different senses." 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.02 at 6 (5th ed. 1992 rev.).[7]

It is a basic tenet of statutory construction that where there is ambiguity, or where the context of the statute taken literally conflicts with the plain legislative intent, the context must yield to the legislative purpose. ***AMISUB v. Department of Health and Rehabilitation***, 577 So. 2d 648 (Fla. 1st DCA 1991). Courts are obligated to adopt a construction of statutory provisions which harmonizes and reconciles them with other provisions of the same act. See ***Woodgate Dev. Corp. v. Hamilton Inv. Trust***, 351 So. 2d 14, 16 (Fla. 1977); ***State v. Putnam County Dev. Auth.***, 249 So. 2d 6, 10 (Fla. 1971); ***Allstate Ins. Co. v. Rush***, 777 So. 2d 1027, 1032 (Fla. 4th DCA 2000). In ***Golf Channel v. Jenkins***, 752 So. 2d 561 (2000), the Florida Supreme Court, in construing the 1992 Act in another context, set forth the test to be applied:

> We have also stated that related statutory provisions should be read together to determine legislative intent, so that "if from a view of the whole law, or from other laws in pari materia the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature." Forsythe, 604 So. 2d at 454 (quoting Van Pelt, 75 Fla. at 799, 78 So. at 695).

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[7] "Ambiguity has been defined as doubtfulness, doubleness of meaning, or indistinctness or uncertainty of meaning of an expression used in a written instrument." 75 AmJur 2d, Statutes §195, and cases cited therein.

Even if section760.11(5) were considered to be clear semantically, which the court below asserted, legislative intent must be given effect even though it may contradict the strict letter of the statute. The Florida Supreme Court in ***Joshua v. City of Gainesville***, 768 So.2d 432, 435 (Fla. 2000) stated the rule:

> "In statutory construction a literal interpretation need not be given the language used when to do so would lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity." ***Las Olas Tower Co. v. City of Fort Lauderdale***, 742 So. 2d 308, 312 (Fla. 4th DCA 1999), review granted, No. SC95674 (Fla. Mar. 20, 2000). Once the intent is determined, the statute may then be read as a whole to properly construe its effect.

See also, ***Vildibill v. Johnson***, 492 So. 2d 1047, 1049 (Fla. 1986); and ***State v. Ramsey***, 475 So. 2d 671 (Fla. 1985). Thus, in order to correctly discern the intent of the legislature, it is necessary to trace the history of Section 760.11(5).

Fortunately, in this case, the legislative history of the Florida Civil Rights Act explicitly provides the correct construction. The old Florida Human Rights Act of 1977 [8] provided ***only*** for back pay and other "affirmative relief," but not for compensatory or punitive damages. The 1977 Act did not contain a 768.28(5) damage limitation on state agencies. In terms of the relief available to an aggrieved employee, the 1992 Act simply added punitive and compensatory damages as an additional remedy. One of the stated purposes of the 1992 Act was to bring Florida law into

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[8] Section 760.01 - 760.10, Florida Statutes (1977).

parity with the additional punitive and compensatory damages remedies added to Title VII by Congress in the recently passed Federal Civil Rights Act of 1991.

In the Comments Section of the *House Judiciary Committee Final Bill Analysis & Economic Impact Statement*, dated April 13, 1992 (Amicus Appendix, **Exhibit "A"**), it is noted:

> In December 1991, the United States Congress passed, and President Bush signed the Federal Civil Rights Act of 1991. One of the most significant changes created by the 1991 Civil Rights Act was the creation of capped compensatory and punitive damages in cases of intentional employment discrimination. Pursuant to the bill, an aggrieved party could receive punitive and compensatory damages up to $300,000.
>
> As a result of the federal changes to the Civil rights laws, persons presently filing claims may seek redress in federal court. The adoption of CS/SB 1368 and 72 will act to create some parity between the Federal and state remedies.

The 1992 Act was not intended to cut back on the courts' existing authority to grant equitable relief to prevailing FCRA plaintiffs. Indeed, the language of the 1992 Act is identical to the 1977 Act as it relates to back pay. Both Section 760.10(13) of the 1977 Act and Section 760.11(5) of the 1992 Act provide that the Commission shall

> **"issue an order prohibiting the discriminatory practice and providing affirmative relief from the effects of the practice, including back pay."**

The limitation on damages against state agencies to the $100,000 cap in 768.28(5), added in 1992, was plainly meant to refer to the newly-added tort-style compensatory damages "for mental anguish, loss of dignity, and any other intangible injuries," not the already available equitable injunctive relief. Indeed, that is exactly the construction contained in the written legislative history of the 1992 Act. In the *House Judiciary Committee Final Bill Analysis & Economic Impact Statement*, dated April 13, 1992 (Amicus Appendix, **Exhibit "A"**), it is explained that:

> Section 8 [760.11(5)] also provides that the state, its agencies and subdivisions are not liable for punitive damages and that any recovery for **compensatory** damages shall be limited by the provisions of sovereign immunity. (Emphasis added). [9]

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[9] The full text of the Committee's analysis regarding Section 8 [760.11(5)] reads:

> "Section 8 provides the procedures to bring a complaint before the HRC. The most significant changes created by this bill are: (1) expanding the statute of limitations to 365 days, (2) expediting the requirement of the HRC to make a finding of reasonable cause, (3) providing redress in either an administrative or a judicial forum, and (4) creating punitive damages (with a cap of $100,000) in civil actions. Section 8 also provides that the state, its agencies and sub-divisions are not liable for punitive damages and that any recovery for **compensatory** damages shall be limited by the provisions of sovereign immunity."
>
> "Section 8 also provides for attorney's fees for the prevailing party as interpreted in a manner consistent with federal case law involving Title VII actions."
>
> "Section 8 also provides that in any civil action or administrative

(continued...)

Thus, the legislature very clearly intended the cap to apply only to the newly added remedy of compensatory damages, not the already available equitable remedies of back pay, front pay, and attorney fees and costs. [10] This interpretation is supported by the Supreme Court's reading of the statute when it listed in ***Klonis v. Department of Revenue***, 766 So.2d 1186, 1190 (Fla. 2000), its reasons for holding that the FCRA waived sovereign immunity for actions against the state:

> Fifth, the Florida Legislature expressly provided that "*the state and its agencies and subdivisions* shall not be liable for punitive damages," while "the total amount of recovery against *the state and its agencies and subdivisions* shall not exceed the limitation as set forth in s. 768.28(5)." § 760.11(5), Fla. Stat. (1997) (emphasis added). The cross-referenced provision, section 768.28(5), Florida Statutes (1997), immunizes "the state and its agencies and subdivisions" from punitive damages and places limits on **compensatory** damages. (emphasis added).

In addition, in keeping with the stated purpose of the 1992 Act to give additional remedies to aggrieved employees, the *Senate Staff Analysis and Economic Impact Statement*, dated February 6, 1992, in Section II.B., Economic Impact and Fiscal Note - Government (Amicus Appendix, **Exhibit "B"**), declared clearly that "the bill appears

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[9] **(...continued)**

> proceeding brought to chapter 760, Florida Statutes, where an employee of the state is or any governmental agency has been found to have violated section 760.10, Florida Statutes, such finding shall as a matter of law constitute just or substantial cause for dismissal."

[10] Mysteriously, the trial court did not even discuss the legislative history of the Act, although the history was presented to it.

to apply to all governmental entities, thereby **increasing their exposure** to potential liability."

When this Staff Analysis was written in February 1992, state agencies, under the 1977 Act, were liable for unlimited back pay, front pay, attorney fees, costs, out of pocket losses, and other equitable "make whole" affirmative relief. A state employee's injunctive relief could literally run into the hundreds of thousands in the right case. See, e.g., ***Merrill v. Dept of Revenue***, Case No.37-1996-CA-239 (Circuit Court of Leon County 1998) ($100,000 in lost wages);***Henry v. City of Tallahassee***, Case No. 37-1993-CA-2126 (Circuit Court of Leon County 1994) ($175,000 in lost wages), both cases brought under the FCRA. So the phrase "increasing their exposure" could not mean capping the "total amount of recovery" at $100,000. The $100,000 limit imposed in 1992 therefore was directed to remedies **in addition to** all that was already available. Otherwise, government employees had remedies stripped from them by legislation which everyone agreed was designed to enlarge remedies, not diminish them.

Since the purpose of the 1992 Act was to expand, not contract, the relief available, it would be a contradiction of the legislative intent and history to impose the $100,000 cap on back pay and other equitable relief. "Like Title VII, chapter 760 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). Such a limiting construction of the statute would also make FCRA plaintiffs from state agencies the only governmental employees to have such a back pay cap. There is no limit, for example, on the back pay that the Public Employees Relations Commission can award to someone fired because of a public employer's unfair labor practice or wrongful termination.[11]

PERC has opined on the issue of back pay that "[i]n computing back pay awards, the Board seeks to restore employees to the status quo they would have enjoyed had they not been discharged. [citation omitted] In this make-whole approach, the back pay formulation includes monies which it is reasonably found that an employee would have received in the absence of unlawful discharge." ***Town of Pembroke Park***, 1983 FPER (LRP) LEXIS 304, 10 FPER (LRP) ¶15,001.

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[11] Section 44.208(3), Florida Statutes, provides:

> (3) Any order of the commission issued under this section may include back pay, if applicable, and an amount, to be determined by the commission and paid by the agency, for reasonable attorney's fees, witness fees, and other out-of-pocket expenses incurred during the prosecution of an appeal against an agency in which the commission sustains the employee.

E. Attorneys Fees and Costs

Finally, the cap cannot be construed to include attorneys fees and costs. Section 760.11(5) specifically provides that **"the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs"** and further that the attorneys fees provision is to be "interpreted in a manner consistent with federal case law involving a Title VII action." Under Title VII, attorneys fees and costs have always been available against state agencies as a separate obligation. See ***Gamble v. Florida Dep't of Health & Rehabilitative Services***, 779 F.2d 1509 (11th Cir. 1986) ("there is no Eleventh Amendment bar to the assessment of attorney's fees against the state or its agencies."). Section 760.11(5) designates attorneys fees as "part of the costs." That was a specific change from the 1977 Act, which made provision for an award of fees, but did not designate them as "costs." See §760.10(13) (1977).[12] Costs are specifically recoverable under the 1992 Act. See §760.11(10) (1992).[13] The only discovered state court case to consider the issue of the application of the

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[12] §760.10(13) (1977): "In the event that the commission, in the case of a complaint under subsection (10), or the court, in the case of a civil action under subsection (12), finds that an unlawful employment practice has occurred, it shall issue an order prohibiting the practice and providing affirmative relief from the effects of the practice, including reasonable attorney's fees. . . ."

[13] §760.11(10) (1992): "A judgment for the amount of damages and costs assessed pursuant to a final order of the commission may be entered in any court having jurisdiction thereof and may be enforced as any other judgment."

760.11(5) cap to attorneys fees has held specifically that "[t]here is no statutory limitation on the amount of reasonable attorney's fees that can be recovered pursuant to §760.11(5), Fla. Stat." ***Ramsey v. Singletary***, 4 Fla. L. Weekly Supp. 841, 842 (Circuit Court, Alachua Co., May 20, 1997) (Court awarded $175,105 in fees).

Ramsey was a FCRA retaliation case against the Department of Corrections in which the jury awarded $110,619.86 in back pay and compensatory damages, only $3,556.44 of which was back pay. On Plaintiff's motion for attorneys fees and costs, the court awarded attorney's fees in the amount of **$175,105.00** plus costs in the amount of **$6,119.74.** The Court further awarded $1,185.48 in prejudgment interest on the back wages, making a grand total judgment of **$293,030.08** against the Department, a clear recognition that the cap in §760.11(5) does not include back pay, attorneys fees and costs.

Conclusion

The nature of equitable remedies and the legislative history of §760.11(5) make it abundantly clear that the interpretation of the trial court was erroneous. Until an appellate decision makes it clear that this interpretation is erroneous, the dynamics of this erroneous argument will continue to clog trial calendars. Governmental defense counsel routinely advise their clients not to offer more than $100,000 at mediation, which plaintiff's counsel must then urge their clients to reject, which then results in

cases that otherwise would settle going to trial. Pretrial motions to determine whether all 760.11(5) relief is limited serve little purpose since they are immune to appellate review pretrial. The parties have little choice but to litigate to a verdict and judgment.

Until the correct interpretation is resolved at the appellate level, hundreds of cases that might be settled at the mediation or pretrial stage, in situations where the simple numbers crunching of calculating back and front pay and attorneys fees and costs produces figures in excess of $100,000, are forced to continue through the litigation process. A definitive appellate decision is necessary and urgent. Florida NELA urges the Court to issue that definitive ruling.

Respectfully submitted,
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER
By Counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by US Mail, to **Robert Michael Eschenfelder**, Assistant County Attorney, P.O. Box 1000, Bradenton, FL 34205, and **Kendra D. Presswood**, Presswood Law Firm, P.A., Post Office Box 1006, Holmes Beach, Florida 34218, this _____ day of October, 2004.

FREDERICK W. FORD

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.

Frederick W. Ford