IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FIRST DISTRICT

DEPARTMENT OF CHILDREN AND FAMILIES, STATE OF FLORIDA, and FLORIDA STATEWIDE ADVOCACY COUNCIL,

Defendant/Appellant,

v.

Case No. 1D06-2853
L. T. No: 2001-CA-002764

MARGARET ROSA,

Plaintiff/Appellee.
_____/

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

BRIEF IN SUPPORT OF APPELLEE
ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

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Interest of Amicus Curiae and Statement of Consent

The National Employment Lawyers Association (NELA) is a nationwide nonprofit, nonpartisan organization of approximately 3,000 lawyers who regularly litigate claims of retaliation against employees who blow the whistle on illegal or wasteful employer conduct under both federal and state laws, and who seek to protect the integrity of those acts. Because reversal of the court below would threaten the ability of NELA lawyers to bring claims to remedy whistleblower violations, would chill meritorious claims, and would depart radically from settled law, affirmation of the decision below is a matter of substantial concern to NELA, its members, and their clients. NELA has filed numerous amicus briefs in the United States Supreme Court and in the United States Courts of Appeals in all circuits.

The Florida Chapter was founded in 1993 and has approximately 200 participating attorneys around the state. The Florida Chapter's amicus activity has been mostly specialized in the area of Florida statutory remedies, including the statute at issue in the instant case. The Florida Supreme Court has accepted amicus briefs from Florida NELA in seven cases. Florida NELA has also filed numerous amicus briefs in the District Courts of Appeal, including several filings as an amicus before this Court.

Both parties have consented to Florida NELA's appearance in this case.

SUMMARY OF ARGUMENT

The court below correctly decided that attorney's fees under the Florida Public Whistleblower's Act are not subject to the caps on total recovery and the cap on fees stated in a separate statute governing negligence claims against governmental entities.

Two important legal doctrines disfavor statutory constructions that limit or impair an employee's ability to secure attorney's fees under the Florida Public Whistleblower's Act. These are the theory of the "private attorney general" and the doctrine of "liberal construction" of remedial statutes to provide maximum access to the remedy.

The Legislature adopted the central tenet of "private attorney general" theory by creating a fee regimen in the Whistleblower law whereby the prevailing employee's fees are virtually automatic but the prevailing employer gets fees only where the suit is frivolous and in bad faith. Legislatures create such fee frameworks to encourage litigation to enforce certain important public policy goals – in this statute, prevention and correction of governmental waste, fraud, and misconduct. The public payroll can not support enough staff lawyers to police these evils, so the Legislature enlists private attorneys to work for prevailing party fees.

The state defendant in this case raises an argument that runs afoul of another important principle of statutory construction in urging the court to read into the

statute words that are not there, words capping attorney fees to conform to words in another statute treating very different kinds of claims. Courts are not at liberty to add words to statutes.

The law of Florida is that remedial statutes are to be liberally construed to provide access to the remedies those statutes establish. The Florida Supreme Court has twice determined that the statute at issue in this case is entitled to liberal construction. Under that doctrine, courts must favor a reasonable interpretation of a statute that allows access to a remedy over a conflicting interpretation that limits or denies access to the remedy.

Importing the negligence caps into this case would reduce the court-awarded fee to less than a quarter of the amount ordered. Whistleblower cases inherently demand many attorney hours. A fee regimen that slashes fees by more than 75% will make it difficult to impossible for Whistleblower plaintiffs to obtain counsel. Such a reading would be the very antithesis of liberal construction.

ARGUMENT

STANDARD OF REVIEW

All questions presented for review in this brief are issues of statutory interpretation. They are pure-law issues, reviewed in this court under the de novo

standard. See, e.g., B.Y. v. Dep't of Children & Families, 887 So. 2d 1253, 1255 (Fla. 2004).

I. Scope And Background

The trial court correctly held that Florida's Public Whistleblower Act at §112.3187, Florida Statutes, is not subject to the cap on total recovery or the cap on attorney's fees that § 768.28 imposes on tort claims against governmental entities. The cap on total recovery in § 768.28(5) is $100,000 per person and $200,000 per incident. The cap on attorney's fees in § 768.28(8) is 25% of the total judgment or settlement in the case.

The employer has relied heavily on an analogy to the statutory tort of worker's compensation retaliation at § 440.205, Florida Statutes, where courts have imported the notice requirements of § 768.28 to a statute that had no notice requirements of its own. The employee and the court below have instead made analogies to the Florida Civil Rights Act, § 760.01-11, Florida Statutes, where the Supreme Court of Florida has refused to import provisions of § 768.28 unless they are expressly stated in the statute. Amicus does not wish to double-cover or triple-cover those points, but instead wishes to look at the policy basis for the "private attorney general" doctrine and the "liberal construction" doctrine that underpin public interest statutes such as civil rights laws and whistleblower laws.

II. "Private Attorney General" Doctrine Governs Whistleblower Fees

The idea behind the "private attorney general" can be stated relatively simply: Legislators can vindicate important public policy goals by empowering private individuals to bring suit. Reliance on "private attorneys general" consists essentially of providing a cause of action for individuals who have been injured by the conduct Legislators wish to proscribe, with the additional incentive of attorney's fees for a prevailing plaintiff.

Virtually all modern civil rights and whistleblower statutes rely heavily on private attorneys general. As the Court explained in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (one of the earliest cases developing the doctrine of "private attorney general), Congress recognized that it could not achieve compliance solely through lawsuits initiated by the Attorney General:

> A [public accommodations] suit is thus private in form only. When a plaintiff brings an action . . . he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.

Id. at 401–02. Thus, Piggie Park recognized the recruitment function of this sort of statute: Congress harnessed private plaintiffs to pursue a broader purpose of obtaining equal treatment for the public or ferreting out governmental and corporate misconduct. These private attorneys could reach into the nooks and crannies of

illegal discrimination or governmental misconduct around the state that the government could not police.

An integral part of the theory of the private attorney general is the advantage given to employees in collecting attorney's fees. Under the standard commonly known as "the Christiansburg doctrine," employees get fees for simply prevailing while the employer gets fees only where the case is frivolous. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). The Florida Legislature took pains to import the Christiansburg standard into the remedy section of Florida Public Whistleblower statute, calling for remedies including:

> Payment of reasonable costs, including attorney's fees, to a substantially prevailing employee, or to the prevailing employer if the employee filed a frivolous action in bad faith.

§ 112.3187(9)(d), Florida Statutes.

Having thus given employees and their counsel an incentive to bring whistleblower suits, the Legislature can not be said to have intended to discourage those suits by capping fees at so low a level that an employee could not obtain counsel.

The statutory language quoted above is plain and simple. But the state in this case would have the court read that statute as including a ghostly amendment providing a clause saying that the reasonable costs including attorney's fees would

be capped at 25% of $100,000. Courts may not do this. Seagrave v. State, 802 So.2d 281, 287 (Fla.2001) ("[I]t is a basic principle of statutory construction that courts 'are not at liberty to add words to statutes that were not placed there by the Legislature.'"); Woodham v. Blue Cross & Blue Shield of Florida, Inc., 829 So. 2d 891, 899 (Fla. 2002) (same).

In statutory interpretation, courts must first look to the actual language used in a statute. Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000). If there is no ambiguity, that ends the inquiry. Here, there is no possible way for "reasonable costs, including attorney's fees" to be rendered as "reasonable costs, including attorney's fees, subject to the caps of § 768.28." Where there is no linguistic ambiguity, there is no room for the sort of creative interpretation in which the state invites the court to indulge. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984).

III. Doctrine Of Liberal Construction Governs Whistleblower Fees

The theory of the private attorney general dovetails nicely with the Florida doctrine of "liberal construction" of remedial statutes. Looking at the particular statute at issue in this case, the Supreme Court of Florida held that the law should be liberally construed.

> [W]e believe it clear that the [public employee] Whistle-Blower's Act is a remedial statute designed to encourage the elimination of public corruption by protecting public employees who 'blow the whistle.' As

> a remedial act, the statute should be construed liberally in favor of granting access to the remedy.

Martin County v. Edenfield, 609 So.2d 27, 29 (Fla.1992); *accord*, Irven v. Department of Health & Rehabilitative Services, 790 So.2d 403, 405-6 (Fla. 2001).

Under the doctrine of liberal construction, a court should make every reasonable effort to adopt an interpretation of a statute that permits access to the remedy. In this case, that means a judicial duty to favor an uncapped attorney fee over a capped one since that will often determine access to the remedy.

If this court were to transplant the § 768.28 caps onto the whistleblower statute, the court would be capping fees at $25,000 ($100,000 x 25%). In this case, with a fee award of $110, 345.00, the cap would slash 77% of the fee to get it down to $25,000. This could not be the legislative intent.

The negligence caps in § 768.28 are for cases such as slip-and-fall, car crashes, and similar injuries. These cases generally involve a single incident with few witnesses. Advertisements for lawyers who want such cases are so pervasive that one can not go through a day without being exposed to them. Whistleblower cases, by contrast, typically implicate complex events stretching over long periods with many witnesses and boxes of evidentiary documents. Few lawyers are available. There will be fewer or none if fees are slashed to less than one-quarter of the amount earned.

Liberal construction to promote access to the remedy can not mean reading the statute to set fees so low that finding a lawyer becomes impossible.

There are two ways governments may urge a court to retrench on whistleblower protections. First, one may urge a court to explicitly redefine a protected activity in narrower terms – to limit the substantive coverage of the statute.

The other approach, which is more insidious, is to seek to leave the formal right in place, but to constrict the remedial machinery. At best, this would dilute the value of the right, since some violations would go unremedied. At worst, it may signal potential wrongdoers that they can infringe the right with impunity.

The best way to pull the teeth from the whistleblower statute is to make cases so unattractive that lawyers will not take them. That emboldens corrupt officials to ply their nefarious trade in the face of an unenforceable whistleblower statute.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 22d day of November, 2006, to Marie A. Mattox, 310 East Bradford Road, Tallahassee, FL 32303; and to John S. Derr, P.O. Box 3741, Tallahassee, FL 32315-3741.

_____
Richard E. Johnson

CERTIFICATE OF COMPLIANCE

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

_____
Richard E. Johnson