IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FOURTH DISTRICT

ADOLFO ZAMORA,

Plaintiff/Appellant,

v.

Case No.: 4D06-3043
L. T. No.: 50 2004 CA 004311 MB

FLORIDA ATLANTIC UNIVERSITY
BOARD OF TRUSTEES,

Defendant/Appellee.
_____/

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

BRIEF IN SUPPORT OF APPELLANT
ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH 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 employee claims of employment discrimination under both federal and state Civil Rights Acts, and who seek to protect the integrity of those acts. The court below followed, as it must, a decision of the Second District Court of Appeal substantially gutting the remedies available in Florida law to public employees who suffer employment discrimination. Because affirming the court below would threaten the ability of NELA lawyers to bring claims to remedy employment discrimination, would chill meritorious claims, and would further a radical departure from previously settled law, reversing the decision below and certifying conflict with the Second District so that the Supreme Court may resolve this issue 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 the Florida Civil Rights Act -- 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 filing as an amicus before this Court.

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

SUMMARY OF ARGUMENT

This court should certify conflict with the decision of a sister court that bound the court below, Gallagher v. Manatee County, 927 So. 2d 914 (Fla. 2d DCA 2006). That decision upset the applecart of a regimen that had been established since 1977 in Florida law by reading language in the Florida Civil Rights Act of 1992 as shrinking the total recovery of public employees rather than adding non-economic damages to the remedies already available such as unlimited attorney's fees and back pay. The Appellants principal brief details the legislative history showing the latter intent. The Amicus adopts, but does not duplicate, that lengthy discussion.

The Gallagher court held that the words "total amount of recovery" were so clear that the court was not allowed to look at legislative history as an aid in discerning the statute's meaning. This is erroneous in two ways. First, the court needed an excursion through numerous dictionaries, cases, and statutes to establish its claim that the language was too clear to question. Second, the court mentioned and then ignored an important doctrine that, even where language is plain, literal

wording will yield to legislative history and intent where plain meaning will lead to an unreasonable result or a result clearly contrary to legislative intent.

Deciding for the first time in 2006 that remedies in existence since 1997 had been radically restricted by the legislature in 1992 and then refusing to look at the legislative history to the contrary would surely strike most observers as an "unreasonable result" of the sort that warrants looking deeper than the plain language. The Gallagher court never discussed even the possibility that its radical conclusion was the sort of "unreasonable result" that would let the court look at legislative history.

Ironically, the court's failure to look at the actual legislative history caused it to postulate an incorrect and fictional history in which the legislature shrunk the remedies of public employees in discrimination cases rather than expanding them.

ARGUMENT

I. 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., Maggio v. Florida. Department of Labor & Employment Security, 899 So. 2d 1074, 1076 (Fla. 2005).

II. Courts Are Not Required To Wear Blinders In Discerning The "Plain Meaning" Of Statutes

The trial court, as it must, followed the only binding appellate authority on whether the damages cap stated in the Florida Civil Rights Act of 1992 at § 760.11(5), Florida Statutes (incorporating § 768.28(5), Florida Statutes), includes back pay and fees and costs as well as compensatory damages when applied to cases brought by public employees. A sister court held the cap to be all-encompassing in Gallagher v. Manatee County, 927 So. 2d 914 (Fla. 2d DCA 2006). Accordingly, this discussion will focus on the Gallagher opinion, which bound the court below.

The statutory provision at issue provides victims of unlawful discrimination with injunctive and other affirmative relief, including back pay and ancillary relief including fees and costs. § 760.11(5), Florida Statutes (2005). In this regard, the Florida Civil Rights Act of 1992 is unchanged from its predecessor, the Florida Human Relations Act of 1977. The Human Relations Act imposed no limits on back pay or attorney's fees and costs, even against governmental defendants. § 760.10(13), Florida Statutes (1991). The 1992 amendments were designed to expand the remedies by adding jury trials and compensatory damages against all defendants and limited punitive damages against private defendants. Compensatory damages against

public defendants were added but capped at the limits of § 768.28, Florida Statutes. In so providing, the legislature added the language at issue in this case:

> 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), Florida Statutes.

The Appellant's principal brief in this case details the legislative history showing that the "total amount of recovery" was intended to apply only to compensatory damages, not payments such as back pay and attorney's fees which had been unlimited for 15 years under the old statute. That was a common understanding throughout the legal community, including the courts. Klonis v. State of Florida, Dept. of Revenue, 766 So. 2d 1186 (Fla. 1st DCA 2000) ("[t]he 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); Jones v. Brummer, 766 So. 2d 1106, 1108 (Fla. 3d DCA 2000) ("Section 768.28(5), in turn, ... continues by additionally placing monetary limits on **compensatory damages** recovered in tort actions against the state, its agencies and subdivisions") (emphasis added).

If the legislature were to abolish a 15-year-old regimen under which public-employee civil rights claimants could win unlimited back pay and attorney's fees

there would be considerable record of documentation, especially if that regimen were to be replaced by one with a total recovery up to the § 768.28 limits. There is instead a considerable legislative history of an intent to leave all the old remedies intact and to add jury trials and non-economic damages. This being so, an assertion that the law is actually the contrary justifies an examination of the record. But that examination is something the Gallagher court refused to undertake.

A central theme of Gallagher is the court's repeated insistence throughout the opinion that it's hands are tied by the "plain meaning" rule under which a court looks to legislative intent and rules of construction in statutory interpretation only where the meaning of a statute is unclear or ambiguous. The Gallagher court found the statutory provision at issue perfectly clear and thus not eligible for interpretation in light of legislative history, public policy, or rules of construction. The statute says the "total amount of recovery" shall not exceed the cap. "Total amount of recovery" means "total amount of recovery" and that is that, says the court.

This is strange in at least two ways.

First is the convoluted obstacle-course through three dictionaries and numerous cases and statutes the court had to run to support its conclusion that the meaning was perfectly clear and without ambiguity. The court goes through an enormous amount

of work to show that it takes no work to interpret the statute. The opinion is completely without any sense of irony in that regard.

Second, the court mentions in passing, but never discusses, the crucial doctrine that courts are not bound by plain meaning where literal readings of statutes would lead to an unreasonable result or a result clearly contrary to legislative intent. Id., at 919, *citing*, State v. Burris, 875 So. 2d 408, 410 (Fla. 2004). The central error in Gallagher is to fail to apply this doctrine or even to pause to consider whether to apply it, though there were many signals that this was a case calling for use of that doctrine. It was only by wearing blinders that the court reached the conclusion it did.

This aspect of Gallagher opinion is self-contradictory. On the one hand the court cites Burris for the proposition that a court may depart from the "plain-meaning" rule where such a practice leads to "an unreasonable result or a result clearly contrary to legislative intent." On the other hand, the court says it may not look at legislative history because of the "plain-meaning" rule.

The court ends by speculating about legislative intent and getting it wrong:

> The statute at issue here unequivocally reflects that in weighing the relevant policy issues the legislature gave priority to the policy of placing strict limitations on the waiver of sovereign immunity. We are bound by the legislature's decision on this issue of policy.

Gallagher, 927 So. 2d at 919.

Actually, as shown in Appellant's brief, the legislature did exactly the opposite. That brief shows not just one way but a good dozen ways the legislative history demonstrates an intent to restrict the cap to only non-economic damages and to keep the old regimen of unlimited back pay and attorney's fees. There is nothing in the history to indicate the opposite. But the Gallagher court smuggles an incorrect interpretation of legislative intent into an opinion that holds it improper to consider legislative intent because of the "plain-meaning" rule.

The Gallagher court likewise eschews use of principles of statutory construction because of the "plain-meaning"rule, but still indulges in a bit of that very thing that turns out, again, to be erroneous for lack of legislative history information.

> The statutory formulation itself recognizes that the construction of the statute must be "according to the fair import of its terms" and must take into account not only the general purpose of protecting against invidious discrimination but also the "special purposes" of the provision at issue. Here, of course, the special purpose of the provision at issue is to limit governmental liability.

Gallagher, 927 So. 2d at 919, n.3. Actually, the special purpose of the provision referenced is exactly the opposite – it is to increase governmental damage liability from zero to the amount of the cap in § 768.28, Florida Statutes, not to limit that liability.

It is said that everyone is entitled to his own opinions but not his own facts. That aphorism fits here. The Gallagher court refused to consider the actual legislative history of the act but then decided the case based upon a notion of postulated legislative intent that would have been refuted by looking at the real history.

CONCLUSION

This court should reverse the decision of the circuit court and certify conflict with Gallagher so that the Supreme Court may restore the Florida Civil Rights Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Brief has been furnished by U. S. Mail this 8th day of January, 2007, Joseph Ackerman, Esquire, Buckingham, Doolittle & Burroughs, LLP, 515 North Flagler Drive, Suite 702, West Palm Beach, Florida 33401, and Michael B. Davis, Esquire, Paxton & Smith, P.A., 1615 Forum Place, Suite 500, West Palm Beach, Florida 33401-2318 and to William Amlong and Karen Coolman Amlong, Amlong & Amlong, P.A.,500 Northeast Fourth Street, Fort Lauderdale, Florida 33301.

_____
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.

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Richard E. Johnson