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Janet Maggio v. Florida Department of Labor & Employment Security

NEXT CASE ON THIS MORNING'S CALENDAR IS MA GGIO VER SUS FLORIDA DEPART MENT OF EMPLOYMENT AND LABORSECURITY.

MAY IT PLEASE THE COURT. GARY PRINTY ON BE HALF OF PETITIONER J ANET MAGGIO. THIS FALSE TO THE CI VIL RIGHTS 19 92 TORT CLAIMS AND THUS SUBJECT TO THE PRE-SUIT REQUIREMENTS .

ON THAT QU ESTION, IT SEEMS TO REV OLVE AROUND WHETHER YOU SAY THIS IS LIKE A TORT CLAIM OR LIKE A STATUTORY CLAIM OR A CONTRACT CLAIM. ISN'T THE REAL CERTIFIED QUESTION JUST SIMPLY WHETHER CLAIMS UNDER CHAPTER 760 , ARE SUBJECT TO THE PRE- SUIT NOTICE REQUIREMENT OF 768?

THAT IS EXACTLY HO W I WASGOING TO BE GIN THIS, YOUR HONOR. THAT, AND THAT THEY ARE NOT BECAUSE THE LEGISLATURE , EVEN IF THIS COURT , BECAUSE THE APPE LLATE COURT HAS NEVER DETERMINED THERE WERE TORT CLAIMS , BUT EVEN IF THIS COURT DETERMINED THATTHERE WAS A TORT CLAIM , NUMBER ONE I AM SAYING IDON'T AGREE WITH THAT , BECAUSE IF I AM COMING THOUGH THIS CIRCUIT COURT AND ALL I WANT , I AM PRO SE LITIGANT AND ALL I WANT IS ONE PHRA SE IN THERE. I WANT MY JOB BACK. I DON'T ASK FOR MO NEY DAMAGES.I DIDN'T ASK FOR ATTORNEYSFEES. I DIDN'T ASK FOR , ALL I SAID WAS I WANT MY JOB BACK.

IS 760, WHERE I N 760, IS THERE A WA IVER OF SOVEREIGN IMMUNITY ? THE EXPRESS LANGUAGE THAT THE STATE W A IVES SOVEREIGN IMMUNITY FOR THIS TYPE OF CLAIM?

OTHER THAN THE FACT THAT L OWER COURTS HAVE HELD AND THEY HAVE REFERRED TO 768 IN SOME PART S AND DON'T I N O THERS --

ISN'T THAT THE ISSUE? THE ISSUE IS WHET HER , WHETHER THE STATE HAS WAIVED SOVEREIGN I MMUNITY FOR THIS TYPE OF CLAIM?

THEY HAVE .

WHERE HAVE THEY DONE THAT?

BECAUSE THEY SAY YOUCONSCIOUS A PERSON IS THESTATE , AN EMPLOYER IS A PERSON IS THE STATE. AN AGGR IEVED PERSON MAY BRING A CIVIL ACTION AGAINST THAT PERSON, THE STATE IT NOWHERE IN THERE , SAYS THEY MAY NOT BR ING AN ACTION AGAINST THE STATE. THEY DIDN'T HAVE T O SPECIFICALLY DEF INE A PERSON WHO IS THE PERPETRATOR , TO BE THE STATE. THEY COULD HAVE LEFT THAT O UT AND SAID WE DON'T WANT YOU SU ING THE STATE FOR THIS.

BUT SOVEREIGN IM MUNITY IS A COMMON LAW DOCTRINE , CORRECT?

YES.

AND IN ORDER TO WAIVE IMMUNITY, IT IS UP TO THE LEGISLATURE TO SPECIFICALLY WAIVE THAT IMMUNITY, ISN'T THAT CORRECT?

HOW DO THEY DO THAT?

THAT , I THINK THAT , WELL --

IN THE STATE OF FLORIDA , THE STATE GOVERNMENT R IGH T NOW CAN FIRE EVERYBODY OVER 50 YE ARS OLD AND SAY I AM FIRINGS , YOU GET OUT OF THIS BUILDING AND DON'T COME BACK BECAUSE YOU ARE TOO OLD , AND THEY CANNOT GO DOWN THE STREET TO FEDERAL COURT OR GET AN INJUNCTIVE OR ANY RELIEF.

WHERE DO YOU CLAIM THAT THE WAIVER OF SOVEREIGN IMMUNITY OC CURS IN THIS SCHEME OF THIN GS? IN OTHER WORDS , DO YOU CLAIM THAT THE STATE, IN THIS STATUTORY S CHEME ,ED WAIVED I TS SOVEREIGN IMMUNITY , OR ARE YOU RELY O INGT BRO ADER--

NO , YOUR HONOR - -

JUSTICE WELLS I S ASKING, ORDINARILY THE STATE HAS SOVEREIGN IMMUNITY , UNLESS IT IS WAIVED , S O WHERE ARE YOU CLAIMING THE WAIVER OCCURRED IN THIS SC HEME OF THINGS, UNDER THIS PARTICULAR, WHERE DID THE WAIVER OCCUR?

BY STATING WHAT THE CAP ON D AMAGES WAS.

PAR DON?

BY STATE WAI NGT CAP ON DAMAGES IS, WHEN YOU SUE THE STATE -- BY STATING WHAT THE CAP O N D A MAGE S IS .

WHAT?

BY STATING WHAT THE CAP ON DAM AGES IS W HEN YOU SUE THE STATE.

YOU ARE SAYING THIS WAIVER OCCURRED IN THE CIVIL RIGHTS STAT UTE, ITSELF?

DO ESN'T THE SCHEME REFER , IN 768 , DOESN'T PARTS OF IT REFER --

IT REF ERS TO FIVE. IT DOESN'T REFER TO SI X. IT GO ES TO FIVE.

AND SIX AND SEVEN. 768.27-5, ISN'T THAT THE WAIVER OF SOVEREIGN IMMUNITY?

YES.

OKAY. SO ISN'T THAT WHERE THE WAIVER IS HE RE?

THAT SO UNDS GOOD TO ME.

I MEAN , I AM WONDERING WHERE YOU HAVEN'T SAID THAT BEFORE IN T HIS ARGUMENT. IF IT WAIVES IN 768.25-5 AND YOU SAY IT DOES NOT AND IT WAIVES IMMUNITY FOR THE STATE , WHY DOESN'T THAT END THE MA TTER , AS FAR AS WHETHER THERE IS A WAIVER OF SOVEREIGN IMMUNITY , PU TTING ASIDE THE ISSUE OF WHETHER YOU NEED PRE-SUIT NOTICE?

FOR ONE , BECAUSE I DON'T EVEN THINK, THAT IS FOR TORTS , AND THE LEGISLATURE COULD HAVE DEFI NED THIS AS A TORT, BUT IS A TORT SUBJECT TO THE WAIVER OF 768.28-5? BUT THEY DIDN'T DO THAT. MY POINT IS THEY CREATED A STATUTE THAT SAYS THIS IS HOW YOU ARE GOING TO SUE THE STATE , IF YOU HAVE BEEN A VICTIM OF AGE DISCRIMINATION, AND YOU DON'T EVEN LOOK TO 768.28, BECAUSE THIS STATUTE CAN STAND ALONE TAN CARE OF THIS, JUST LIKE THE FE DERAL CIVIL RIGHTS STATUTE DOES.

I AM LO OKING AT 760.11 PAREN 5, AND AT THE END OF THAT PARAGRAPH IT SAYS THE TOTAL AM

OUNT OF RECOVERY AGAINST THE STATE AND ITS AGENCIES AND SUBDIVISION S HALL NOT KPEETED LIMITATION THAT IS SET FORTH IN 768.28-56789 SO THAT SE EMS TO M E - - 768.28-5. SO THAT SEEMS TO ME TO SAY WE ARE GO ING TO WAIVE ON LYTO THE EXTENT THAT IT IS WAIVED IN 28-5.

NOBODY IS ARGUING THE DAMAGE CAPS. IN FACT MAYBE I SHOULD , BUT THEY SPELL OUT. YOU CAN READ THAT AS WE WANT TO HAVE A \$100,000 CAP ON DAMAGES. OF COUR SE THAT O PENS UP A WHOLE --

THAT IS NOT REALLY THE ISSUE HERE, RIGHT? WHAT HAPP ENS. SO LET 'S JUST --

WE ARE TALKING ABOUT THE ISSUE, AND I SAY , YES , WHY WOULD THEY HAVE PUT THAT IN THERE , UNLESS THEY MEANT , I F THEY WANT TO EXEMPT THEMSELVES FROM IT, YOU WOULDN'T REFER TO THAT AT ALL. YOU WOULD SAY WE HAVE SOVEREIGN IMMUNITY AND YOU ARE NOT GOING TO SUE THE STATE. THAT IS THE WAY YOU SAY YOUARE NOT GOING TO SUE THESTATE.

CERT AINLY WHEN JUSTICE CANTERO SAYS WHERE A PERSON UNDER THIS STATUTE OR ANY OTHER GOVERNMENTAL EN TITY OR AGENCY, IF YOU PUT TH OS E T WO TOGETHER, DON'T YOU HAVE AWAIVER OF SOVEREIGN IMMUNITY?

YOU MUST. OTHERWISE YOU HAVE THE LEGISLATURE THROWING WORDS AROUND AND I WON'T COMMENT ON WHETHER I THINK THE LEGISLATURE THROWS WORDSAROUND, BUT THEY MEANT SOMETHING WHEN THEY PUT IT IN THER E. WHAT COULD THEY HAVE POSSIBLY MEANT?

LET'S GET TO THE NE XT QUESTION AND DETERMINEWETHER YOU MEET ANY PRE-SUIT REQUIREMENTS , AND THAT IS HOW DO WE DEFINE TORT AND HOW DO YOU DEFINE A TORT?

I DEFINE A TORT AS EITHER A NEGL ISENT OR INTENTIONAL ACT , RESULTING I N PHYSICAL INJURY TO SOMEBODY . THE AGENCY OF AN OTHER.

IS TORT A COM MON LAWCAUSE OF SNX.

YES. HISTORIC -- HISTORICALLY.

SO TO DETERMINE WHETHER THIS FALLS UNDER 768.28 -6 , IS TO DETERMINE WHETHER OR NOT IT IS A COMMON LAW CAUSEOF ACTION, AND IF IT A STATUTORY CAUSE OF ACTION,THEN IT SHO ULDN'T BE DEFINED AS A TORT.

CERTAINLY IT IS A STATUTORY CAUSE OF ACTION,AND IF YOU WERE AN INSURANCE COMPANY --

I WOULD THINK THESE ARE FRIENDLY QUESTIONS, BECAUSEBEFORE THIS STATUTE WENT INTO EFFECT , WE SPECIFICALLY IN HILL VE RSUS DEPARTMENT OF CORRECTIONS , SAID THAT APPLICATION OF 768.28, IS LIMITED TO TRADITIONAL TORTS, AND THERE WAS NO WAY T O SUE THE STATE FOR ANY K IND OF CIVIL RIG HTS VIOLATION , UNTIL THEY SPECIFICALLY CAME UP WITH THIS STATUTORY CAUSEOF ACTION .

CO RRECT. AND , YES , YOUR HO NOR, W E EXISTED FROM 19 77 TO 2 002 , WITH THIS ISSUE NEVER COMING UP. SO FOR 25 YE ARS , EVERYBODY WHO PRACTICES THIS LAW , I N THIS STATE , HAS NOT BEEN FILING PRE-SUIT NOTICE REQUIREMENTS AND HAS NOT BEEN REQUIRED T O FILE PRE -SUIT -

WHAT NOTICE REQU IREMENTS ARE SET OUT IN THIS STATUTORY SCHEME ITSELF? IN OTHER WORDS , I S THERE A FAIRLY ELABORATE SCHE ME?

YES , YOUR HON OR. IT IS PRE TTY COMPREHENSIVE . IT REQUIRES YOU, I T INCLUDES

EVERYTHING THAT A 768.28-6 WOULD INCLUDE AND MORE , WITH THE EXCEPT ION YOU DON'T HAVE TO PUT YOUR P LACE OF B IRTH IN AND WHETHE R YOU HAVE A LIEN OF \$ 200 OR MORE , B UT YOU HAVE TO PUT A M UCH MORE COMPREHENSIVE AND UNDER O A TH, YOU MUST SWEAR TO THE STATEMENTS, WHERE 768.28 , YOU WRITE A L E TTER AND SAY ON A P RIL 10 I WAS IN A CAR ACCIDENT WITH A D.O.T. TR UC K IN PENSACOLA , FLORIDA, AND I AM GOING TO SUE YOU GUYS AND I WANT SOME MUST NOT I.

I THINK IT IS THE NOTICE REQUIREMENTS THAT ARE THE IMPORTANT FACTOR HERE , AND WHAT , WHO DO YOU HAVE T O NOTICE UNDER 760 , VERSUS 768?

YOU FILE WITH THE COMMISSION, FLORIDA COMMISSION ON HUMAN RELATIONS OR ANY OTHER EEOC, OR IF Y OU HAVE THE LOCAL DADE COUNTY HAS THEIR OWN FAIR EMPLOYMENT PRACTICES BOARD, YOU MUST FILE WITH THEM, THEN UNDER THE STATUTE, THEY ARE REQUIRED WITHIN FIVE DA YS, TO SE ND A CERTIFIED LETTER TO THE INDIVIDUAL NAMED IN THAT COMPLAINT. MY SUPERVISOR IS DO ING THE FOLLOWING TO ME OR THAT PERSON IS REQUIRED UNDER THE STATUTE , WITHIN FIVE DAYS, TO GET A CERTIFIED COPY OF THAT, AND HAS 2 5 DAYS TO FILE HIS OR HER OWN SW OR N STATEMENT DENYING THE CLAIM.

SO THE APPROPRIATE AGENCY WOULD BE NOTICED UNDER THAT , BUT WHAT ABOUT THE DEPARTMENT OF FINANCIAL SERVICES , WH ICH IS ONE OF THE PLAC ES YOU HAVE TO NOTICE UNDER 768.

THEY DON'T , UNDER THE STATUTE , THEY DON'T GET , U NDER 760 , THEY DON'T GET NOTICED , AND THE LEGISLATURE DRAFTED THIS STATUTE WITH THAT IN MIND. THE PRIOR STATUTE, IF YOU GO B ACK AND RE AD WHAT WE HAD FROM '77 TO ' 92, I T NEVER MENTIONS 768.28 PAREN 5. I T DIDN'T DIS CUSS THAT AT ALL.

SO PR IOR TO THE INCL USION OF THAT , THE, UNDER THESE CLAIMS, YOU COULD GET MORE THAN THE \$100,000 CAP UNDER 768?

PRESUMABLY THAT WOULD HAVE, BY IMPLICATION , I DON'T KNOW THAT IT CAME UP.

WASN'T THAT THE PRACTICE?

I DON'T KNOW WHAT WAS GOING ON IN 1 977 , BUT WITHOUT ANY LI MITATION AND CONSTRUING IT IN LIGHT OF WHAT THE FEDERAL GOVERNMENT , THE CIVIL RIGHTS STATUTE S AYS, I THINK YOU WOULD BE ARGUING THAT YOU WOULD HAVE WHATEVER DAM AGES ARE CAP PED UNDER THE FEDERAL STATUTE , SINCE THIS STATUTE DIDN'T SPEAK TO IT , AND I T DOESN'T MENTION ANYTHING A BOUT WHETHER , YOU KNOW , THE \$100,000 CAP IN 768 IS NOT MENTIONED IN THE OLD 760. WHEN THEY ENTERED IT, THEY PUT THAT IN THERE.

THE WHOLE QUESTION IS , WHY SHOULDN'T 768.28-6, THAT IS THE NOTICE REQUIREMENT , CORRECT?

YES.

AND WHY COULDN'T YOU CONSTRUE THIS, S O THAT Y OU WOULD HAVE TO COMPLY WITH BOTH OF THOS E? SINCE YOU ARE SUING THE STATE , AND YOU , W E ALREADY ARG UED THAT THERE IS A WAIVER OF SOVEREIGN IMMUNITY HERE, AND S O WHY NOT THOSE NOTICE REQUIREMENTS?

BECAUSE IT IS NOT A TORT. LIKE I SAID, IF I WANT AN INJUNCTION TO TELL MILE SUPERVISOR T O QUIT -- TO TELL MY SUPERVISOR TO QUIT DOING SOMETHING TO ME, OR I WANT AN IN JUNCTION , A COURT SAYING PUT M E BACK IN MY JOB. I DON'T WANT ANYTHING ELSE. JUST PUT ME BACK IN MY JOB. THE WHISTLE-BLOWER STATUTE.

DOES IT DEPEND ON WHAT IS ALLEGED? BECAUSE AN INJUNCTIVE RELIEF , YOU MAY NOT BE ENTITLED TO A JURY TRIAL OR SPECIAL DAMAGES, BUT YOU DO HAVE A RIGHT TO A JURY TRIAL AND CAN GET TORT DAMAGES.

RIGHT. BUT MY POINT --

IS IT YOUR POSITION THAT IT DEPENDS, THEN , ON THE RELIEF SOUGHT , WHETHER OR NOT YOU HAVE TO DO THE PRE-SUIT REQUIREMENTS? OR ARE YOU SAYING THAT NO MATTER WHAT --

MY POINT IS BECAUSE YOU CAN SEEK, THAT IS WHAT MAKES IT NOT A TORT. IT IS SPECIAL STATUTORILY CREATED CAUSE OF ACTION THAT HAS ELEMENTS OF TORT , BUT IT ALSO HAS ELEMENTS THAT ARE NOT TORT , AND SINCE IT IS NOT 100 PER CENT TORT , TREAT IT DIFFERENTLY FOR WHAT IT IS, JUST A CIVIL CAUSE OF ACTION THAT DOESN'T SOUND IN TORT, THAT DOESN'T COMPEL THE NOTICE UNDER THE STATUTE!

WHAT IS , YOU MENTION WHISTLE-BLOWER STATUTE. HAS THAT BEEN CONSTRUED TO REQUIRE THE 768-6 NOTE IS?

NO , YOUR HONOR , AND IN FACT , ATTACHED TO THE RESPONDENT'S BRIEF, THEY HAVE SOME ORDERS FROM JUDGE NIKKI CLARK THAT SHE HAD ENTERED AGAINST RAY MADDOX IN A COUPLE OF CASES. I WAS OVER THERE IN FRONT OF HER, AND WE HAD THIS ISSUE CAME UP, AND JUDGE CLARK AGREED WITH ME THAT , BECAUSE SPECIFICALLY UNDER THE NOTICE, ALL YOU GET IS YOUR JOB BACK AND BACK PAY.

I DON'T WANT TO KNOW WHAT JUDGE CLARK SAID UNLESS SOMETHING IS IN THE RECORD. ARE THERE ANY CASES ABOUT THE WHISTLE-BLOWER STATUTE?

NONE INTERPRETING THIS POINT. BUT I WAS GOING TO SAY SHE RULED , AND I WAS GOING TO GIVE YOU THE REASON WHY , IS BECAUSE 112 , 319. 87 , I THINK 2 IS , 3 -- I THINK IT IS , 3187 , IS THE WHISTLE-BLOWER STATUTE. IF YOU WRITE A LETTER TO THE EMPLOYER AND WRITE A LETTER TO THE INSPECTOR GENERAL AND SAY THEY ARE WASTING A TON OF MONEY HERE AT THE DEPARTMENT OF EDUCATION, AND THEY COME IN AND SAY GET OUT OF HERE. YOU ARE FIRED. YOU HAVE TO GO TO DHR AND FILE AN IDENTICAL CLAIM AS YOU DO TO RACIAL DISCRIMINATION , EXCEPT YOU CITE 3112.17, BUT ALL YOU GET UNDER THIS STATUTE IS YOU GET YOUR JOB BACK AND YOU GET YOUR BACK PAY. YOU GET YOUR ATTORNEYS FEES , BUT YOU DON'T HAVE, YOU DON'T GET ANY COMPENSATORY DAMAGE. YOU DON'T GET ANY PAIN AND SUFFERING. IT IS JUST PUT THE GUY BACK TO WORK . IN FACT THE COMMISSION HAS GIVEN DISCRETION.

YOU ARE IN YOUR REBUTTAL TIME , AND I DON'T KNOW IF YOU WANT TO CONTINUE .

THANK YOU.

WELL , MAYBE THE COURTS. MY NAME IS JAY LECHNER AND I REPRESENT THE RESPONDENT , WORK FORCE FOR INNOVATION .

ISN'T THE COMMON UNDERSTANDING OF WHAT A TORT IS, IS THAT IT IS A COMMON LAW CAUSE OF ACTION , EITHER FOR INTENTIONAL MISCONDUCT OR FOR NEGLIGENCE , AND ISN'T THAT WHAT THE STATE WAIVED IN 768.28?

ABSOLUTELY NOT , YOUR HONOR .

IF IT IS NOT A COMMON LAW CAUSE OF ACTION, THEN HOW DO YOU DEFINE TORT?

WELL , IN 768.28 THERE , IS NOTHING LIMITING TORT TO A COMMON LAW TORT.

HOW DO YOU DEFINE IT?

A TORT IS GENERALLY DEFINED AS A CIVIL WRONG FOR WHICH THE STATE PROVIDES RELIEF. THE REST ATEMENT O F TORTS --

THAT DEFINITION, A CONTRACT ACTION WOULD BE A TORT ACTION .

THAT IS TRUE , YOUR HONOR , EXCEPT THAT THE RELIEF PROVIDE UNDER A TORT ACTION , WOULD INCL UDE RELIEF SUCH AS COMPENSATORY DAMAGES AND PUNITIVE DAMAGES. THAT IS ONE ESSENTIAL ELEMENT OF A TORT ACTION .

CA N YOU GET PU NITIVE DAMAGES UNDER THIS STATUTE?

UNDER THE FLORIDA CIVIL RIGHTS ACT?

YES.

YES, YOUR HONOR.

SO THAT IS WHAT MAKESTHIS A TORT?

THAT IS ONE ELEMENT. THAT IS THE WAY THAT THEUNITED STATES SUPREME COURT HAS GENERALLY EVALUATED WHETHER AN ACTION IS A TORT ACTION.

YOU DON'T GET PUNITIVE DAMAGE PA SS FOR NEGLIGENCE,DO YOU?

I BELIEVE SO , YOUR HONO R.

YOU GET PUNI TIVE DAMAGES FOR PURE NEGLIGENCE?

THAT IS MY UNDERSTANDING .

WOULD YOU HE LP M E UNDERSTAND , JUST AS W E APPROACH THIS PROBLEM, UNDER 760 , IT IS A PRE TTY ELABORATE STEP-BY-STEP REQUIREMENT SET FORTH IN THERE , IS THERE NOT?

YES, YOUR HONOR. THERE IS --

IT GIVES YOU A PROGRAM OR A P L AN AS TO HOW YOU HAVE TO PROCEED TO HAVE ANY RELIEF UNDER THAT STATUTE.

IT PROVIDES SOME OF THESTEPS THAT MUST BE TAKEN.

ARE THERE OTHER NOTICES SOMEWHERE ELSE, OTHER THAN YOUR ALLEGED 768.28-5 NOTICES THAT THESE , THE INDIVIDUALS WHO MAKE THESECLAIMS ARE REQUIRED TO SATISFY , OR IS THAT THE ONLY ONE?

YOUR HONOR , I N THE, THIS COURT I N JOSHUA VERSUS CITY OF GAINESVILLE , THE COURT HELD THAT THE STATUTE , THE FOUR-YEAR STATUTE OF LIMITATIONS APPLIES .

NO , I AM TALKING ABOUT THE PLOS ES. THAT IS A -- THE PROCESS. THAT IS A LIM ITATION PERIOD.AS FAR AS NOTICES OR WHAT YOU HAVE TO DO OR HOW YOU HAVE TO DO IT, ARE THERE ANY OTHER REQUIREMENTS THAT THESE INDIVIDUALS HAVE TO SATISFY THAT ARE NOT SET FORTH IN 760 SPEC IFICALLY , OTHER THAN THE 728 , 768.28-5?

WELL , OTHER THAN THE ADMINISTRATIVE REQUIREMENTS,NO, YOUR HONOR , EXC EPT THAT DISCRIMINATION OR --

IF THEY WANTED TO, FOR EXAMPLE, WE GOT OFF ON THIS TANGENT OF DID THEY WAIVE SOVEREIGN IMMUNITY. I THOUGHT THE QUESTION WAS REALLY JUST DIRECTED TO THIS NOTICE. YOU AGREE THAT THERE IS NOT AN ISSUE OF SOVEREIGN IMMUNITY IN THIS CASE, DO YOU NOT?

WELL --

YOU CAN SUE THE STATE, PURSUANT TO CHAPTER 760?

YOU CAN SUE THE STATE PURSUANT TO 768.28.

YOU CAN'T PURSUE THEM ACCORDING TO 760. THAT IS NOT AN ACTION, EVEN THOUGH IT DEFINES THE EMPLOYER AS THE STATE.

NO, YOUR HONOR. IT IS THE CROSS-REFERENCE TO 768.28. IF YOU LOOK TO THE CASES THAT HAVE HELD THAT THE WAIVER OF SOVEREIGN IMMUNITY OR THAT THE STATE HAS WAIVED SOVEREIGN IMMUNITY FOR DISCRIMINATION CASES, FOR EXAMPLE, THE CLONIS CASE, THEY SPECIFICALLY POINT TO THE CROSS-REFERENCED 768.28 SUBSECTION 5 AS ONE OF THE ESSENTIAL REASONS WHY THE STATE HAS WAIVED SOVEREIGN IMMUNITY.

BUT IF YOU ACCEPT THAT, IN ACCEPTING THAT, IN THAT THERE IS, IN THE REFERENCE IN THE LAST SENTENCE, OF 760.11-5, THAT THE TOTAL AMOUNT OF RECOVERY AGAINST THE STATE AND ITS AGENCIES AND SUBDIVISION SHALL NOT EXCEED THE LIMITATION AS SET FORTH IN 768.28, AS THE BRIDGE THAT WAIVES SOVEREIGN IMMUNITY, THEN IF THE LEGISLATURE WAS DEALING WITH IT THAT WAY, WHY, AND THEY WANTED THERE TO BE A REQUIREMENT AS TO 768.28 PARAGRAPH 6, THE LEGISLATURE COULD HAVE SAID THAT IS, COULD IT NOT?

THE LEGISLATURE DID SAY THAT.

WHERE?

IN 768.28. THE LANGUAGE IS CLEAR.

WHERE DOES THAT SAY IT IN 760? I MEAN, IT SEEMS TO ME THAT IT DIDN'T REFER TO IT IN 760, AND OTHER THAN, IT HAS THIS SORT OF, AS JUSTICE LEWIS SAYS, ELABORATE SCHEME FOR FILING A CIVIL RIGHTS ACTION.

YES, YOUR HONOR. ALSO UNDER THE MEDICAL MALPRACTICE STATUTE THERE, IS AN ELABORATE ADMINISTRATIVE SCHEME VERY SIMILAR TO THE SCHEME SET FORTH IN THE FLORIDA CIVIL RIGHTS ACT, BUT THIS COURT IN MENENDEZ, HELD THAT DESPITE THAT ADMINISTRATIVE SCHEME, THE PRE-SUIT NOTICE REQUIREMENTS OF 768.28 SUBSECTION STICKS.

MEDICAL MALPRACTICE IS A COMMON LAW TORT.

YES, YOUR HONOR.

THE STATUTE RESTRICTED RIGHTS THAT EXISTED AT COMMON LAW, AND THEREFORE IT STILL IS, I MEAN, WHATEVER YOU WOULD CALL MEDICAL MALPRACTICE, IS AT ITS ESSENCE, BEFORE THAT STATUTE CAME INTO EXISTENCE, YOU COULD STILL SUE THE STATE, BASED ON 768.28. ISN'T THAT A PRETTY BIG DIFFERENCE?

THERE IS NO DIFFERENCE, YOUR HONOR. THE STATUTORY --

THERE IS NO DIFFERENCE. YOU ARE TELLING ME THERE IS -- YOU ARE TELLING ME THERE IS NO DIFFERENCE BETWEEN HOW WE LOOK AT STATUTORY CAUSE OF ACTION AND COMMON LAW TORTS?

NO, YOUR HONOR. IN BYRD, FOR EXAMPLE , THIS COURT HELD THAT THE CA USE OF ACTION FOR HAD HARASSMENT BASED ON H O STILE WORK ENVIRONMENT , IS A TORT .

LET ME GO BACK OVER SOMETHING.WE HAVE GOT 760 AS A FREE STANDING CAUSE OF ACTION AGAINST THE STATE THAT , REFERENCES SUBSECTION 5, WHICH IS THE WAIVER OF SOVEREIGN IMMUNITY AND THE LIMIT ON HOW MU CH CAN BE RECOVERED , CO RRECT ? IS THAT COR RECT?

YES, YOUR HONOR.

AND YOU HAVE , T HERE IS NO QUESTION IN THIS CASE THAT THE STATE RECEIVED NOTICE THROUGH ALL OF THE REQUIREMENTS OF 760 , THAT , WHERE THEY ARE REQUIRED TO DO WHAT MR . PR INTY DESCRIBED , AS FAR AS THE SWORN TO EXPLANATION OF WHAT THE N ATURE OF THE DAMAGES ARE. THERE IS SOME T YPE OF MEDIATION PROCESS THAT GO ESON, WHERE THEY INVESTIGATE THE CLAIM.IS THAT ARE RIGHT?

YES , YOUR HONOR -- IS THAT RIGHT?

YES, YOUR HONOR.

SO LET ME, IS THE ONLY PART OF SAYING THERE SHOULD BE ANOTHER NOTICE , IS BECAUSE THE DEPARTMENT OF, WHAT IS IT , DEPARTMENT OF FINANCIAL SERVI CES?

YES, YOUR HONOR.

BECAUSE THEY NEED TO HAVE THAT NOTICE DIRECTLY? ARE THEY INVOLVED IN THE NEGOTIATION OF THESE DISCRIMINATION CLAIMS? ARE THEY PA RT OF THAT PROCESS.

YES, YOUR HONOR. THEY , NOT D URING THE ADMINISTRATIVE PHASE, BUT ONCE THE CLAIM GET S TO THE LITIGATION STAGE, THEDEPARTMENT OF FINANCIAL SERVICES IS THE DEP ARTMENT THAT ULTIMATELY MAKES THEDECISION WHETHER TO S E TTLE THE CLAIM.

AF TER LI TIGATION IS FILED.

YES, Y OUR HONOR.

SO DOESN'T THAT ALSO SORT OF BELY THE FACT THAT THE IDEA IS THAT OTHER AGE NCIES ADMINISTER THESE CLAIMS BEFORE LAWSUITS ARE FILED, AND THAT IS WHY , FOR 760 , WHEREAS WHEN YOU HAVE EVERY OTHER KIND OF TORT , THE , IT IS THE DEPA RTMENT OF FINANCIAL SERVICES THAT WOULD BE INVO LVED I N ANY KIND OF PRE- SUIT NEG OTIATION , IF THE CASE IS GOI NG TO GET RESOLVED. ISN'T THAT HOW IT WORKS?

WELL , FIRST OF ALL , YOUR HONOR, THERE IS NO REQUIREMENT IN 760 , AND ANY NOTICE IS G IVEN TO THE DEPARTMENT OF FI NANCIAL SERVICES.

BUT THE QUESTION IS , IF THE LEGIS LATURE THOUGHT THAT WAS A VITAL PART OF HOW THESE CLAIMS NE EDED TO BE RES OLVED , THEY , ALL THEY HAD TO DO IS AT THE SAME TIME THEY ARE REFERENCING 5 , SAY , AND THEY ARE SUBJECT TO THE NOTICE RE QUIREMENTS OF SIX. I M EAN , THAT WOULD , BUT IF THERE IS REA LLY NO REASON TO HAVE THEM INVOLVED BE FORE LITIGATION IS FILED , THEN THIS THREE-YEAR NOTICE IS , REALLY, WOULD BE AL MOST A USELESS ACT , AND WE HAVE GOT TO THINK THAT THE LEGISLATURE , INCOMING UP WITH THIS SCHEME , UNDERSTOOD WHY 768.286 NOTICE, REAL LY, WAS NOT THE KIND OF CR ITICAL NOTICE THAT WAS NEEDED IN THE STATUTORY CAUSE OF ACTION . AND WHAT WE ARE DOING IS T RYING TO FI GURE OUT LEGISLATIVE INTENT.

YES , YOUR HONOR, AND LEGISLATIVE INTENT IS CLEAR AND UNAMBIGUOUS I N SE CTION 768.28, WHERE IT CLEARLY SAYS THAT , FOR ACTIONS IN TORT, PRE-SUIT NOTICE REQUIREMENT BE GIVE N.

SO COULD THE STATE HAVE BEEN, WIT HOUT 760 , COULD THE STATE HAVE BEEN SUED FOR DISABILITY , DISCRIMINATION BASED ON DISABILITY , JUST BASED ON 768.28?

NO, YOUR HONOR. WELL , WITH OUT 760 , THERE WASN'T A CAUSE OF ACTION FOR HANDICAPPED DISCRIMINATION.

AND THAT CAUSE OF ACTION DIDN'T AR ISE UN TIL AFTER 768.28 WAS ADOPTED , C ORRECT?

YES, YOUR HONOR. 760 WAS ENACTED IN 19 92 , AND --

SO WHEN THIS LEGISLATURE WAS ADO PTING 768.28 , ACTUALLY 760 DID NOT EXIST. IS THAT CORRECT?

YES , YOUR HONOR.

AND IN THE MEDICAL MALPRACTICE ACT, IN 761.201-B , REGARDING PRE-SUIT INVESTIGATION, THE LEGISLATURE I N SERTED I N THAT SUBSEQUENTLY EN ACTED LEGISLATION , THE RIGHTS OF ACTIONS AGAINST THE STATE, AND THEY HAVE TO MEET THE 768.28, SO I N THAT STATUTORY PROVISION , MEDICAL P LAL PRACTICE, THE STATE SAID - - MEDICAL MALPRACTICE , THE STATE SAID YOU HAVE TO MEET THE 728 REQUIREMENTS , BUT THEY DID NOT DO THAT I N 760 , CORRECTA?

I N 760 , THEY DID NOT SAY THAT EXPR ESSLY BUT THEY DID CROSS-REFERENCE I N OTHER ASPECTS OF 760.

BUT 760 SAYS IT IS TO BE LIBERALLY CONSTRUED TO F URTHUR ITS INTENT ANDPURPOSE , AND HOW DOES YOUR INSTRUCTION MEET THAT INSTRUCTION THAT THE LEGISLATURE GIVES TO US AND ITS AGENCIES, OTHER AGENCIES AND ITS BRANCH , EXECUTIVE BRANCH, THAT THAT CONSTRUCTION, HOW DOES YOUR CONSTRUCTION MEET THAT REQUIREMENT?

THE ST RICT CON STRUCTION THAT IS G RANTED 768.28 IS WAIVER OF SOVEREIGN IMMUNITY, I N NO WA Y --

K NOW THE LI BERAL CONSTRUCTION OF 760.

THERE IS NO CONFLICT BETWEEN THE TWO , YOUR HONOR. 768.28 CAN BE STRICTLY CONSTRUED AND 760 CAN BE LIBERALLY CONSTRUED .

DOESN'T 760 , THOUGH , HAVE ITS OWN WAIVER OF SOVEREIGN IMMUNITY PROVISION?

SECTION 760 , YOUR HONOR , ABSOLUTELY NOT.

760.

NO, YOUR HONOR.

WHAT IS THE EFFECT, THEN , OF DEFINING PERSON AS A STATE AGENCY OR THE GOVERNMENT OR ALL THOSE THINGS LIKE THAT?

THE ONLY EFFECT OF THAT , YOUR HONOR, I S THAT THE LEGISLATURE WAS ME RELY RECOGNIZING THAT THE STATE WAS SUBJECT TO SUIT , AFTER AND TAKING I NTO CONSIDERATION THE EXISTENCE OF 768.28.

DOESN'T THAT LANGUAGE CLEARLY PROVIDE THAT THE REMEDY SET OUT IN 760 , WILL BE APPLIED TO THE GOVERNMENT , TO THE STATE AGENCY?

NO , YOUR HONOR. JUST I REFER YOU TO THE SPANGLER CASE , FOR EXAMPLE , AND IN THAT CASE THE STATUTE SAID THAT THE AGENCY HAD THE POWER TO SUE AND BE SUED AND THE COURT HELD THAT THAT LANGUAGE WAS NOT A CLEAR AND UNEQUIVOCAL WAIVER OF SOVEREIGN IMMUNITY .

THERE IS A LITTLE, THE LANGUAGE HERE IS A LITTLE BROADER THAN THAT , IS IT NOT?

IT IS A LITTLE BROADER BUT IT IS THE SAME --

YOU DON'T THINK THE LANGUAGE HERE INDICATES THAT A STATE AGENCY WILL BE SUBJECT TO ANY PROCEEDINGS OR ACTIONS UNDER THIS STATUTE? ARE YOU SAYING THAT IT DOESN'T INDICATE THAT ?

YOUR HONOR , IT JUST RECOGNIZES THE EXISTENCE OF 768.28, TWO STATUTES.

SO THE LANGUAGE IN 760 DOESN'T EXPLICITLY RECOGNIZE THAT A STATE AGENCY WILL BE SUBJECT TO THE PROVISIONS OF THE ACT. THAT IS YOUR POSITION.

IT DOES SAY THAT, YOUR HONOR. IT DOES NOT EXPLICITLY SAY THAT THE STATE --

IT DOES SAY IT OR IT DOESN'T?

IT DOES SAY THAT THE STATE WILL BE SUBJECT TO SUIT UNDER THE FLORIDA CIVIL RIGHTS ACT, YES , YOUR HONOR.

OKAY .

SO UNDER YOUR ARGUMENT HERE , IS THE ENTIRETY OF 768.28, APPLICABLE TO 760?

YES , YOUR HONOR.

SO ANY AGENCY THAT IS SUED PURSUANT TO 760 , CAN, THEN, PURSUANT TO 768.28 SUB3 , GO TO THE DEPARTMENT OF FINANCIAL SERVICES AND MAKE THEM A PART OF THE SUIT , ALSO?

THAT'S CORRECT, YOUR HONOR.

SO EVERYTHING THAT WE HAVE HERE , IS TRANSFERRED BY REFERENCE , TO 768.28 5, BY MAKING THAT REFERENCE , EVERYTHING IN 768.28 , HAS BEEN TRANSFERRED TO 760. THAT IS YOUR ARGUMENT BEFORE US.

NO , YOUR HONOR .

WELL, THEN , HOW DOES , HOW DO WE, THEN , GET TO EVERYTHING IN 768.28?

BECAUSE DISCRIMINATION IS A TORT , YOUR HONOR. SO BY THE EXPRESS LANGUAGE OF 768.28 , BECAUSE DISCRIMINATION IS A TORT , ALL OF THE PROVISIONS IN 768.28 --

IT IS A TORT BECAUSE?

I AM SORRY , YOUR HONOR.

IT IS A TORT BECAUSE OF WHAT? I MEAN, WHY IS IT A TORT?

IT IS A TORT BECAUSE THIS COURT , IN BYRD VERSUS RICHARDSON, HELD THAT HARASSMENT BASED ON HOSTILE WORK ENVIRONMENT, IS A TORT , AND ALSO BECAUSE THIS COURT, IN SCOTT VERSUS OTIS ELEVATOR , HELD THAT A WRONGFUL DISCHARGE CLAIM UNDER THE WORKERS COMPENSATION RETALIATION PROVISION, IS A TORT .

IN BOTH THOSE CASES , THEY WERE DEALING WITH THE WORKERS COMPENSATION SCHEME , AND A TOTALLY DIFFERENT ISSUE THAN WE ARE DEALING WITH TODAY. WOULD YOU AGREE WITH THAT?

I WOULD NOT AGREE THAT THAT IS A TOTALLY DIFFERENT ISSUE, YOUR HONOR.

WHETHER THERE WAS A REMEDY FOR WRONGFUL DISCHARGE AND DISCRIMINATION UNDER THE WORKERS COMPENSATION STATUTE OR NOT ? IS NOT A DIFFERENT ISSUE THAN WHAT WE ARE TALKING ABOUT TODAY?

NO , YOUR HONOR .

CAN'T THIS ISSUE BE RESOLVED, JUST SIMPLY AS ONE OF STATUTORY CONSTRUCTION, WHICH IS THAT THE LEGISLATURE, IF THEY HADN'T REFERENCED 768 AT ALL , YOU COULD SAY , WELL , THEY KNEW THAT THIS WAS , WOULD BE SUBJECT TO IT SO THEY DIDN'T NEED TO REFERENCE IT , BUT BY REFERENCING ONE SUB SECTION AS OPPOSED TO AS JUSTICE BELL POINTED OUT IN THE MEDICAL MALPRACTICE REFERENCING JUST 768.28 , IS THAT THEY , JUST BY THAT LANGUAGE ALONE , IS ENOUGH TO SAY THAT THERE WAS , THERE IS NO OTHER PROVISIONS OF 768.28 THAT APPLY , OTHER THAN SUBSECTION FIVE , AND IN TERMS OF EVERY KIND OF STATUTORY CONSTRUCTION THAT WE DO , I JUST , I AM JUST TRYING TO GET AROUND , I MEAN HOW DO YOU GET AROUND THAT , THAT THEY REFERENCE SUBSECTION FIVE AND JUST DIDN'T SAY, AND ALL OF THE PROVISIONS OF 768.28 WILL APPLY TO THIS STATUTORY CAUSE OF ACTION ?

WELL , YOUR HONOR , THE REASON THAT THEY EVEN CROSS-REFERENCED 768.28 -5 WAS BECAUSE THERE WAS THE POTENTIAL CONFLICT BETWEEN THE DAMAGES AVAILABLE UNDER FLORIDA CIVIL RIGHTS ACT AND UNDER 768.28.

BUT YOU JUST SAID THAT , SINCE IT IS A TORT , IT WOULD BE SUBJECT TO 768.28 , SINCE IT IS THE STATE. WHY WOULD THEY NEED TO EVEN WORRY ABOUT THAT?

THAT IS EXACTLY WHY THE LEGISLATURE RECOGNIZED THAT , THE DAMAGE PROVISIONS OF 768.28 APPLIED . IF THEY DIDN'T EVEN CONSIDER THAT THEY WOULD HAVE APPLIED , THERE WOULD BE NO NEED TO PUT IN THE CROSS-REFERENCE IN THE FIRST PLACE .

BUT IF 768.28 , I LIEN , THE WHOLE POINT IS -- I MEAN, THE WHOLE POINT IS IF THE ENTIRETY OF 768.28 IS APPLICABLE TO 760 , THERE WAS NO REASON TO MAKE ANY CROSS-REFERENCE TO 768.28-5 SPECIFICALLY. BECAUSE THE ENTIRETY OF THE THING WOULD THEN BE APPLICABLE ANYWAY , SO IT MAKES THAT REDUNDANT , DOESN'T IT?

NO, YOUR HONOR , BECAUSE THAT IS THE ONE AREA WHERE THERE WOULD HAVE BEEN A CONFLICT BETWEEN THE TWO STATUTES THERE. IS NO CONFLICT BETWEEN GIVING PRE-SUIT NOTICE AND THE ADMINISTRATIVE SCHEME UNDER THE FLORIDA CIVIL RIGHTS ACT, BUT THERE WOULD HAVE BEEN A CONFLICT --

WHAT WOULD BE THE CONFLICT, IF THE ENTIRETY OF 768 IS APPLICABLE?

WELL , THE FLORIDA CIVIL RIGHTS ACT PROVIDES FOR UNLIMITED COMPENSATORY DAMAGES. 768.28 LIMITS COMPENSATORY DAMAGES. SO THERE WOULD HAVE BEEN A POTENTIAL CONFLICT BETWEEN THE TWO, THE LANGUAGE OF THE TWO STATUTES . BUT --

SO THERE IS NO OTHER CONFLICT IN 768.28 THAT CONFLICTS WITH 760.

NO , YOUR HONOR . THE WHOLE ISSUE , THE MAIN ISSUE IS THAT DISCRIMINATION IS A TORT , AND ONE ISSUE THAT WE HAVE NOT ADDRESSED , YOU HAVE DISCUSSED STATUTORY CONSTRUCTION, BUT THE PRIMARY RULE OF CONSTRUCTION HERE IS THAT WAIVER OF SOVEREIGN IMMUNITY MUST BE STRICTLY CONSTRUED IN FAVOR OF THE STATE. THIS COURT HAS REPEATEDLY HELD THAT , AND THE CASES OF LEVINE, SPANGLER AND MENENDEZ , AND TO HOLD OTHERWISE HERE, WOULD BE HOLDING ALL OTHER TORT CLAIMANTS TO A HIGHER STANDARD THAN DISCRIMINATION CLAIMANTS.

IT IS INTERESTING, BECAUSE IT WAS THAT MENENDEZ CASE THAT SPECIFICALLY SAID THAT IS WHY WE ARE NOT GOING TO CONSTRUE 768.28 AS JUST A GENERAL WAIVER OF SOVEREIGN IMMUNITY FOR CIVIL RIGHTS ACTIONS. IT IS A WAIVER FOR COMMON LAW TORTS . ISN'T THAT WHAT , WAS THAT THE MEN ENDEZ CASE? MAYBE NOT.

THE MENENDEZ CASE SAID NOTHING ABOUT DIFFERENTIATING BETWEEN COMMON LAW .

WAS IT HILL?

I AM NOT FAMILIAR WITH THE COURT SAYING THAT. 768.

768.28 WAS NEVER CONSTRUED AS WAIVING ANYTHING FOR THE STATE , OTHER THAN COMMON LAW TORTS , UNTIL THERE WOULD BE STATUTORY CAUSE OF ACTION THAT , THEMSELVES , WOULD END UP BEING THE WAIVER OF SOVEREIGN IMMUNITY. THAT IS TRUE FOR THE WHISTLE-BLOWER STATUTE. THAT IS TRUE FOR THE CIVIL RIGHTS ACT.

WELL, YOUR HONOR , BOTH THE THIRD DCA AND THE FIRST DCA HAVE HELD THAT THE PRE-SUIT NOTICE REQUIREMENTS OF 768.28 SUBSECTION 6, DO APPLY TO WORKERS COMPENSATION RETALIATION .

IF WE AGREE WITH YOU , DO WE HAVE TO REcede FROM THE LANGUAGE IN HILL , WHERE THE COURT SAYS THAT APPLICATION OF SECTION 768.28 IS LIMITED TO TRADITIONAL TORTS, SPECIFICALLY THOSE IN WHICH THE STATE WOULD BE LIABLE IF THEY WERE A PRIVATE PERSON? DO WE HAVE TO REcede FROM THAT LANGUAGE , THAT THIS IS LIMITED TO TRADITIONAL TORTS ? IN ORDER TO ACCEPT YOUR POSITION ?

NO , YOUR HONOR. THE LANGUAGE TRADITIONAL TORTS , I DON'T SEE THAT AS THE SAME THING AS SAYING COMMON LAW TORTS .

WELL , WHAT ELSE DOES TRADITIONAL TORTS MEAN?

I WOULD SAY THAT TRADITIONAL TORTS ARE JUST DESCRIBING THE NATURE OF A--

THIS WAS A CASE FROM 1987 , AND YOU WOULD AGREE THAT IS PRIOR TO THE CIVIL RIGHTS ACT IN FLORIDA.

YES, YOUR HONOR.

SO COULD THAT LANGUAGE BE TRADITIONAL TORTS , BE APPLICABLE TO A CAUSE OF ACTION THAT WAS DECIDED IN 1992?

YES , YOUR HONOR. THE TRADITIONAL TORTS , THE FLORIDA CIVIL RIGHTS ACT COULD BE CONSTRUED AS CREATING A TRADITIONAL TORT IN THE SENSE THAT IT IS AN INTENTIONAL TORT. IT ALSO PROVIDES FOR COMPENSATORY AND PUNITIVE DAMAGES. SO IN THAT SENSE , IT IS NO DIFFERENT THAN A COMMON LAW TORT, EXCEPT THAT THE CAUSE OF ACTION WAS CREATED BY

THE LEGISLATURE INSTEAD OF COMMON LAW.

SO COMMON LAW AND TRADITIONAL ARE, IN FACT , SYNONYMOUS .

I DON'T THINK SO , YOUR HONOR, NO , AND THERE IS NO LANGUAGE IN THE 768.28 THAT WOULD DISTINGUISH BETWEEN, THAT DOES NOT QUALIFY TORT IN ANY WAY AS ACCEPTING STATUTORY TORTS OR ACCEPTING DISCRIMINATION TORTS.

CHIEF JUSTICE: YOUR TIME HAS EXPIRED. THANK YOU VERY MUCH.

THANK YOU .

YOUR HONOR, THE PETITIONER WOULD WAIVE REBUTTAL, IF THAT IS ACCEPTABLE TO THE COURT.

CHIEF JUSTICE: THANK YOU VERY MUCH , AND WITH THAT WE WILL TAKE OUR MORNING RECESS OF 15 MINUTES .

MARSHA L: PLEASE RISE.