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**IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FIRST DISTRICT**

MICHELLE WILSON,

Appellant,

v.

Case No.: 1D2024-0476

L.T.No.: 2023-CA-1569

FLORIDA COMMISSION ON
HUMAN RELATIONS and
CHEYANNE COSTILLA,
in her official capacity, and
individually,

Appellees.

_____ /

APPELLANT'S INITIAL BRIEF

Appeal of a Final Order of the Circuit Court of the Second Judicial
Circuit of Florida, Honorable John C. Cooper presiding

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STATEMENT OF CASE AND FACTS

The Complaint in this case, R-004-018, states that the Florida Commission on Human Relations (FCHR) violated several of Appellant's state and federal constitutional rights by refusing to issue a determination on a whistleblower charge Appellant had filed against FCHR itself upon being dismissed by that agency.

FCHR moved to dismiss for lack of subject matter jurisdiction. R-019-024. Wilson opposed the motion. R-025-033. The circuit court dismissed the Complaint for lack of subject matter jurisdiction. Order at R-034-037 and Judgment at 038.

Appellant had brought the issue of FCHR's failure to issue a determination before this Court in a prior appeal of an agency decision, *Wilson v. Florida Commission on Human Relations*, 351 So. 3d 109 (Fla. 1st DCA 2022), (rehearing denied, December 5, 2022). The main point of that case was that the public whistleblower statute, at § 112.31895(3)(d), Florida Statutes, requires FCHR to investigate and make a determination on every whistleblower complaint. The FCHR determination, regardless of outcome, amounts to a ticket for the

charging party to bring a case in circuit court. In this regard, a whistleblower charge differs from a charge of discrimination in that, for the latter, a timely negative finding by FCHR can block access to court. By contrast, a whistleblower charge goes to court regardless of FCHR's determination.

For years, FCHR sought a means to escape the statutory mandate to investigate and make a determination in every case. The agency hit upon an "inherent power" to dismiss cases without investigation or determination if those cases appeared to be untimely, appear to fail to state a prima facie case, or to fall short in whatever other way FCHR determined to be fatal. Charging parties challenged these dismissals in a quartet of cases. *Robinson v. Department of Health*, 89 So.3d 1079, 1082–83 (Fla. 1st DCA 2012); *Tillery v. Fla. Dep't of Juvenile Justice*, 104 So.3d 1253, 1255 (Fla. 1st DCA 2013); *Stanton v. Florida Department of Health*, 129 So.3d 1083, 1084 (Fla. 1st DCA 2013); and *Caldwell v. Florida Dept. Of Elder Affairs*, 121 So.3d 1062, 1063 (Fla. 1st DCA 2013).

These cases seemed legally erroneous to the team bringing the present action. But the losses also seemed to be at least in part the

fault of the previous appellants, who had never raised any of the salient constitutional violations that marred FCHR's dismissals of cases without determination. Accordingly, the present Appellant did not stop at showing that her whistleblower charge met all statutory standards of acceptability for investigation and determination on the merits of the charge. She went on to show that the FCHR dismissal without determination violated the numerous constitutional rights set forth in the Complaint in the instant case. Under the constitutions of the United States and the State of Florida, every charging party under the whistleblower statute is entitled to a day in court.

However, this Court declined to reach any of the constitutional issues in its opinion disposing the case. Indeed, this Court declined even to mention the constitutional issues, let alone decide them. The opinion stuck strictly to interpretation of the whistleblower statute, as decided in this Court's old cases. This spurred Appellant to file a motion for rehearing, which, among other things, pointed out that the DCA's silence on the constitutional issues deprived Appellant of her jurisdiction to have the Florida Supreme Court consider the constitutional issues. The Supreme Court could not take up those

issues because the DCA did not decide them. This Court denied rehearing without comment.

Thus, Plaintiff brought the instant case to litigate the constitutional issues for the first time. Accordingly, no collateral estoppel is even theoretically possible. That form of preclusion requires that a point be actually decided by the prior court. It is not enough that one or more parties mentioned it.

The gravamen of the Judgment now appealed is that Appellant seeks an improper second bite at the apple in violation of collateral estoppel. That holding is in error because Appellant, even now, has still not had her first bite at the apple. No court has ruled on the issues raised in the instant suit. That is the dispositive factor of this appeal. It is of no consequence that the issues were raised in a prior proceeding in which the tribunal declined to reach them.

The court below signed FCHR's proposed order of dismissal, R-034-037, and then entered judgment, R-038. This timely appeal follows.

SUMMARY OF ARGUMENT

The court below misapplied the doctrine of collateral estoppel by

holding that a non-decision on an issue by a prior court bars consideration of that issue by a later court. But collateral estoppel applies only to decisions, not non-decisions. For the bar to apply, the issue must have been actually litigated and resulted in a clearcut adjudication on the merits. It is never enough that an issue was presented and not decided.

The motion to dismiss that ended this case in the court below was not properly cognizable. This is so because the stated basis of the motion was a lack of subject matter jurisdiction based on collateral estoppel. But there is no such thing. It is not even a theoretical possibility. Subject matter jurisdiction may be raised at any time and is not capable of waiver. By contrast, collateral estoppel is waived if not timely asserted and must be raised in a pleading as an affirmative defense, not in a motion. There is an exception when a complaint puts the prior ruling in the record, but the exception does not apply here because the complaint did not say there was an affirmative decision on the contested issues, but only a non-decision.

The decision below violates the access-to-courts provision of the Florida Constitution. That right is a right to have one's case heard on

the merits. The right is not one that can be circumvented by procedural sophistry. A trial court has the duty to decide the cases before it on the merits. An appeals court may pick and choose what to address and what to ignore when presented with multiple issues. A trial court does not have that luxury.

STANDARD OF REVIEW

An order determining subject matter jurisdiction resolves an issue of law and is therefore reviewed *de novo*. *Point Conversions, LLC v. Omkar Hotels, Inc.*, 321 So. 3d 326 (Fla. 1st DCA 2021). The Order and Judgment on appeal grant a motion to dismiss for lack of subject matter jurisdiction. However, the stated basis for the lack of subject matter jurisdiction is collateral estoppel, which can never implicate subject matter jurisdiction because collateral estoppel can be waived while subject matter jurisdiction cannot be waived. This is discussed below. Nevertheless, even if a “tipsy coachman” analysis finds that the better vehicle for dismissal would have been failure to state a cause of action, the standard of review is still *de novo*. *Palm Beach County School Board v. Doe*, 210 So. 3d 41 (Fla. 2017).

ARGUMENT

I. COLLATERAL ESTOPPEL REQUIRES AN ACTUAL DECISION, NOT A BARE MENTION

In *Gordon v. Gordon*, 59 So.2d 40 (Fla. 1952), the Florida Supreme Court held that the test in determining whether judgment by estoppel applies to a case is “whether the evidence in both cases is in essence the same” and whether “every point and question” presented in the second action was actually litigated and decided in the first. *Id.*, 59 So.2d at 45. For collateral estoppel to apply, there must also exist in the prior litigation a “clearcut former adjudication” on the merits. *Dep’t of Health & Rehab. Servs. v. LaPlante*, 470 So.2d 832, 834 (Fla. 2d DCA 1985); see also *R.D.J. Enters., Inc. v. Mega Bank*, 600 So.2d 1229, 1231 (Fla. 3d DCA 1992) (holding that collateral estoppel prevents re-litigation of issues that have been fully litigated and which resulted in a final decision of a court of competent jurisdiction).

No issue in this case was previously litigated to conclusion. Thus there is no preclusion under Florida law. *Dep’t of Health & Rehab. Servs. v. B.J.M.*, 656 So.2d 906, 910 (Fla.1995) (noting that Florida

courts have emphasized that judgment by estoppel “precludes re-litigation of issues *actually litigated* in a prior proceeding”) (court’s emphasis). It is never enough that an issue was presented and not decided. The court below misapprehended that point in finding it is enough that Appellant (Plaintiff below), in her Complaint, mentioned that she raised constitutional issues and that this Court made a ruling. That sweep of misapprehension omits the fact that the ruling made by this Court had nothing to do with the constitutional issues. This is a dispositive fact that makes irrelevant the dismissal order’s reliance on *Barrington v. Florida Dept. of Health*, 112 F. Supp. 2d 1299, 1303 (M.D. Fla. 2000). *Barrington* is a case in which an employee who litigated and lost her discrimination claim at the Public Employee Relations Commission (PERC) was barred by collateral estoppel from relitigating the same race discrimination in federal court. Though the statutory regimen was different and the employee was on the offense in federal court but on the defense at PERC, there was still a determination of the exact same issue – whether her termination was because of race discrimination. Moreover, the employee in *Barrington* had a full due process hearing, whereas in the instant case Plaintiff has had no

opportunity to present documents or witnesses nor to cross examine anyone, nor even to be informed of the grounds for her termination. That, in itself, would be enough to prevail on this motion because it is well-settled that preclusion will not apply where it would result in a manifest injustice. See, e.g., *Beverly Beach Properties, Inc. v. Nelson* , 68 So. 2d 604, 608 (Fla. 1953); *Strazzulla v. Hendrick*, 177 So. 2d 1, 3-4 (Fla. 1965); *Flesche v. Interstate Warehouse*, 411 So. 2d 919, 924 (Fla. 1st D.C.A. 1982); see also *State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003).

Though it may be fair enough that a plaintiff who litigated and lost the merits of a race discrimination claim in one forum does not get to relitigate it in another, it does not follow that a claimant who had her constitutional claims ignored in one forum must also have them ignored in every subsequent forum. It is not as though she lost those issues in the prior proceeding.

II. DISPOSITIVE MOTION WAS NOT COGNIZABLE

Defendants moved to dismiss under Fla.R.Civ.P. 1.140(b)(1), for lack of subject matter jurisdiction, based on collateral estoppel. R-019-024.

Collateral estoppel is an affirmative defense. Fla. R. Civ. P. 1.110(d). This defense may not be used in a motion to dismiss. *Garnac Grain Co., Inc. v. Mejia*, 962 So. 2d 408 (Fla. 4th DCA 2007). It must be pled first in an answer. *Palmer v. McCallion*, 645 So.2d 131, 133 (Fla. 4th DCA 1994). The court below erred in even taking cognizance of the issue.

Although the defense of collateral estoppel can look jurisdictional in character, it is an affirmative defense, see Fed.R.Civ.P. 8(c)(1), and therefore is not a per se jurisdictional bar to court review as contemplated by Fed.R.Civ.P. 12(b)(1) (and thus the Florida rule which is based on that federal rule, Fla.R.Civ.P. 1.140(b)(1)). *Youngin's Auto Body v. District of Columbia*, 775 F.Supp.2d 1,6 (D.D.C. 2011); and see, *Hemphill v. Kimberly-Clark Corp.*, 605 F.Supp.2d 183, 186 (D. D.C.2009) (observing that “res judicata is an affirmative defense that is generally pleaded in a defendant's answer, but is also properly brought in a pre-answer Rule 12(b)(6) motion”).¹

¹ In the motion and response in the court below, collateral estoppel and res judicata were used interchangeably. By the time of the order, all concerned realized that res judicata was out of the question because there were two different suits. But there is no place in this case where the law differs on the two concepts.

Though it is true that there is an exception that permits collateral estoppel to support a motion to dismiss where the facts that establish such defenses are stated on the face of the Complaint, this is not such a case. Indeed, the refutation of collateral estoppel is set forth in the Complaint, which stated at Paragraph 26, “The appeals court failed to acknowledge or address any of the constitutional issues, even on rehearing, and found FCHR to have an “inherent” power to decline jurisdiction over a whistleblower charge.” Thus, according to the Complaint, this Court did not decide anything that is advanced in this case, so its decision can have no preclusive impact. If the Complaint had said the DCA considered and expressly rejected the constitutional claims, that would have opened the door to the defense gambit of arguing that assertion of collateral estoppel need not be held back until the answer.

The Defendants compounded the error by purporting to rest the motion to dismiss on jurisdictional grounds, Rule 1.140(b)(1), instead of the more common “failure-to-state-a-cause-of-action” basis, Rule 1.40(b)(6). There are two apparent reasons Defendants chose that erroneous path. First, there is a body of law, already referenced,

barring collateral estoppel from serving as bases for the sort of motion to dismiss that was used in this case. Second, a motion under Rule 1.40(b)(6) must stay within the confines of the four corners of the Complaint, while a motion under Rule 1.40(b)(1), to dismiss for lack of subject matter jurisdiction, may bring in extraneous evidence. But the very idea of affirmative defenses defeating subject matter jurisdiction is fatally flawed both legally and logically. Subject matter jurisdiction can never be waived. *United States v. Cotton*, 535 U.S. 625 (2002); *Page v. Deutsche Bank Trust Company Americas*, 308 So.3d 953 (Fla. 2020). By contrast, “res judicata is an affirmative defense which must be pled, and may be waived, by the defendant.” *Norfolk Southern Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1289 (11th Cir. 2004).

Thus the motion was not cognizable under the procedural vehicle on which it rode in because it in no way implicated the Court’s subject matter jurisdiction.

III. DISMISSAL VIOLATES RIGHT OF ACCESS TO COURTS

Article I, section 21 of the Florida Constitution expressly provides that “[t]he courts shall be open to every person for redress of any injury,

and justice shall be administered without sale, denial, or delay.” The right to go to court to resolve our disputes is one of our fundamental rights. *Psychiatric Assocs. v. Siegel*, 610 So.2d 419, 424 (Fla.1992), receded from on other grounds in *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So.2d 1239 (Fla.1996) "While article I, section 21 may not give a litigant a particular remedy, the right of access does guarantee the litigant a forum in which to be heard.")

Under Defendants’ calculus, Appellant’s constitutional claims can never be heard. One court’s refusal to hear them must be copied by all later courts. But the Constitution demands a decision on the merits, at least where a plaintiff has committed no fatal error in pleading, such as missing a statute of limitation, splitting actions, or suing immune entities. This is not a case in which Plaintiff held back claims from the DCA to be presented later in another court, thus running afoul of the doctrine that the ruling would be preclusive “not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.” *Kimbrell v. Paige*, 448 So. 2d 1009, 1012 (Fla. 1984). Plaintiff had no control over the DCA decision not to

address the constitutional claims.

The proposed order wrongly assumes that Plaintiff is seeking a second bite at the apple. In fact, Plaintiff is seeking her first substantive decision.

One should recoil instinctively from the notion that, because a DCA decided nothing about an issue, a later circuit court must also decide nothing. Billy Preston sang, “Nothing from nothing leaves nothing.” Those are words of wisdom, but they do not compel the conclusion that a DCA saying nothing on a subject requires a circuit court to say nothing on the same subject. We get similar sagacity from the ancient legal maxim “*ex nihilo nihil fit*,” translated as “from nothing nothing comes,” in Black’s Law Dictionary, Fifth Edition, West 1979. That tells us that nothing comes from the absence of a ruling from this Court in a prior case, let alone a bar on consideration of the same issues by a different court in a later case.

The decision on appeal makes “nothingness” into an absurd rule holding that the first court presented with the constitutional claims in this case refused to reach them, therefore collateral estoppel dictates that no court can ever reach them. Collateral estoppel would become

not just issue preclusion on claims already decided affirmatively, but also a bar on hearing claims a prior court refused.

In a nobler time, that would have been called frivolous.

CONCLUSION

The Court should reverse the decision below and remand for discovery and trial. The decision is substantively incorrect in that it purports to find preclusion in a prior proceeding that did not address the constitutional issues that form the basis of the instant case. The decision also suffers from fatal procedural infirmities in that it seeks to conscript collateral estoppel into service as a basis for lack of subject matter jurisdiction when it is an affirmative defense that is subject to waiver and thus can never support a finding of lack of subject matter jurisdiction. The decision below also violates the right of access to courts under the Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was served to all counsel of record this 2d day of May, 2024, through the Court's e-service system.

/s/ Richard E. Johnson
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 Bookman Old Style, 14-point font.

/s/ Richard E. Johnson
Richard E. Johnson

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