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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 REPLY 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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ARGUMENT

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

FCHR casts its argument at such a high and abstract level of generality that it misses everything important in this case. FCHR's argument is that this court ruled that Michelle Wilson is not entitled to a determination on her public whistleblower charge in a prior case, so that precludes forever any relief on Wilson's whistleblower on any theory or authority.

But down here on the ground, other things matter.

The prior opinion addressed only the whistleblower statute. It carefully avoided ruling on the constitutional issue. It is quite possible that FCHR's dismissal of Wilson's charge is legal under the whistleblower statute, but illegal under the various constitutional doctrines asserted in this case. Since the whistleblower statute is not reasserted here, the prior decision on that statute has no preclusive impact on this case. It is not enough to say that Michelle Wilson lost in a prior case, so she must lose in this case. That is too high a level of generality.

In that prior case, FCHR had been both a party and judge in the events leading up to the appeal. FCHR fired Wilson on October 15, 2020. After that date, FCHR, acted as a quasi-judicial agency processing Wilson's whistleblower claim and sitting in judgment of its own actions, despite Wilson's protest of conflict of interest. Thus, for the events up to October 15, 2024, FCHR acted as Wilson's employer; for events after that date, FCHR was an adjudicative agency.

In the prior case before this Court, Wilson appealed FCHR's dismissal of her whistleblower charge. To do so, she made statutory arguments and constitutional arguments. The statutory arguments were mostly about FCHR's violations as an employer. None of the constitutional arguments were about the merits of the whistleblower claim – only about Wilson's rights to receive the determination of “cause” or “no cause,” that serves as a ticket to court. This Court's opinion made no reference to the constitutional arguments. The opinion, *Wilson v. Florida Commission on Human Relations*, 351 So. 3d 109 (Fla. 1st DCA 2022), stuck strictly to what FCHR could do under the whistleblower statute.

FCHR now (Answer Brief at 9) gets to the bare essence of its

argument: “To find in Wilson’s favor on any of these [constitutional] issues would contradict this Court’s prior decision affirming FCHR’s dismissal of her Charge.” But when a statute contradicts a constitutional provision, the statute must fall. That is the most fundamental doctrine in constitutional law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

It is only by operating at such a high level of generality that FCHR can make so bold an assertion. It should go without saying that an interpretation of a statute, no matter how correct an interpretation, says nothing about that law’s constitutionality. And that a prior court’s silence on whether a law is constitutional can never serve as an outcome that works collateral estoppel on a future claim.

II. DISPOSITIVE MOTION WAS NOT COGNIZABLE

FCHR chose to frame its motion to dismiss around jurisdiction, using Fla.R.Civ.P. 1.140(b)(1) as its vehicle, instead of the more common “failure to state a cause of action” under Fla.R.Civ.P. 1.140(b)(6). This allows wandering outside the four corners of the Complaint to reference other documents that are mentioned in the Complaint. Here, that reference is a statement from 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.” With no small audacity, FCHR claims that this recites a holding of this Court in the prior case on the constitutional issues that works collateral estoppel on everything in this case. That is self-refuting. An absence of a holding cannot be a holding.

In the Answer Brief, FCHR suggests that the Court use the “tipsy coachman” doctrine to convert the motion below into one under Rule 1.140(b)(6). That does not help FCHR’s case. Such a conversion would merely put a claim of collateral estoppel in its proper place – an affirmative defense that cannot serve as a basis for a motion to dismiss. So it hardly helps a motion to dismiss.

III. DISMISSAL VIOLATES RIGHT OF ACCESS TO COURTS

FCHR now claims that Wilson was derelict in not filing a First Amendment claim when FCHR foreclosed her whistleblower claim. This assertion ignores the main authority in recent First Amendment employee law, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which stripped

First Amendment protection from public employees for speech that is made in the course and scope of their jobs. Indeed, *Garcetti, id.*, at 425, points out that taking First Amendment protection away from public employees will not be so bad because those employees have state whistleblower laws that they can still use.

The result in this case is a total strangulation of a right because there is no avenue for redress. FCHR refused to investigate Wilson's claim or issue a determination on it. This Court, in the prior case, refused to consider the constitutional challenge. So now, FCHR holds out that refusal as a preclusion on any other court's consideration of those claims. That leaves Wilson no point of entry. That is a textbook case of a right without a remedy, as prohibited by Article 1, section 21, of 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 19th day of June, 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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