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**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

MICHELLE WILSON,

Plaintiff,

v.

Case No.: 2023-CA-1569

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

Defendants.

_____ /

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

The gravamen of this motion to dismiss is that Plaintiff seeks an improper second bite at apple in violation of res judicata and/or collateral estoppel. That claim is in error because Plaintiff, 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. It is of no consequence that the issues were raised in a prior proceeding in which the tribunal declined to reach them.

I. PRIOR PROCEEDING

The prior proceeding, *Wilson v. Florida Commission on Human Relations*, 351 So. 3d 109 (Fla. 1st DCA 2022), (rehearing denied, December 5, 2022), was an appeal from the dismissal, without processing or investigation, of Plaintiff's

whistleblower complaint by the Florida Commission on Human Relations (FCHR). 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. A whistleblower charge goes to court regardless of FCHR's determination.

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, all originating in Tallahassee and all filed by attorney Marie Mattox. *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 and result-oriented 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 without determination. Accordingly, the present Plaintiff did not stop at showing that her whistleblower charge met all previous known 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, the First District Court of Appeal declined to reach any of the constitutional issues in its opinion disposing the case. Indeed, that 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 that court's old cases. This spurred Plaintiff to file a motion for rehearing, which, among other things, pointed out that the DCA's silence on the constitutional issues deprived Plaintiff of her jurisdiction to have the Florida Supreme Court consider the constitutional issues. The Supreme Court could not take up those issues where the DCA did not decide them. The court denied rehearing without comment.

Thus, Plaintiff is here to litigate the constitutional issues for the first time. Accordingly, no res judicata or collateral estoppel is even theoretically possible. These forms of preclusion require that a point be actually decided by the prior court. It is not enough that one or more parties mentioned it.

II. BOTH RES JUDICATA AND COLLATERAL ESTOPPEL REQUIRE 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.” 59 So.2d at 45. For res judicata or 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. That seems to escape Defendants, who (Motion at 4-5), claim it is enough that Plaintiff, in her Complaint, mentioned (a) that she raised constitutional issues and (b) that the First DCA made a ruling. That sweep of legerdemain omits the fact that the ruling made by the First DCA had nothing to do with the constitutional issues. This is a dispositive fact that makes irrelevant the Defendants' 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 res judicata or 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).

III. MOTION IS NOT COGNIZABLE

Res judicata and collateral estoppel are affirmative defenses. Fla. R. Civ. P. 1.110(d). These defenses may not be used in a motion to dismiss. *Garnac Grain Co., Inc. v. Mejia*, 962 So. 2d 408 (Fla. 4th DCA 2007). They must be pled first in an answer. *Palmer v. McCallion*, 645 So.2d 131, 133 (Fla. 4th DCA 1994).

Although the defense of res judicata 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 Federal Rule of Civil Procedure 12(b)(1) (and thus the Florida rule which is based on that federal rule.). *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”).

Though it is true that there is an exception that permits res judicata and 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 res judicata and 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, the First DCA did not decide anything that is advanced in this case, so its decision can have no preclusive impact.

The Defendants have 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 for the latter error. First, there is a body of law, already referenced, barring res judicata and collateral estoppel from serving as bases for that sort of motion to dismiss. 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 1.140(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 is not cognizable under the procedural vehicle on which it rides in because it in no way implicates the Court's subject matter jurisdiction.

CONCLUSION

The motion to dismiss should be denied. The motion 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 Complaint. The motion also suffers from fatal procedural infirmities in that it seeks to conscript res judicata and collateral estoppel into service as bases for lack of subject matter jurisdiction when they are affirmative defenses that are subject to waiver and thus can never support a finding of lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of the foregoing to all counsel of record through the Court's portal, this 12th day of July, 2023.

/s/Richard E. Johnson
Richard E. Johnson

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