

IN THE SUPREME COURT  
STATE OF FLORIDA

ROBERT J. CROUCH,

Petitioner,

v.

CASE NO.: SC 08 2164

THE PUBLIC SERVICE  
COMMISSION, STATE OF  
FLORIDA,

Respondent.

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**RESPONDENT'S BRIEF ON JURISDICTION**

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**STATEMENT OF THE CASE AND FACTS**

Crouch was fired from his job with the Public Service Commission ("PSC"). He filed suit, alleging he was fired in violation of the Public Whistle-Blower's Act. Respondent served on Petitioner a Proposal for Settlement in the underlying action on August 13, 2004. R. (1D04-5384) Vol. 1, pp. 190-92. Petitioner made no objection to the Proposal for Settlement at the time Respondent served same.

The trial court entered a directed a verdict for Respondent on November 2, 2004. R. (1D04-5384) Vol. 1, p. 188. The trial court also entered a Final Judgment on November 2, 2004, reserving jurisdiction to address the issue of attorneys' fees. R. (1D04-5384) Vol. 1, p. 189. Following entry of the Final Judgment, Respondent filed its Motion for Attorneys' Fees and Costs, pursuant to its proposal for settlement. R. (1D04-5384) Vol. 1, pp. 190-92. Petitioner sought review of the trial court's directed verdict in Case No. 1D04-5384 Crouch v The Public Service Commission, State of Florida, 923 So.2d 111 (Fla. 2005)(hereinafter referred to as "*Crouch I*"). However, Petitioner made no objection to Respondent's Motion for Attorneys' Fees and Costs prior to appealing the entry of the directed verdict.

Respondent filed a Motion for Appellate Attorneys' Fees and Costs pursuant to its proposal for settlement on May 11, 2005.

Petitioner made no objection to the Motion. The First District Court of Appeal affirmed the directed verdict in) and awarded appellate attorneys' fees to Respondent, pursuant to Respondent's Proposal for Settlement under section 768.79, *Fla. Stat.* (2004). Petitioner did not seek rehearing or clarification of the First District's Order awarding attorneys' fees.

Petitioner next sought jurisdiction from this Court in Case No. SC05-2140, to review the First District's decision affirming the entry of the directed verdict. Respondent filed a Motion for Attorneys' Fees with this Court on January 6, 2006. Petitioner also did not file any objection to that Motion with this Court. Petitioner further did not question the First District's award of attorneys' fees in *Crouch I* in his jurisdictional brief. This Court declined jurisdiction and also awarded Respondent attorneys' fees in the amount of \$2,500.00, upon demonstration Respondent satisfied the requirements of section 768.79. Petitioner did not file any subsequent pleading seeking rehearing or clarification in opposition to this Court's award of attorneys' fees until his present request for review.

Following this Court's decision in Case No. SC05-2140, the trial court awarded attorneys' fees to Respondent for both the underlying case and appeals pursuant section 768.79 on November 15, 2007. R. (1D07-6060) Vol. 1, pp 26-27. In its Memorandum in Opposition to Defendant's Motion for Sanctions and at the

hearing, Petitioner objected only to the applicability of section 768.79 to the Florida Public Whistleblower's Statute, sections 112.3187 et. seq., *Fla. Stat.* (2005) (hereinafter referred to as "FPWA"). R. (1D07-60606) Vol. 1, 4-7. Petitioner did not raise any procedural objections or allege any failure to comply with section 768.79 or *Fla. R. Civ. P.* 1.442. The parties further stipulated to the amount of attorneys' fees sought.<sup>1</sup> The trial court found section 768.79 applied to the FPWA and awarded attorneys' fees to Respondent from the date of Respondent's proposal for settlement. R. (1D07-6060) Vol. 1, pp 26-27.

Petitioner sought review of the trial court's award of fees with the First District Court of Appeal in Case No. 1D07-6060 (hereinafter referred to as "*Crouch II*"). The First District affirmed the award of attorneys' fees pursuant to section 768.79 based on the law of the case doctrine established through its and this Court's award of attorneys' fees pursuant to Respondent's proposal for settlement. The First District determined section 768.79 was applicable to this case on that basis alone and determined the manifest injustice exception to the law of the case doctrine did not apply.

#### **JURISDICTIONAL STATEMENT**

"The discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that

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<sup>1</sup> It is Respondent's understanding Petitioner is raising only the issue of the attorneys' fees awarded pursuant to section 768.79 and is not disputing the

expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, Sec. 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). Florida intermediate appellate courts are intended to, in most cases, be courts of last resort. Further review by this Court is limited to only certain cases.

The stated purpose of conflict jurisdiction is to ensure harmony among the various appellate courts. See *Orange County v. City of Orlando*, 327 So.2d 7 (Fla. 1976); *Florida Power and Light Co. v. Bell*, 113 So.2d 697 (Fla. 1959). Thus, when district court opinions conflict, this Court is called upon to decide which is correct. Conflict jurisdiction does not, however, authorize this Court to act as an error-correcting court. *Whipple v. State*, 431 So.2d 1011, 1014 (Fla. 2d DCA 1983); see also *Kincaid v. World Ins. Co.*, 157 So.2d 517 (Fla. 1963)(test whether there is conflict jurisdiction does not include an evaluation as to whether this Court agrees or disagrees with the opinion on appeal).

The test here is simple:

For this [C]ourt to interfere with the judgment of a district court of appeal . . . it must appear that the court of appeal has, in the decision challenged, made a pronouncement of a point of law which the bench and bar and future litigants may fairly regard as an authoritative precedent but which is in *direct conflict* with the pronouncement on the same point of law in a decision or decisions of the Supreme Court or another District Court of Appeal.

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award of costs to Respondent.

*South Florida Hospital Corp. v. McCrea*, 118 So.2d 25, 27 (Fla. 1960)(emphasis added). Thus, the question here is whether there is any pronouncement of law in *Crouch II* that lawyers and litigants would "fairly regard as authoritative precedent but which is in *direct conflict*" with any of this Court's other holdings.

#### **SUMMARY OF THE ARGUMENT**

There is no conflict between the cases Petitioner cites or any other decision of this Court or the district courts to create jurisdiction for the Court in this case. Petitioner fails to address in his brief the specific basis of the district court's decision in any manner. Instead, Petitioner's argument passes over this issue and presents only his position as to the applicability of section 769.79 to the FPWA. There is no conflict as to the basis for the district court's determination and, therefore, no basis for jurisdiction with this Court.

Further, none of the cases Petitioner cites conflict with the district court's determination to apply section 768.79 to the FPWA. Petitioner's claim that the cases cited in his brief apply to govern the interplay between section 768.79 and the FPWA and create the necessary conflict must fail because the distinct, plain language of the FPWA is not analogous to the holdings in those cases and cannot form the basis for conflict jurisdiction.

## ARGUMENT

a. Petitioner has presented no basis for conflict jurisdiction based on the District Court's application of the "Law of the Case" Doctrine.

The First District affirmed the trial Court's award of attorneys' fees in this case based on the law of the case established by its decision and the decision of this Court to award attorneys' fees pursuant to section 768.79 in *Crouch I*. In ruling for Respondent, the district court explicitly stated "[t]he appellant argues that the offer of judgment statute does not apply in whistle-blower actions. However, as applicability has been determined through the law of the case doctrine, we affirm."

Petitioner has not raised this issue in any fashion in his jurisdictional brief and has not presented this Court with any cases that would conflict with the district court's decision. Because of this failure, there is no basis to establish a conflict between the First District's decision and any decision of this Court or any other district Court. Accordingly, there is no basis for the Court to accept jurisdiction of this appeal and Respondent requests the Court decline to hear this matter.

b. The First District's application of the law of the case doctrine was proper.

This Court stated in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1266 (Fla. 2006) that "[t]he law of the case applies in subsequent proceedings as long as there has been no change in the

facts on which the mandate was based." Further, an exception to this general rule exists only in "unusual circumstances and for the most cogent reasons and . . . only where manifest injustice will result from a strict and rigid adherence to the rule." *Id.*, citing *Strazulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965).

The law of the case doctrine is clearly applicable in this case as there is no factual distinction between the decision of the First District Court and this Court in *Crouch I* and the decision of the First District Court in *Crouch II*. In both cases, the First District and this Court had an opportunity to determine the applicability of section 768.79 to the FPWA and determined fees were awardable to Respondent on that basis. Petitioner did not address the law of the case doctrine, on which the First District issued its determination, at any point in its brief.

Petitioner has not demonstrated any factual distinction between the cases or met the standard of manifest injustice, as the First District determined. Petitioner had ample opportunity at many points during the both the underlying action and the appellate process during *Crouch I* to raise any objections he felt necessary in opposition to Respondent's claim for attorneys' fees. However, Petitioner did not raise any objections in the underlying action until after the decisions in by the district court and this Court in *Crouch I*, including filing any objections

with the district court or this Court at the time Respondent filed its Motions for fees. Further, Petitioner did not seek any clarification or rehearing of the Orders awarding attorneys' fees during the appellate process.

Petitioner has failed to demonstrate there is any manifest injustice or that the First District erroneously applied the law of the case doctrine. As a result, there is no basis for jurisdiction before this Court and Respondent respectfully requests the Court decline same.

c. Petitioner has presented no basis to support any conflict with the substantive result of the First District's decision.

Evaluation of the PWBA pursuant to the standard established by the Florida Supreme Court in *State Farm Mut. Auto Ins. v. Nichols*, 932 So. 2d 1067 (Fla. 2006) leads to the result there is no conflict between the PWBA and section 768.79 and no conflict with this Court's determination in *Nichols*. This is primarily true because the Court was interpreting two different statutes and, as such there can be no "direct conflict" as required by *South Florida Hospital Corp. v. McCrea*, 118 So.2d 25, 27 (Fla. 1960). Additionally, comparison of the evaluation in *Nichols* is instead supportive of the substantive result reached by the district court.

Similar to this Court's evaluation in *Nichols* of section 627.736, *Fla. Stat.* (2006), section 112.3187(9)(d) of the PWBA

does not expressly preclude an award of fees pursuant to a valid Proposal for Settlement (or any other means). The statute states relief under the Act must include "Payment of reasonable costs, including attorneys' fees, to a substantially prevailing employee, or to the prevailing employer if the employee filed a frivolous action in bad faith." Similar to section 627.736(8), this subsection favors one party more than the other. However, also like section 627.736(8), section 112.3187(9)(d) does not contain any language prohibiting an award of attorneys' fees on a basis other than contained in that subsection. There is no logical reason to treat these statutes differently.

Appellant further erroneously argues section 760.11(5) of Florida Civil Rights Act (FCRA) and the PWBA are sufficiently similar for the Federal case law prohibiting application of section 768.79 to the FCRA to apply equally to the PWBA. This argument is not supported by the cases Petitioner claims to be in conflict with *Crouch II*. As with section 627.736, the statute interpreted in the cases Petitioner raises may have a similar purpose, but they are not the same statute and cannot create the direct conflict required for jurisdiction before this Court. Without such conflict, the Court should decline to accept jurisdiction of Petitioner's request for review.

**CONCLUSION**

There is no express and direct conflict between the opinion below and any opinion of this Court. The Petition for review should be denied.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of Respondent's Brief on Jurisdiction was furnished by U.S. mail this 15th day of December, 2008 to Marie A. Mattox, Marie A. Mattox, P.A., 310 East Bradford Road, Tallahassee, Florida 32303.

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