IN THE SUPREME COURT OF FLORIDA

Case No. SC12-520

RICK SCOTT, PAM BONDI, and
JEFF ATWATER, as the FLORIDA
STATE BOARD OF ADMINISTRATION,
et al.,

Appellants,

L.T. Case Nos.: 2011 CA 1584,
1D12-1269

vs.

GEORGE WILLIAMS, et al.,

Appellees.

_______________________________________ /

ON APPEAL FROM THE CIRCUIT COURT FOR THE
SECOND JUDICIAL CIRCUIT, CERTIFIED BY THE
FIRST DISTRICT COURT OF APPEAL AS
A MATTER OF GREAT PUBLIC IMPORTANCE

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. THE 2011 PENSION REFORM LEGISLATION DOES NOT VIOLATE THE CONTRACT CLAUSE

The Order is inconsistent with this Court's decision in *Florida Sheriffs Association v. Department of Administration,* 408 So. 2d 1033 (Fla. 1981), with the language of section 121.011(3)(d), and with the legislative power over appropriations and the State's fiscal responsibilities.

A. The Plan Amendment Does Not Impair Contractual Rights Because It Changes the Pension System Only Prospectively

Plaintiffs assert (br. at 18) that the Plan Amendment "retroactively decreased the value of the benefits for the employees who were members of the FRS prior to July 1, 2011." The record demonstrates, however, that the Plan Amendment changes the FRS only prospectively; it does not affect benefits Plaintiffs have earned. Defendants' evidence demonstrated that under the Plan Amendment accrued benefits would not be reduced (initial br. at 6). Plaintiffs submitted no evidence to the contrary, and the circuit court did not find that the Plan Amendment applied to accrued benefits. Plaintiffs' expert merely assumed that individual Plaintiffs would remain employed at similar salaries until they retired and calculated their "lifetime benefits" with and without the Plan Amendment (initial br. at 6-7). While Plaintiffs argue that the difference between the two figures represents a retroactive decrease in benefits (br. at 18), they lump together

past accrued benefits with future unearned benefits, thereby attempting to disguise the fact that their calculations are premised on future work and unearned benefits.[1]

Plaintiffs also argue (br. at 17) that *Florida Sheriffs* does not apply because the Court "simply did not reach the issues presented by SB 2100," "no matter how broad its language," because it did not interpret the Plan Amendment itself. Of course *Florida Sheriffs* did not consider this precise statute. But if that rendered *Florida Sheriffs* irrelevant, few appellate cases ever would have precedential value. Fact patterns differ from case to case. But, as should go without saying, the concept of *stare decisis* does not require identical circumstances. Decisions act as precedent when the facts are similar. *See Forman v. Fla. Land Holding Corp.*, 102 So. 2d 596, 598 (Fla. 1958) ("The rule of stare decisis is merely the embodiment of a legal maxim to the effect that a principle or rule of law which has been established by the decision of a court of a controlling jurisdiction will be followed in other cases involving similar situations."). The controlling principle of *Florida Sheriffs* is that the Legislature can change the FRS prospectively.

Here, just as in *Florida Sheriffs*, the Legislature modified the FRS prospectively. The amendment addressed in *Florida Sheriffs*, a one-third reduction in the special risk credit (from 3% to 2%), reduced retirement benefits for certain

[1] Even if the Plaintiffs had submitted contrary evidence, it would merely create a disputed issue of fact, which, in a motion for summary judgment, must be resolved in favor of the non-moving party. *See Turner v. PCR, Inc.*, 754 So. 2d 683, 684 (Fla. 2000). In this case, Defendants were the non-moving party.

employees far more than the Plan Amendment does. Contrary to Plaintiffs' suggestion, nothing in *Florida Sheriffs* turned on the nature of the mathematical formula at issue (br. at 13-14). The Court decided the case on the straightforward notion that section 121.011(3)(d) "vests all rights and benefits already earned under the present retirement plan so that the legislature may now only alter retirement benefits prospectively." 408 So. 2d at 1037. That holding is consistent with the statute's plain language, which says nothing about prohibiting "qualitative changes" to the FRS (br. at 9). Although protecting participants' "rights," section 121.011(3)(d) does not explicitly define them. *Florida Sheriffs* plainly held that the statute creates rights only for benefits already earned.[2]

To the extent Plaintiffs argue that *Florida Sheriffs* did not involve "qualitative" changes to the FRS, Plaintiffs do not define what renders a change qualitative rather than quantitative. The changes at issue in *Florida Sheriffs* and here both concern the value of benefits FRS members will receive for future service. To describe some changes as "quantitative" (which will be upheld) and others as "qualitative" (which will not) would substitute a vague standard for the clear one this Court adopted, which focuses on whether changes are prospective or retroactive. 408 So. 2d at 1037 ("We stress that the rights provision was not

[2] It is also incorrect that the statute was enacted as part of "a single legislative act" that converted the entire FRS to a noncontributory system (br. at 15-16). The FRS did not become noncontributory for all members until 1981 (initial br. at 3 n.1).

intended to bind future legislatures from prospectively altering benefits which accrue for future state service").

Plaintiffs attempt to compare the Plan Amendment with other statutes that retroactively impaired contractual rights (br. at 19). But they ignore this Court's conclusion that FRS members have no vested rights to future, unearned benefits. The cases Plaintiffs cite involved impairment of vested, existing contractual rights, not prospective expectations. *See Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077, 1080 (Fla. 1978) (finding that a statute improperly reduced the value of an insurance contract the insured already had paid for); *Yamaha Parts Distrib. Inc. v. Ehrman*, 316 So. 2d 557, 559 (Fla. 1975) (finding that a statute modifying the terms of a franchise agreement could only operate prospectively). Because the Plan Amendment does not disturb the value of any accrued benefits, it does not retroactively impair contractual rights.

B. The Court Should Not Recede from *Florida Sheriffs*

Apparently conceding that the Order is inconsistent with *Florida Sheriffs*, Plaintiffs ask the Court to recede from it (br. at 21-36). But if *Florida Sheriffs* must be overruled, then it applied when the Plan Amendment was enacted and Plaintiffs had a contractual right only to benefits already earned as of July 1, 2011.[3]

[3] As Plaintiffs note, the law at the time a contract is made forms part of the contract unless the contracting parties express a contrary intent. *See Geico Gen. Ins. Co. v.*

In any event, as this Court has recognized, the "doctrine of *stare decisis,* or the obligation of a court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of Anglo–American jurisprudence for centuries." *Strand v. Escambia Cnty.*, 992 So. 2d 150, 159 (Fla. 2008). "The 'presumption in favor of *stare decisis* is strong;'" the Court will not depart from a decision because it is "merely erroneous." *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012) (quoting *N. Fla. Women's Health & Counseling Servs., Inc. v. State,* 866 So. 2d 612, 637-38 (Fla. 2003)). The Court must consider whether the decision is "unsound in principle," "unworkable in practice," whether there has been subsequent reliance on the decision, and whether there has been a change in circumstances. *Id.*; *Strand,* 992 So. 2d at 159-60. Plaintiffs do not argue that circumstances have changed, and the other factors weigh in favor of applying *stare decisis*.

1. ***Florida Sheriffs* was soundly decided**

Plaintiffs argue (br. at 22) that *Florida Sheriffs* is contrary to the "plain and unambiguous meaning of the statute." But as described in the initial brief (at 12-13), nothing in section 121.011(3)(d) suggests that the Legislature intended to handcuff its ability to amend the FRS prospectively. And the statute's legislative

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Virtual Imaging Serv., Inc., 79 So. 3d 55, 61 (Fla. 3d DCA 2011). Thus, a decision to recede from *Florida Sheriffs* could only limit changes for the future.

history demonstrates that the Legislature had no intention to create binding obligations indefinitely into the future (Legislature Amicus Br. at 3-7).[4]

Florida Sheriffs is also consistent with a long line of Florida cases finding that public employees generally have no contractual rights to pension benefits (initial br. at 20). Plaintiffs claim (br. at 24) that this prior case law is irrelevant to the interpretation of section 121.011(3)(d) in *Florida Sheriffs*. But *Florida Sheriffs* did not recede from cases holding that public employees generally have no contractual rights to public pension plans. *See Anders v. Nicholson*, 111 Fla. 849 (1933); *Vorhees v. City of Miami,* 199 So. 313 (Fla. 1940).[5] Instead, it recognized that when the Legislature decided to shift to a noncontributory system, it created a contractual right to accrued benefits. The Court otherwise expressly left its prior case law undisturbed. 408 So. 2d at 1037.

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[4] Plaintiffs claim (br. at 24) that the submission of legislative history constitutes an "attempt to retry this case on appeal" and "should be rejected." But legislative history always may be considered, even for the first time on appeal. *See Ellsworth v. Ins. Co. of N. Am.*, 508 So. 2d 395, 398 (Fla. 1st DCA 1987); *In re Estate of Boyd*, 519 So. 2d 692, 693 (4th DCA 1988) (Glickstein, J., concurring). Plaintiffs cite their own legislative history (br. at 25-26), which confirms that the statute was intended to preserve FRS members' existing benefits. *See* House Committee on Retirement, Personnel and Claims, LEGISLATIVE PROGRAM OVERVIEW 3 (1974) ("This section expressly establishes that the rights of FRS members will not be violated or abridged by the proposed conversion [to a noncontributory system].").

[5] Although Plaintiffs and their *amici* cite to the law of other states (br. at 26-27), the rights created by entirely different pension systems have little, if any, relevance to the meaning of section 121.011(3)(d), and Plaintiffs offer no evidence that the Legislature considered those cases in drafting the statute.

This Court correctly decided that the existence of a contractual right to certain benefits does not mean that those benefits must continue indefinitely. For example, membership in the FRS creates no rights to future employment, *see* § 121.051(5)(a), Fla. Stat. (2011), and public employees have no generalized right to future employment. *See, e.g., Creel v. Dist. Bd. of Trs. of Brevard Cmty. Coll.*, 785 So. 2d 1285, 1286 (Fla. 5th DCA 2001) (finding that government employee "did not have a property interest in his job after the contractual year expired"); *Davis v. Sch. Bd. of Gadsden Cnty.*, 646 So. 2d 766, 769 (Fla. 1st DCA 1994) (finding that a terminated government employee had "no proprietary or contractual right to renewal of his annual contract."). Because public employees are generally terminable at will, it makes no sense to suggest that they have a right to future benefits when they have no general right to remain in the employment that would allow them to earn those benefits.

Plaintiffs would replace the clear rule of *Florida Sheriffs*—that the Legislature may change the FRS prospectively, but not retroactively—with an inherently vague rule that the Legislature cannot make "qualitative" changes or change some mathematical formula (br. at 9, 13-14). This is precisely the type of "impractical legal 'fiction'" that the Court strives to avoid when it applies *stare decisis*. *Strand,* 992 So. 2d at 159.

2. **The Legislature has relied on *Florida Sheriffs***

Plaintiffs assert (br. at 32) that *Florida Sheriffs* "has not been relied upon to the extent that injustice would result from receding from the case." Yet when the Legislature passed the Plan Amendment, it expressly relied on *Florida Sheriffs* (initial br. at 21 n.5). Receding from it would throw the state budget into disarray. As described in the initial brief (at 4), entering the 2011 session the Legislature faced a $3.6 billion budget shortfall. The Plan Amendment saved $1.1 billion—about 30% of that shortfall. An adverse decision could require the Legislature not only to reimburse these funds, but also to find other ways to reduce the substantial and recurring financial impact. Under these circumstances, receding from a thirty-year-old case would undermine the stability and predictability that *stare decisis* promotes. *See Brown*, 84 So. 3d at 309.

As Plaintiffs acknowledge, since this Court's decision in *Florida Sheriffs*, the Legislature has repeatedly amended the FRS. Plaintiffs nevertheless argue (br. at 32) that none of these amendments involve a "substantial impairment" to retirement benefits. They miss the point: the Legislature relied on *Florida Sheriffs* even when it *increased* benefits because it was secure in the knowledge that it always could prospectively unwind those changes if they no could longer be afforded. *Cf. Florida Sheriffs*, 408 So. 2d at 1037 (stating that requiring the state to maintain the same retirement plan "would prohibit the legislature from

modifying the plan in a way that would be beneficial to a majority of employees, but would not be beneficial to a minority”).[6]

3. **The holding in *Florida Sheriffs* is sound public policy**

The holding in *Florida Sheriffs* also promotes sound public policy. As the Court explained, it provides the Legislature flexibility to manage the state budget and adjust benefits as appropriate to different economic times without forever locking itself into a given system. 408 So. 2d at 1037. And it does so while prohibiting reductions in benefits already earned.

II. THE PLAN AMENDMENT DOES NOT VIOLATE THE TAKINGS CLAUSE

Plaintiffs’ takings claim is based on the argument that section 121.011(3)(d) “grants Public Employees enforceable rights to a noncontributory plan with a COLA;” and that by changing the FRS, the Plan Amendment takes those rights (br. at 37). As noted above and in the initial brief (at 14-19), section 121.011(3)(d) creates no right to a type of retirement system, only to already-earned benefits. Therefore, the Plan Amendment takes no property. The two cases Plaintiffs cite, *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), and

[6] For example, Plaintiffs acknowledge (br. at 4) that until 1987, the COLA could be less than, but not greater than, 3%. In 1987, the Legislature fixed the COLA at 3%. Had the Legislature known that this fixed the COLA at 3% for all time, it may not have set the benefit at this level. Moreover, if section 121.011(3)(d) locked in the pension system forever on July 1, 1974, then all of the post-1975 changes in employees’ favor were impermissible unilateral alterations to a contract, *including* the statutory changes that made the system non-contributory.

Bailey v. State, 500 S.E.2d 54 (N.C. 1998), involve actions in derogation of *existing* rights.[7]

III. THE PLAN AMENDMENT DOES NOT ABRIDGE PLAINTIFFS' COLLECTIVE BARGAINING RIGHTS

The Collective Bargaining Clause does not supersede the Legislature's right to exercise its appropriations power. Moreover, the Plan Amendment does not prohibit public employees from bargaining collectively over retirement benefits.

A. The Constitutional Power of the Legislature to Control Appropriations Supersedes the Right of Public Employees to Collectively Bargain

As this Court held in *State v. Florida Police Benevolent Association,* 613 So. 2d 415, 419 & n.6 (Fla. 1993) ("*PBA*"), the Legislature's power over appropriations limits public employees' right to collectively bargain. Plaintiffs attempt to distinguish *PBA*, arguing that there the Legislature merely refused to fund a negotiated collective bargaining agreement (br. at 38). But the Court found no violation of Article I, Section 6, even though "the Legislature did not simply

[7] Plaintiffs also claim (br. at 37) that requiring an employee contribution without a corresponding benefit is a taking of property. But they do not dispute that contributions will be applied to accrual of their own retirement benefits. §§ 121.021(36), 121.4501(2)(j), Fla. Stat. (2011). Defendants showed that Plaintiffs would accrue future benefits at several times the value of their future employee contributions (A. 169-70; R16. 68-69). Plaintiffs offered no evidence to the contrary. Thus, members will receive all of their contributions and more because participating employers still contribute toward their retirement. § 121.71(4), Fla. Stat. (2011).

underfund or refuse to fund certain benefits, but rather unilaterally changed them." *PBA,* 613 So. 2d at 420.

This Court's decision in *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993), is not to the contrary. In that case, this Court found that "[o]nce the executive has negotiated and the legislature has accepted *and* funded an agreement, the state and all its organs are bound by that agreement under the principles of contract law." *Id*. at 672-73 (emphasis added). Plaintiffs identify no collective bargaining agreement that the Plan Amendment violates, or any appropriations act in which the Legislature funded the FRS indefinitely. In fact, such an act would impermissibly bind future legislatures. *See Neu v. Miami Herald Publ'g Co.*, 462 So. 2d 821, 824 (Fla. 1985). And the statute itself contemplates that the Legislature will periodically establish new contribution and funding requirements, as it has consistently done since the late 1980s. *See, e.g.*, §§ 121.031, 121.71, Fla. Stat. (2011); Ch. 2010-180, § 4, Laws of Fla.; Ch. 2009-76, § 1, Laws of Fla.; Ch. 2008-139, § 7, Laws of Fla.; Ch. 2007-84, § 1, Laws of Fla.; Ch. 2006-35, § 1, Laws of Fla. Therefore, *United Faculty* does not apply.

Plaintiffs argue (br. at 41) that this Court's decision in *City of Tallahassee v. Public Employees Relations Commission*, 410 So. 2d 487, 489 (Fla. 1981), rather than *PBA*, controls. But that case struck down a statute that expressly prohibited certain public employees from bargaining collectively about retirement. The Plan

Amendment does no such thing. Public employees may continue to negotiate with their employers about retirement benefits. In fact, public unions—including the Amalgamated Transit Union Local 1395 and the Police Benevolent Association—have negotiated benefits (such as increased salary) to offset the new contribution requirements (initial br. at 28).

Plaintiffs nevertheless claim (br. at 45) that such negotiation "in no way compensates for the loss of the opportunity to bargain over whether the changes should be made in the first place." That was the dissent's argument in *PBA*. 613 So. 2d at 423-24 (Kogan, J., dissenting). Plaintiffs imply that *any* change to the FRS must be negotiated with all public employees. But it would be impractical, if not impossible, for the Governor and local employers to negotiate with hundreds of public employee unions before changing the FRS. And the Florida Constitution does not require it. *PBA*, 613 So. 2d at 421. The Legislature must have the flexibility to modify the FRS at a statutory level, especially in light of the fiscal challenges it must address. Meanwhile, public employees remain free to negotiate with their employers regarding the terms of their employment.

B. Plaintiffs Fail to Identify Any Collective Bargaining Agreement the Plan Amendment Violates

The only plaintiff who even contends that the Plan Amendment violates a specific collective bargaining agreement ("CBA") is Rodney Durbin, who claims that the Plan Amendment violates the CBA between the State and the Florida State

Fire Service Association (the "FSFSA") (Durbin br. at 4-5). But even this assertion is wrong. During the 2011 legislative session, the Legislature resolved an impasse between the State and the FSFSA by adopting the State's last offer. Ch. 2011-48, § 1(1), at 734, Laws of Fla. That offer removed the "no cost" language and instead provided that the State would administer the FRS in accordance with any applicable provision or Act (R14. 2566). The Legislature's adoption of the State's last offer was codified at Chapter 2011-48, Laws of Florida, which also took effect on July 1, 2011. Ch. 2011-48, § 2, at 736, Laws of Fla. Therefore, when Chapter 2011-68 took effect, Durbin's CBA no longer provided participation in FRS at no cost. The Plan Amendment is therefore entirely consistent with Durbin's CBA.[8]

An argument that the Plan Amendment violated a particular CBA would constitute an as-applied challenge to the Plan Amendment rather than the facial challenge Plaintiffs brought, and would not invalidate the entire Plan Amendment. *See Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 265 (Fla. 2005) (distinguishing an "as applied" challenge from a facial challenge, which requires the Court to "determine only whether there is *any* set of circumstances under which the challenged enactment might be upheld.") (emphasis added).

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[8] Durbin's CBA contemplates the possibility that a provision can "be rendered or declared invalid . . . or not enforceable by reason of . . . subsequently enacted legislation" (R12. 2251).

IV. THE REMEDY EXCEEDED THE COURT'S AUTHORITY

In arguing that the circuit court had the authority to order refunds for the parties to this litigation, Plaintiffs ignore Defendants' point: that the Order improperly provided monetary relief to *non-parties*. Plaintiffs do not deny that most FRS members were not parties to this action. Nevertheless, they argue that the circuit court could issue the equivalent of class-wide monetary relief to all FRS members (br. at 46-48)—even though Plaintiffs stipulated early in the case to "[w]ithdraw their request for class certification . . . and *requests for relief on behalf of any class* made in the Complaint . . ." (R2. 374) (emphasis added), and the circuit court ordered that "the parties shall comply with the terms set forth in the foregoing stipulation" (R2. 376). Plaintiffs cite no Florida case holding that a circuit court may order class-wide monetary relief in the absence of a certified class; the conclusory final sentence in *State v. Lee,* 356 So. 2d 276, 283 (Fla. 1978), does not state such a principle. The effect of the Order is to put the circuit court in charge of a complex legislative task that involves hundreds of thousands of people who are not parties to this case.

Defendants did not waive this argument. From the start, they argued that Plaintiffs could not meet the standard for class representation of all FRS members (R1. 155-56; R18. 2851). Even if Defendants had not objected to class-wide relief, it would be fundamental error to issue monetary relief to non-parties. *Beaumont v.*

Bank of N.Y. Mellon, 81 So. 3d 553, 554 (Fla. 5th DCA 2012) ("It is fundamental error to enter judgment in favor of a nonparty."); *Norville v. Bellsouth Adver. & Pub. Corp.,* 664 So. 2d 16, 16-17 (Fla. 3rd DCA 1995).

Defendants are not estopped from making this argument, either. At the hearing on Plaintiffs' motion for temporary injunction, Defendants argued that Plaintiffs could not proceed as a class action (R18. 2851) and that the individual Plaintiffs had an adequate remedy at law because the State Board of Administration and the Secretary of DMS are subject to the jurisdiction of the circuit court and would satisfy a judgment (R18. 2891-92, 2895-98, 2906, 2919, 2928). Nowhere did Defendants agree that the circuit court could issue monetary relief to *non-parties*. If any party is estopped, it is *Plaintiffs*—they stipulated to "[w]ithdraw their request for class certification . . . and *requests for relief on behalf of any class* made in the Complaint . . ." (R2. 374) (emphasis added). Their argument for class-wide relief violates that stipulation.

If this Court strikes down a major budgetary decision of the Legislature, it must give the Legislature the time and flexibility to account for that ruling. The sweeping, one-line remedy announced by the circuit court is not sufficient.

CONCLUSION

This Court should reverse and remand with directions to enter judgment in favor of the Defendants, or at least remand to determine the proper remedy.

Respectfully submitted,

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I certify that on July 18, 2012, a copy of this brief was served by mail and email to all counsel on the attached service list.

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CERTIFICATE OF COMPLIANCE

I certify that this brief is submitted in Times New Roman 14-point font, which complies with the font requirement. *See* Fla. R. App. P. 9.210(a)(2).

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