

2-25

IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NO. 69,745

JOSEPH J. JOZWIAK,

Petitioner,

vs.

ROBERT LEONARD, as Sheriff of Suwannee
County, Florida, and SUWANNEE COUNTY,
FLORIDA, a political subdivision of
the State of Florida,

Respondents.

FILED
FEB 2 1987
CLERK SUPREME COURT
By Deputy Clerk

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RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE FACTS AND CASE

Respondent will accept the Statement of Facts and Case as set forth in Petitioner's Brief on the Merits.

POINTS ON APPEAL

POINT I

THERE IS NO EVIDENCE WHATSOEVER IN THE RECORD THAT RESPONDENT LEONARD HAS PURCHASED INSURANCE UNDER SECTION 30.55, FLORIDA STATUTES.

POINT II

RESPONDENT LEONARD HAS NOT IN FACT PURCHASED INSURANCE PURSUANT TO SECTION 30.55, FLORIDA STATUTES.

POINT III

REGARDLESS OF THE EXISTENCE OF INSURANCE, RESPONDENT LEONARD WAS ENTITLED TO WRITTEN NOTICE AS PROVIDED BY FLORIDA STATUTES, SECTION 768.28(6).

ARGUMENT

POINT I

THERE IS NO EVIDENCE WHATSOEVER IN THE RECORD THAT RESPONDENT LEONARD HAS PURCHASED INSURANCE UNDER SECTION 30.55, FLORIDA STATUTES.

The Complaint in the Trial Court did not allege compliance with the notice provisions of Florida Statutes, Section 768.28(6). Neither did it allege that those notice requirements need not be met because Defendant Leonard had purchased liability insurance under Florida Statutes, Section 30.55.

There is no evidence whatsoever in the record before this Court that Sheriff Leonard in fact purchased insurance under Section 30.55. Insurance is mentioned in the record only in Petitioner's Response to the Motion to Dismiss filed on or about June 7, 1984, in paragraph 6 thereof which reads as follows:

"The Defendant Robert Leonard as Sheriff of Suwannee County, Florida, has waived any right he may have to sovereign immunity by purchasing professional liability insurance for actions as those alleged in the complaint. (See Florida Statute, Section 30.55)."

There was no request for production of any such insurance policy, there is no affidavit from anyone that such an insurance policy was purchased, and there is no

evidence in this record whatsoever from which this Court could validly conclude that Respondent Leonard purchased insurance under Section 30.55.

The general rule is that the Appellant must present to the reviewing Court all of the evidence necessary to resolve the question presented to the Court. If some of the evidence relevant to the issues is not presented, or if it does not exist, then the reviewing Court has no alternative but to affirm. The cases so holding are legion. One example is Brown v. Householder, 134 So. 2d 801 (Fla. 2d DCA 1961). In that case the Plaintiff had suffered a directed verdict and on appeal he brought up only the Plaintiff's testimony before the Court and not the Defendant's testimony as a part of the Defendant's case. The Second District Court of Appeal affirmed because of the lack of record and held as follows:

"On exclusion of evidence from the record-on-appeal in various fact situations, the general rule is that the appellate court will not inquire into the sufficiency or insufficiency of the evidence to support a verdict or judgment when evidence is missing from the record-on-appeal. See Brody v. Brody, Fla. App. 1958, 105 So. 2d 378; McClosky v. Martin, Fla. 1951, 56 So. 2d 916; and Hall v. Davis, Fla. App. 1958, 106 So. 2d 599."

134 So. 2d at 803.

Petitioner in this action has not favored the Court with any evidence whatsoever to support his contention that Sheriff Leonard purchased insurance under Section 30.55. Accordingly, the Court has no alternative but to affirm the District Court of Appeal.

POINT II

RESPONDENT LEONARD HAS NOT IN FACT PURCHASED INSURANCE PURSUANT TO SECTION 30.55, FLORIDA STATUTES.

Prior to October of 1977, most Sheriffs in Florida were insured by commercial insurance companies. In October of 1977, all of the established companies writing law enforcement liability insurance pulled out of the market. Some Sheriffs insured with an off-shore company which has now gone bankrupt, some insured with a small Pennsylvania company, which has also gone bankrupt, several went without insurance at all for approximately a year.

In response to the obvious need of Sheriffs to have liability protection, the Legislature amended Section 768.28(13) to add the following language:

"Agencies or subdivisions and Sheriffs for the purpose of police professional liability only, which are subject to homogeneous risks, may purchase insurance jointly, or may join together as self-insurers to provide other means of protection against tort claims, any charter provisions or laws to the contrary notwith-

standing. Sheriffs may join together as self-insurers to provide coverage for police professional liability claims only."

(Emphasis supplied)

Sheriff Leonard, at the time of the accrual of the cause of action in the case at bar, was and still is, a member of the Florida Sheriffs Self-Insurance Fund, which was created and organized pursuant to the authority of 768.28(13), which Section contains no restrictions whatsoever on the use of the sovereign immunity defense. Neither does the Self-Insurance Fund Agreement contain any prohibition against the use of the sovereign immunity defense. Therefore, since Sheriff Leonard has not purchased liability insurance under 30.55, Florida Statutes, that Statute is inapplicable to this case.

POINT III

REGARDLESS OF THE EXISTENCE OF INSURANCE,
RESPONDENT LEONARD WAS ENTITLED TO WRITTEN
NOTICE AS PROVIDED BY FLORIDA STATUTES,
SECTION 768.28(6).

The First District, in two recent opinions, has held that the purchase of insurance by a state agency, does not waive the notice requirements of Section 768.28(6). In Burkett v. Calhoun County, 441 So. 2d 1108 (Fla. 1st DCA 1983), the Court held as follows:

". . . Section 768.28(1) waives sovereign immunity 'only to the extent specified in this act.' Therefore, we believe that it was the intent of the legislature to require compliance with the notice provision of Section 768.28(6) whether or not the political subdivision elected to carry liability insurance."

441 So. 2d at 1109.

One year later in Mrowczynski v. Vizenthal, 445 So. 2d 1099, (Fla. 4th DCA 1984), the Court, relying largely on Burkett, supra, held as follows:

"Accordingly, we hold that to maintain a tort action against the State or one of its subdivisions (other than a municipality) the notice requirements of Section 768.28(6) must be complied with regardless of whether or not the subdivision has procured liability insurance in compliance with Section 286.28, Florida Statutes (1981)."

On page 6 of his brief Petitioner asserts that the notice requirements of 768.28(6) are to allow the agency and the Department of Insurance to investigate the claim. He then says that there is no purpose for that provision where the agency has purchased insurance. That type of argument has been specifically rejected by this Court in the landmark case on the subject, Levine v. Dade County School Board, 442 So. 2d 210 (Fla. 1983). In Levine, supra, this Court answered the certified question as follows:

"May a plaintiff maintain an action to recover damages from a state agency or subdivision, pursuant to section 768.28(6), Florida Statutes (1977), if he notified the appropriate agency but failed to present a written notice of claim to the Department of Insurance, which has no interest or role in the proceedings other than to report claims to the legislature, and no prejudice resulted?

419 So. 2d at 809. We are compelled to answer the question in the negative and approve the decision of the district court of appeal."

442 So. 2d at 212.

This Court then speculated about the necessity for several of the provisions of the Statute, but concluded as follows:

". . . One can speculate that the department may have such a role in lawsuits against departments and agencies of the executive branch of state government. The provision in section 768.28(6) excepting suits against municipalities from the requirement of notice to the Department of Insurance, together with the affidavit negating any role or function for the department in suits against school districts, gives rise to further speculation that the failure to also except county school districts from the statutory notice requirement was inadvertent.

Such speculation, however, does not authorize us to ignore the plain language of the statute. Section 768.28(6) clearly requires written notice to the department within three years of the accrual of the claim before suit may be filed against any state agency or subdivision except a municipality.

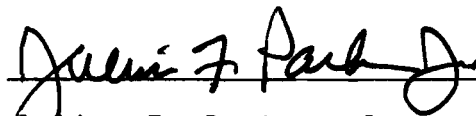
Because this subsection is part of the statutory waiver of sovereign immunity, it must be strictly construed. *Manatee County v. Town of Longboat Key*, 365 So. 2d 143 (Fla. 1978); *Spangler v. Florida State Turnpike Authority*, 106 So. 2d 421 (Fla. 1958). In the face of such a clear legislative requirement, it would be inappropriate for this Court to give relief to the petitioner based on his or our own beliefs about the intended function of the Department of Insurance in the defense of suits against school districts. Our views about the wisdom or propriety of the notice requirement are irrelevant because the requirement is so clearly set forth in the statute."

442 So. 2d at 212. (Emphasis supplied)

CONCLUSION

Petitioner has failed to bring up a sufficient record for this Court to reverse. As a matter of fact, Respondent Leonard has not purchased insurance under Section 30.55, Florida Statutes. Finally, even if he has purchased such insurance, he is still entitled to the notice provisions so clearly set forth in Section 768.28(6).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been
furnished to:

Mr. Michael H. Lambert, P.A.
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by mail, this 2nd day of February, 1987.



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