O/a 10-12-87

IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

~~STATE OF FLORIDA~~ DEPARTMENT
OF TRANSPORTATION,

Petitioner,

CASE NO.: 70,109

vs.

PAIGE SOLDOVERE,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

On Petition for Review of a Decision
of the Fourth District Court of Appeal

DAVID C. WIITALA, ESQUIRE
INGALSBE, McMANUS, WIITALA &
CONTOLE, P.A.
P.O. Box 14125
North Palm Beach, FL 33408
(305) 627-1180

Attorneys for Respondent

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

A cause of action cannot be said to have accrued until an action can be instituted thereon, and Keith v. Dykes, 430 So.2d 502 (Fla. 1st DCA 1985) correctly held a cause of action under F.S. 768.28(6) (1981) did not accrue until after the required notice of claim had been given. While an otherwise time barred action cannot be revived by a Supreme Court decision creating a new cause of action, neither can an existing cause of action be said to have accrued until the injured person is permitted to bring an action against the wrongdoer.

The Florida Supreme Court denial of the Department of Transportation's Certiorari Petition in Soldovere I established the law of this case on the issue of the date of accrual of Soldovere's cause of action, and this issue cannot be reconsidered by this Court.

This appeal concerns the limits of liability provisions of Fla. Stat. 768.28(5) (1981). The ruling in Soldovere I as to the applicability of subsection (6) of 768.28 (1981) settles the same issue raised by DOT in this appeal, which is the applicability of 768.28(5) (1981). The Fourth District Court of Appeal correctly ruled that the prior decision on the applicability of the venue provision of 768.28 established the law of this case as to the applicability of the liability limits provision in 768.28.

ARGUMENT

POINT I

WHETHER APPELLEE'S CAUSE OF ACTION ACCRUED BEFORE OR AFTER OCTOBER 1, 1981.

Penthouse North Association, Inc. v. Lombardi, 461 So.2d 1350 (Fla. 1984) only overruled Burleigh House Condominium, Inc. v. Buchwald, 368 So.2d 1316 (Fla. 3rd DCA 1979) insofar as Burleigh House held that otherwise time barred actions could be revived by a Supreme Court decision creating a new cause of action. Soldovere's action has never been time barred.

The Supreme Court in Penthouse North, supra, did not disapprove that portion of Burleigh House, supra, which, quoting the Florida Supreme Court, held:

> "A cause of action cannot be said to have accrued within the meaning of that statute of [limitations], until an action can be instituted thereon." Berger v. Jackson, 23 So.2d 265 (Fla. 1945), Burleigh House, supra, at page 1319.

The above holding of Burleigh House is the holding on which Keith v. Dykes, 430 So.2d 502 (Fla. 1st DCA 1985) was based. Keith held that since the statute provided that an action shall not be instituted on a claim against the state until the proper notice was given, and since a party could therefore not file suit on its cause of action until after giving the required

notice, the cause of action did not accrue until after the notice was given. This holding of Keith v. Dykes, supra, has nothing to do with the revival of otherwise time barred actions. The Keith v. Dykes holding is grounded on that portion quoted above of Burleigh House, citing Berger v. Jackson, supra.

The provisions of F.S. 768.28(6) (1981) prohibited maintenance of an action against the state until and unless the claim had been presented to the appropriate agency; Keith v. Dykes properly held that an action against the state did not accrue until the required notice had been provided.

Nothing in Penthouse North, supra, overrules the holding of Berger v. Jackson relied upon in Burleigh House Condominium that a cause of action cannot be said to have accrued until an action can be instituted thereon. Soldovere's action could not be instituted until she gave notice of her claim, and her cause of action therefore did not accrue until such notice was given.

The Florida Supreme Court had the opportunity to overrule Keith v. Dykes in the Department of Transportation's certiorari petition in Soldovere I, but declined to do so. The holding of Keith v. Dykes has been negated by the 1983 amendments to F.S. 768.28(6) which provides that the notice requirement is procedural only and not jurisdictional. Keith v. Dykes correctly states the law applicable to the accrual date of causes of action

against state agencies prior to the 1983 amendments.

This Court should follow the Keith v. Dykes holding for the further reason that the principal of stare decisis would be best served by a holding consistent with Keith v. Dykes. The 1983 amendments to 768.28(6) have eliminated any precedental value to a decision overruling Keith v. Dykes, and although this Court is not bound to follow the First District by the principal of stare decisis, clearly no compelling reason exists to depart from the First District's ruling in this case, especially where this Court has previously refused certiorari on the same question.

Further, if, as Petitioner claims, this Court is not bound by Soldovere I, it would seem the Department of Transportation would have appealed the venue ruling of Judge Hartwell as well as Judge Sholts' liability limits ruling, since venue can be appealed either as an interlocutory or final appeal.

POINT II

WHETHER NEITHER THE FLORIDA SUPREME COURT NOR THE FOURTH DISTRICT COURT OF APPEAL IS BOUND UNDER THE LAW OF THE CASE DOCTRINE BY THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN SOLDOVERE I.

Respondent contends the only issue properly before this Court is whether the Fourth DCA correctly applied the "law of the case" doctrine. Respondent cannot take issue with Petitioner's argument that the Supreme Court of Florida is not bound by a lower state court decision. However, if this Court's review of this case is limited to the issue of whether the Fourth DCA properly ruled this case is governed by law of the case doctrine, based on Soldovere I, then the Fourth DCA decision should be affirmed on its merits.

The "manifest injustice" exception to the law of the case doctrine should not apply because the 1983 statutory amendments, which nullified the Keith v. Dykes holding, were not made retroactive. Since the legislature chose not to make its amendments to 768.28 retroactive, it must be presumed the legislature intended Soldovere's case be controlled by the Keith v. Dykes holding. Under these circumstances, it is not "manifestly unjust" to follow the law of the case, despite a later statutory change in the law.

Petitioner's argument that Keith v. Dykes and Soldovere I decided venue questions only, and did not consider the accrual

question in the context of Plaintiff's claim to the expanded damages authorized by the 1981 amendments, fails to take into account the fact that Keith v. Dykes and Soldovere I both specifically considered the accrual question as applied to F.S. 768.28(6) (1981) and that this appeal concerns the accrual question as applied to Fla. Stat. 768.28(5) (1981). Petitioner's claim that the issues in Soldovere I and the issues on this appeal are different, is both wrong and misleading. An opinion as to the date of accrual for purposes of one subsection of 768.28 is obviously controlling as to other subsections of the same statutory section. Petitioner's argument amounts to a request that this Court rule Soldovere's cause of action for purposes of venue, arose under the 1981 amendment to 768.28, but that for purposes of the limits of liability, the same 1981 amendments to 768.28 do not apply to Soldovere's case.

Petitioner's argument that because 768.28 provides the state is liable in tort "in the same manner .... as a private individual under like circumstances ...." ignores the fact that 768.28 is riddled with exceptions to this statement. If the state were in fact liable to Soldovere in the same manner as a private individual under like circumstances, Soldovere's case never would have been transferred to Leon County in the first place, she never would have had to give notice of her intent to

bring suit, and neither would there be a $100,000.00 cap applicable to her damages. Despite the statement in 768.28(5) to the effect that the state is liable as would be a private individual under like circumstances, the statute itself provides numerous exceptions to this statement. Petitioner has itself attempted to avail itself of exceptions to the above statement.

Respondent submits the Fourth DCA properly ruled that the holding of Soldovere I, to the effect that Keith v. Dykes applies to Soldovere's case, became the law of the case in this appeal. Rogers v. State, 23 So.2d 154 (Fla. 1945); Miller v. State of Florida, Department of Health and Rehabilitative Services, 10 FLW 2020 (8/30/85) and Airvac, Inc. v. Ranger Insurance Company, 330 So.2d 467 (Fla. 1976) where the Supreme Court reversed the Fourth District for failing to follow the law of the case. In Airvac, the Supreme Court held:

> "Enunciations in a prior appellate decision upon the same case becomes the law governing that case, and the court upon a second appeal must take judicial notice and knowledge of the opinion and the judgment entered in the first appeal, as well as the facts presented by the transcript of record in the original case." Airvac, supra, at 469.

In Soldovere I, Petitioner specifically urged the 1st DCA to denounce the rational of Keith and recede from that decision. Petitioner has conceded the facts are the same (DOT Brief

in 4th DCA at page 5) and, by making the identical request in both Soldovere appeals, (that the Court overrule Keith v. Dykes) Petitioner admits the issues are the same. The identity of the issues was conceded by Petitioner in the 4th DCA because, while mentioning that Soldovere I concerned venue and this appeal concerns limits of liability, (Petitioner's 4th DCA Brief at page 5), not until the Supreme Court does Petitioner argue that this Court should refuse to follow Soldovere I because that case involved venue while this appeal concerns liability limits. The First District Court of Appeal declined to recede from Keith v. Dykes in Soldovere I, and the Florida Supreme Court refused to hear Petitioner's appeal. The First DCA decision thus settled the law of this case as to the issue of the applicability of the holding of Keith v. Dykes to the facts of Soldovere. The DOT concedes in this appeal and in Soldovere I that the holding of Keith v. Dykes compels the conclusion that Soldovere's cause of action arose after the effective dates of the 1981 amendments to F.S. 768.28.

This Court should affirm the correctness of the 4th DCA decision that law of the case requires Soldovere I be followed.

Even though this Court is not bound by the law of this case, the holding of Keith v. Dykes has been nullified by the 1983 amendments to F.S. 768.28(6)(b), and, as the First DCA said

in Soldovere I, "Departure from the rule of stare decisis would not alleviate continuing injustice and, in fact, would be little more than redundant in view of Chapter 83 - 257 (Soldovere I at page 12).

CONCLUSION

Keith v. Dykes correctly held a cause of action against a state agency does not arise until the injured party has complied with the notice of claim requirements of F.S. 768.28 (1981). Nothing in Penthouse North overruled that portion of Burleigh House upon which Keith was based, and Keith correctly interpreted the law on this issue until negated by the 1983 amendments to F.S. 768.28.

Because Soldovere I estalished the law of this case concerning the applicability of the Keith v. Dykes holding to the facts of Soldovere, this Court should affirm the 4th DCA decision to follow Soldovere I and hold that her cause of action did not accrue until after the effective dates of the amendment to F.S. 768.28 which raised the DOT's limits of liability to $100,000.00.

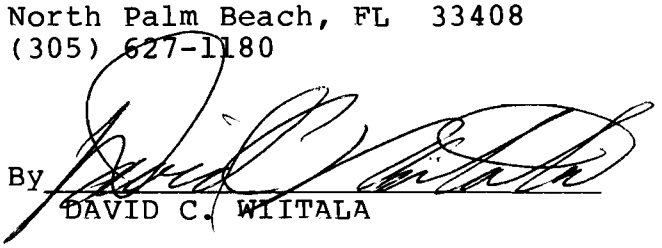
Respectfully submitted,

DAVID C. WIITALA
INGALSBE, McMANUS, WIITALA & CONTOLE, P.A.
Attorneys for Respondent
P.O. Box 14125
North Palm Beach, FL 33408
(305) 627-1180

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Robert A. Butterworth, Attorney General and Louis F. Hubener, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, FL 32399, this 23rd day of July, 1987.

INGALSBE, McMANUS, WIITALA & CONTOLE, P.A.
Attorneys for Respondent
P.O. Box 14125
North Palm Beach, FL 33408
(305) 627-1180

By 
DAVID C. WIITALA