IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

STATE OF FLORIDA DEPARTMENT
OF TRANSPORTATION,

Petitioner,

vs. CASE NO. 70,109

PAIGE SOLDOVERE,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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

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STATEMENT OF THE CASE AND FACTS

On August 18, 1981, Soldovere, plaintiff in the trial court, was injured in an automobile accident in Palm Beach County, Florida. As authorized by section 768.28(6), Florida Statutes (1981), Soldovere filed a notice of claim with the Florida Department of Transportation ("DOT") on December 1, 1981. When DOT did not timely respond, the claim was deemed denied by section 768.28(6)(a).

In May, 1982, Soldovere filed suit in Palm Beach County against DOT and other defendants. The trial court granted a motion for change of venue to Leon County based on DOT's venue privilege. However, in 1983, the First District Court of Appeal decided Keith v. Dykes, 430 So.2d 502 (Fla. 1st DCA 1983), and on authority of that case the circuit court in Leon County ordered the action transferred back to Palm Beach County. On appeal, the First District Court of Appeal affirmed, holding Keith v. Dykes controlling. Department of Transportation v. Soldovere, 452 So.2d 11 (Fla. 1st DCA 1984), pet. for rev. denied, 458 So.2d 272 (Fla. 1985) ("Soldovere I").

Keith v. Dykes held that a cause of action against the state did not accrue under section 768.28, Florida Statutes (1981), until the state denied the plaintiff's claim. Since the state's denial in Keith and in Soldovere occurred after October

1, 1981, the plaintiff in each case was entitled to the benefit of Chapter 81-317, Laws of Florida, effective October 1, 1981, abrogating the state's common law venue privilege.

Section 768.28(6), Florida Statutes (1981), did not, by its terms, provide that a tort claim did not accrue until after its denial by the Department of Insurance. Rather, the plain language of that section suggested that a claim accrued before denial by the Department:

> (6) An action shall not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing . . . within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing. The failure of Department of Insurance or the appropriate agency to make final disposition of a claim within 6 months after it is filed shall be deemed a final denial of the claim for purposes of this section . . . .

Section 768.28(6), Florida Statutes (1981). To clarify the meaning of subsection (6) and to correct the ruling in Keith v. Dykes, Chapter 83-257, Laws of Florida, added the following language to section 768.28(6):

> (b) for purposes of this section, the requirements of notice to the agency and denial of the claim are conditions precedent to maintaining an action but shall not be deemed to be elements of the cause of action and shall not affect the date on which the cause of action accrues.

Although the 1983 amendment became effective before the First District's decision in Soldovere I, that court refused to recede from its venue ruling in Keith v. Dykes, stating:

> Even were we so inclined, we would not recede from Keith because Chapter 83-257, Laws of Florida, now codified as Section 768.28(6)(b), Florida Statutes (1983), has negated the holding of Keith as to all accidents occurring after 1 October 1983, the effective date of Chapter 83-257. 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.

Department of Transportation v. Soldovere, 452 So.2d at 12. The Florida Supreme Court denied review of the First District's venue decision. 458 So.2d 272 (Fla. 1984).

Upon trial in Palm Beach County, the jury returned a verdict in the amount of $1,000,000 for plaintiff Soldovere, finding DOT 12% negligent. On DOT's motion to determine the extent of its liability under section 768.28, the trial court entered final judgment against DOT in the amount of $100,000. It found on the basis of the First District's decision in Soldovere I that it was bound as a matter of law to hold that the cause of action accrued after October 1, 1981, the effective date of the amendment to section 768.28(5) raising the limit of liability to an individual from $50,000 to $100,000. See Chapter 81-317, Section 1, Laws of Florida.

On appeal, the Fourth District Court of Appeal ruled that the venue decision in Soldovere I determined the limit of liability to plaintiff Soldovere under the amended statute, holding that it was "bound by the law of the case doctrine to affirm the trial court's ruling that Soldovere's cause of action accrued after October 1, 1981." Department of Transportation v. Soldovere, 500 So.2d 568, 569 (Fla. 4th DCA 1987) ("Solodvere II"). In so holding, the decision of the Fourth District is necessarily that DOT is liable for the statutory maximum because the plaintiff's cause of action accrued after October 1, 1981, when plaintiff's notice of claim was denied.

SUMMARY OF ARGUMENT

The general rule in tort law is that a cause of action for personal injuries sounding in negligence accrues when the injury is first sustained. The First District Court of Appeal, followed by the Fourth District in the decision sub judice, improperly interpreted section 768.28(6), Florida Statutes (1981), in a manner that was contrary to the general rule and even in conflict with the use of "accrues" in the language of that statute. Although the First District has apparently recognized its error in subsequent cases, the Fourth District felt bound by Soldovere I under the law of the case doctrine.

Plaintiff Soldovere's cause of action accrued on the date she suffered injuries in the automobile accident--August 18, 1981. She is therefore entitled to a maximum of $50,000 in damages from the state rather than $100,000. Neither the Fourth District nor this Court is bound by the erroneous ruling in Soldovere I. First, Soldovere I decided only a venue question, not the extent of the state's liability. Second, patent conflict exists, and as this Court did not rule on the merits of the Soldovere I decision it is not bound by the law of the case doctrine. Third, to the extent the law of the case doctrine has any application here, Soldovere II falls within the "manifest injustice" exception. The plaintiff would receive a $50,000 windfall because of an obviously incorrect interpretation of section 768.28(6) in Soldovere I. Moreover, claimants who may

have been injured in identical circumstances will be denied the same maximum liability limits merely because they promptly filed claims and had them denied before October 1, 1981, or because, as to claims denied after that date, other courts may follow the correct rule of law. To the extent some courts do not, the burden of disparate damage awards will unjustly fall on the taxpayers of the state.

ARGUMENT

I. A CAUSE OF ACTION FOR PERSONAL INJURIES RESULTING FROM NEGLIGENCE ACCRUES WHEN THE INJURY WAS INFLICTED; SOLDOVERE'S CAUSE OF ACTION THEREFORE ACCRUED ON AUGUST 18, 1981.

Case law in this state is clear and unequivocal on the issue before the Court. Actions for personal injury based on wrongful or negligent acts of another accrue at the time of injury. There is no reason to apply a different rule to claims against the state. In fact, section 768.28(5), Florida Statutes, provided in 1981, and so provides now, that the state is liable in tort "in the same manner . . . as a private individual under like circumstances . . . ." Plaintiff Soldovere's cause of action against the state accrued on August 18, 1981, the date of her injury.

The general rule is the same as to actions against both private and governmental defendants. In State Farm Mutual Automobile Insurance Co. v. Kilbreath, 419 So.2d 632 (Fla. 1982), the Florida Supreme Court held that a cause of action under an uninsured motorist insurance policy "arises on the date of the accident . . . since the right of action stems from the plaintiff's right of action against the tortfeasor." Id. at 633. The plaintiff's right of action against the tortfeasor accrued at the time of the accident. Although the insurance policy required an attempt at settling the claim, and failing that arbitration, these were mere conditions precedent to filing

suit against the insured "but neither has any effect on when the cause of action arises." Id. at 634. The reasoning of Keith v. Dykes, 430 So.2d 502 (Fla. 1st DCA 1983), progenitor of Soldovere I and II, was exactly contrary to State Farm, supra; it held that the condition precedent of notice to the state delayed the accrual of the cause of action.[1]

In Carter v. Cross, 373 So.2d 81 (Fla 3d DCA 1979), cert. denied 385 So.2d 755 (Fla. 1980), the Third District Court of Appeal held that a cause of action for personal injuries sounding in negligence and arising from an automobile accident "accrues . . . from the time the injury sustained was first inflicted . . . ." The Third District relied on established authority of this Court in stating the general rule that:

> The law is well-settled that "[g]enerally, in actions for personal injuries resulting from the wrongful act or negligence of another, the cause of action accrues and the statute [of limitations] begins to run from the time the injury was first inflicted and not from the time the full extent of the damages sustained has been ascertained." **Seaboard Air Line Railroad Co. v. Ford**, 92 So.2d 160, 164 (Fla. 1957).

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[1]In fact, the decision effectively results in a seven and one-half year statute of limitations: three years for filing a notice of claim under section 768.28(6), six months for the state to deny the claim and, under section 768.28(11), Florida Statutes, four years more to file suit.

373 So.2d at 82. Cristiana v. City of Sarasota, 65 So.2d 878, 879 (Fla. 1953), involved a governmental entity in a personal injury action. The case cites as a general rule that "actions for personal injury based on the wrongful or negligent act of another accrue at the time of injury . . . ." It therefore ruled that a 12 month statute of limitations barred a claim brought 18 months after the injury was incurred, even though the injury did not manifest itself until that time.

In Gordon v. City of Belle Glade, 132 So.2d 449 (Fla. 2d DCA 1961), the Second District Court of Appeal held that a cause of action against a city for wrongful assault and battery accrued on the date the plaintiff was injured. Gordon cites numerous other cases upholding that rule. The same rule is stated in 35 Fla.Jur.2d Limitations and Laches §48 and more recent authority continues to adhere to it. Smith v. Continental Insurance Co., 326 So.2d 189 (Fla. 2d DCA 1976); Gasparro v. Horner, 245 So.2d 901 (Fla. 4th DCA 1971). See also Mechan v. Celotex Corp., 466 So.2d 1100, 1102 (Fla. 3d DCA 1985) ("a cause of action in tort arises when the plaintiff knew or should have known of the existence of the cause of action or the invasion of his legal rights").

Keith v. Dykes, supra, held that a cause of action for personal injury did not accrue until plaintiff's notice of claim was denied. As pointed out, ante p. 2, this is not consistent with the plain language of §768.28(6) in 1981 stating that the

claim was to be made on the state "within 3 years after such claim accrues." Moreover, the First District stated that the statutorily required notice and denial of a claim were only conditions precedent to suit. The statute did not make notice to the state an element of the cause of action. Such conditions precedent, under the foregoing cases, do not affect the date of accrual of the cause of action.

In a case that is perhaps most on point, the Supreme Court of Kansas held that a two year statute of limitations on the state's liability to one injured on account of a highway defect began to run at the time damages were sustained and not from the time that a notice of claim was filed. Fuller v. State Highway Commission, 38 P.2d 99 (Kan. 1934). The court concluded that the filing of notice was a mere procedural step and the cause of action accrued at the time of injury.

Keith v. Dykes relied solely on Burleigh House Condominium v. Buchwald, 368 So.2d 1316 (Fla. 3d DCA 1979), in reaching the conclusion that a condition precedent delayed the time at which a cause of action for personal injuries accrued. Plaintiff Soldovere relied on Burleigh House and Berger v. Jackson, 156 Fla. 251, 23 So.2d 265 (1945), in the appeal before the Fourth District. Neither case supports the results reached by the First and Fourth Districts.

Burleigh House held that a statute of limitations applicable to a new, judicially created cause of action did not begin to run until rendition of the decision recognizing the new action. In support of this conclusion it quoted one sentence from Berger v. Jackson, supra, stating:

> 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.

Burleigh House, supra, at 368 So.2d 1316. However, Berger v. Jackson involved a cause of action accruing after the death of the person against whom claim was made. Looking at the full text, the Berger decision said:

> The court below was evidently of the opinion, and so are we, that where a cause of action accrues after the death of the person against whom it lies, the limitation does not begin to run until there is a grant of administration of the estate. A cause of action cannot be said to have accrued, within the meaning of that statute, until an action can be instituted thereon. There must be some person capable of suing or being sued upon the claim in order for the statute to begin to run.

23 So.2d at 269. (E.S.)

Obviously, suit cannot be instituted in the absence of a valid cause of action and a defendant capable of being sued. In this general sense, Berger supports the conclusion reached in Burleigh House. But neither Keith v. Dykes nor Soldovere I and II were concerned with new causes of action. They were concerned

with the giving of notice - merely a condition precedent to filing - which this Court, in State Farm, supra, stated has no effect on when the cause of action arises.[2]

In concluding this point, we briefly advert to those cases cited in DOT's jurisdictional brief showing that the First District has departed from the reasoning and conclusions of Soldovere I. In City of Panama City v. Florida Department of Transportation, 477 So.2d 646 (Fla. 1st DCA 1985), the accident in question occurred on August 13, 1981, in Bay County. The First District ruled that the plaintiff was not entitled to venue in Bay County based on the amendment effective October 1, 1981, since the cause of action accrued on the date of injury. In McSwain v. Dussia, et al., 499 So.2d 868 (Fla. 1st DCA 1987), the court, construing the 1983 amendment to section 768.28 (see p. 2, ante), stated that

> . . . it is absolutely clear that the requirement to give notice to the Department of Insurance is statutorily defined as a condition precedent which is not an essential element of the cause of action.

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[2]We point out that this Court partially disapproved Burleigh House in Penthouse North Association, Inc v. Lombardi, 461 So.2d 1350 (Fla. 1985). While recognizing that a statute of limitations would not begin to run until a cause of action accrued - when someone was damaged - Penthouse held that previously time barred claims based upon the new cause of action were not to be given new life. To the extent Penthouse is relevant here, it recognizes the traditional rule that a cause of action accrues when the injury is incurred.

499 So.2d 870. This clarifying 1983 amendment was applied in McSwain to a case involving medical malpractice that occurred in June 1980. In Griffin v. City of Quincy, 410 So.2d 170, 173 (Fla. 1st DCA 1982), pet. for rev. denied 434 So.2d 887 (Fla. 1983), the First District also reached the conclusion that a cause of action under §768.28 accrues at the time of injury.

Although these cases were brought to the attention of the Fourth District in the proceedings below, that court, nevertheless, ruled that Soldovere's cause of action accrued after October 1, 1981; hence she was entitled to claim the benefit of the larger liability limits conferred by Chapter 81-317, Laws of Florida. The decision of the Fourth District is wrong and gives unwarranted legitmacy to a recent line of cases that is contrary to the established case law of this state. Those cases should be disapproved and the decision of the Fourth District Court of Appeal quashed.

II. 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.

In matters that fall within its jurisdiction, the court of last resort in this state is the Florida Supreme Court. An erroneous decision of a district court of appeal, even though it may have achieved "law of the case" status, does not bind the Florida Supreme Court. For the doctrine to apply to the Supreme Court, that court, as the court of last resort, must have adjudicated some point of law involved in the case at issue. Preston v. State, 444 So.2d 939 (Fla. 1984); Greene v. Massey, 384 So.2d 24, 28 (Fla. 1980); 3 Fla. Jur.2d Appellate Review §§417, 420. This Court's denial of review in Soldovere I was not an adjudication of any point of law involved in that appeal. We therefore submit that this Court may review and decide this case strictly on the question of law involved - the accrual date of Soldovere's cause of action - rather than whether the Fourth District improperly ignored the "manifest injustice" exception to that doctrine.

As pointed out in DOT's jurisdictional brief, the state had no appeal as of right to the Florida Supreme Court from the First District's venue decision in Soldovere I. DOT did seek this Court's discretionary review but that review was denied without comment on the merits of the decision. Since this Court has not passed upon the merits of any decision of any inferior court in

this case, and since the state has not failed to exercise any appeal as of right, the Florida Supreme Court, as the court of last resort, may review the correctness of the Soldovere I decision insofar as that decision constitutes authority for Soldovere's claim to the increased damages allowed by Chapter 81-317, Laws of Florida. See annotations at 118 ALR 1286 and 41 ALR 1078. Because Soldovere's cause of action accrued on August 18, 1981, she is not entitled to the benefits of a law that took effect at a later date.

Even if the Fourth District's refusal to apply the "manifest injustice" exception remains an issue in this appeal, that court clearly erred in refusing to apply the exception. The Fourth District ignored several factors, both legal and equitable, that dictate a contrary result. First, both Keith v. Dykes and Soldovere I decided venue questions only - neither considered the accrual question in the context of a plaintiff's claim to the expanded damages authorized by a law that became effective after the injuries were suffered. The law of the case doctrine should not apply to a second decision adjudicating a different point of law. Second, Soldovere I acknowledged that Keith v. Dykes was a questionable decision, and the First District has not in subsequent decisions accorded plaintiffs injured before October 1, 1981, the benefits of Chapter 81-317. In fact, in several cases it has acknowledged with respect to such plaintiffs that their causes of action accrued on the date

of their injury, not when their claim was denied. See City of Panama City v. Florida Department of Transportation, 477 So.2d 646 (Fla. 1st DCA 1985); McSwain v. Dussia, 499 So.2d 868 (Fla. 1st DCA 1987); Griffin v. City of Quincy, 410 So.2d 170, 173 (Fla. 1st DCA 1982), pet. for rev. denied 434 So.2d 887 (Fla. 1983). The law of the case doctrine does not demand that the Fourth District follow Soldovere I when the First District has abandoned that decision.

It is also highly ironic that Soldovere I found that the 1983 amendment adding (6)(b) to section 768.28 was not retroactive, observing the general rule that statutes are not presumed to operate retroactively in the absence of clear legislative intent. Department of Transportation v. Soldovere, 452 So.2d at 13. The Fourth District's uncritical adherence to Soldovere I gives retroactive effect to the 1981 amendment expanding damages liability (Chapter 81-317, Laws of Florida) insofar as the amendment now encompasses injuries occurring before Octobert 1, 1981. There is no express legislative intent to make the 1981 amendment retroactive either.

If Keith v. Dykes and Soldovere I are incorrect, the plaintiff in this case will have reaped a $50,000 windfall on the basis of a venue decision rather than a considered judgment as to when the expanded damages provision of Chapter 81-317 became effective and to what actions it should apply. Moreover, the argument on which Soldovere staked her claim - that the

administrative denial of her claim under section 768.28(6) is the accrual date of her action - is inherently arbitrary and unfair as a rule of decision. Claimants injured before October 1, 1981 - conceivably even those injured in the same accident - will have the statutory limit of damages determined by bureaucratic happenstance, and nothing else. It is manifestly unjust that plaintiff Soldovere or anyone else should profit by such a rule while others lose. It is manifestly unjust that claimants who may have suffered more serious injuries and were more prompt in filing notices of claim should be entitled to recover less.

In rejecting the manifest injustice exception, the Fourth District attempted to distinguish Soldovere I from State Farm Mutual Automobile Insurance Co. v. Kilbreath, 419 So.2d 632 (Fla. 1982), on the basis that the former involves a statutorily mandated accrual date while the latter involves an accrual date determined by a private consensual contract. Such reasoning ignores section 768.28(5) providing that the state is liable in tort "in the same manner . . . . as a private individual under like circumstances . . . ." Moreover, it is a classic distinction without a difference, one that has not been recognized in the long line of cases deciding when a cause of action for personal injuries arises. Additionally, section 768.28 never mandated or specified an "accrual" date; it merely imposed a certain condition precedent to filing suit.

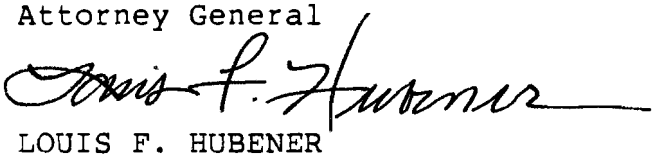
One does not have to be steeped in legal philosophy to understand that injustice stems from rules that operate arbitrarily and by chance, and that treat similarly situated persons differently. It is no injustice to plaintiff Soldovere to correct an erroneous decision and to accord her only those damages to which other persons in like circumstances are entitled. It is a manifest injustice to let stand an erroneous line of cases that will only work mischief upon litigants and taxpayers alike.

CONCLUSION

The decision of the Fourth District Court of Appeal should be quashed and the case remanded for entry of judgment against respondent DOT in the amount of $50,000.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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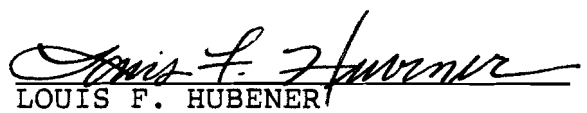
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to **DAVID WIITALA** Esquire, Post Office Box 14125, West Palm Beach, Florida 33408, this 3rd day of July, 1987.



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