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IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

~~STATE OF FLORIDA~~ DEPARTMENT
OF TRANSPORTATION,

Petitioner,

v. CASE NO: 70,009

PAIGE SOLDOVERE,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

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, plaintiff Soldovere was injured in an automobile accident on State Road 811 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. DOT did not respond and the claim was thereby deemed denied.

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. On authority of **Keith v. Dykes**, 430 So.2d 502 (Fla. 1st DCA 1983), 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), petition for review denied 458 So.2d 272 (Fla. 1985). **Keith v. Dykes** held that a cause of action against the state did not accrue under **section 768.28** until the state denied the plaintiff's claim. Since the 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.

Although a 1983 amendment to **section 768.28(6)** negated the holding in **Keith v. Dykes**, the **Soldovere** decision refused to recede from the prior ruling, 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.[1]

452 So.2d 12. The Florida Supreme Court denied review. 458 So.2d 272.

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 liabiity 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** that it was bound as a matter of law to hold that the cause of

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[1]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.

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. **Chapter 81-317, Section 1, Laws of Florida.**

On appeal ("**Soldovere** II"), the Fourth District Court of Appeal held 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**, _____ So.2d _____ (Fla. 4th DCA 1987). 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, Florida Statutes**, in a manner that was contrary to the general rule and without any basis in the language of the statute. Although the First District has apparently recognized its error, the Fourth District felt bound by **Soldovere** I under the law of the case doctrine. Since that

doctrine does not bind a superior appellate court, this Court should accept jurisdiction to resolve the express conflict among appellate decisions.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS WITH DECISIONS OF THE FLORIDA SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL IN HOLDING THAT PLAINTIFF'S CAUSE OF ACTION ACCRUED AFTER OCTOBER 1, 1981, UPON DENIAL OF PLAINTIFF'S CLAIM.

A. A cause of action for personal injuries resulting from negligence accrues when the injury was inflicted.

Plaintiff Soldovere was injured in an automobile accident on August 18, 1981. The holdings in **Keith v. Dykes**, **Soldovere** I and **Soldovere** II are that the cause of action did not accrue when the injury was incurred but when the state administratively denied the injured party's claim. The ruling in **Soldovere** II conflicts with numerous Supreme Court and district court decisions.

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.[2]

In **Carter v. Cross**, 373 So.2d 81 (Fla 3rd 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 court quoted from a decision of the Florida Supreme 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).

373 So.2d at 82. See also, **Cristiani v. City of Sarasota**, 65 So.2d 878, 879 (Fla. 1953), citing as a general rule that "actions for personal injury based on the wrongful or negligent act of another accrue at the time of injury . . . ."

In **Gordon v. City of Belle Glade**, 132 So.2d 449 (Fla. 2nd DCA 1961), the Second District Court of Appeal held that a cause

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[2]The Court should note that §768.28(5) provided in 1981 and provides now that the state is liable in tort "in the same manner . . . as a private individual under like circumstances . . . ."

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.

Keith v. Dykes, supra, held that a cause of action for personal injury did not accrue until plaintiff's notice of claim was denied. (The plain language of §768.28(6) in 1981 stated that the claim was to be made on the state "within 3 years after such claim accrues.") Even in that decision, however, 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 above cited cases, do not affect the date of accrual of the cause of action. Unfortunately, the error in **Keith v. Dykes** has been carried over into **Soldovere** I and II.[3]

In decisions that followed **Keith v. Dykes**, the First District, without receding from that decision, has nevertheless clearly held that a cause of action under **section 768.28, Florida Statutes**, accrues at the time of the injury. 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,

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[3]Keith v. Dykes relied solely and inappropriately on Burleigh House Condominium v. Buchwald, 368 So.2d 1316 (Fla. 3d DCA 1979), which held that the 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.

1981, in Bay County. The court 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.**, _____ So.2d _____ (Fla. 1st DCA 1987) (11 FLW 2560), the court, construing the 1983 amendment to **section 768.28** (see n.1, 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.

_____ So.2d _____. This clarifying 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. den. 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. The decision in **Soldovere** II clearly and expressly conflicts with these three decisions of the First District Court of Appeal.

B. The law of the case doctrine does not preclude review of conflicting decisions by the Florida Supreme Court.

Although the Fourth District Court of Appeal may have considered itself "bound" to find that plaintiff Soldovere's cause of action accrued long after the injuries occurred, the law of the case doctrine does not bind a superior appellate court in subsequent proceedings. Although there seems to be no Florida authority directly on point, this question is addressed in two

annotations at 118 ALR 1286 and 41 ALR 1078. Both the majority and minority rules, as set forth in those annotations, favor review by this Court on the merits and without regard to the law of the case doctrine. The majority rule holds that where a party fails to exercise a right of appeal from the initial decision of an intermediate appellate court to the court of last resort, the decision of the intermediate court is binding on all subsequent proceedings, including an ultimate appeal to the court of last resort. The minority rule holds that when a case finally comes to the court of last resort, that court will review it to the extent the record before it permits, without regard to any previous decision of the intermediate court.

In the instant proceedings, DOT sought review by this Court of the venue decision in **Soldovere** I. The Court denied review. 458 So.2d 27 (Fla. 1985). That appeal was not an appeal of right, and this Court has in no way passed on the merits of the "accrual" question. This Court and the First District may have considered that **Soldovere** I ruled on nothing more than a venue question. Neither court decided what causes of action were entitled to the increased liability for damages. In any event, the Supreme Court's denial of review is not approval of the district court decision. Under either the majority or minority rule, this Court is not bound by the law of the case doctrine in resolving the palpable conflict among the cases cited.

C. Statement as to why the Supreme Court should accept jurisdiction and review this appeal on its merits.

There are numerous claims pending against the state under **section 768.28, Florida Statutes,** wherein the injuries were incurred before October 1, 1981, but the claim was denied after that date. Thus the question of whether the cause of action accrued on the date of the accident or the date of denial of the claim determines a potential damages difference in each case of $50,000 to $100,000 because of the expanded statutory maximum effective October 1, 1981. The potential additional liability to the state reaches into the millions of dollars.

Keith v. Dykes and its progeny **Soldovere** I and II are clear anomalies in tort law. There is no authority for the position that compliance with a condition precedent delays the accrual of a cause of action. The decisions lead to a most peculiar and inequitable result in that plaintiffs who may have been injured on the same date or even in the same accident could receive vastly different damage awards depending on whether their claims were denied by the state before or after October 1, 1981. The claimant who was most dilatory in filing may, for just that reason, reap the greater award. The First District, or at least a different panel on that court, apparently does not adhere to **Keith v. Dykes** but does not recede from it. The **Soldovere** decisions blindly follow. If these are not correct, plaintiff

Soldovere receives a windfall. And worse, until set right, authority exists by which the state's liability for damages is immeasurably and unjustifiably increased.

CONCLUSION

Because the decision below conflicts with numerous decisions of other Florida appellate courts, this Court should accept jurisdiction to review and quash the district court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **DAVID WIITALA, ESQUIRE**, Post Office Box 14125, North Palm Beach, Florida 33408, this 27th day of February, 1987.

LOUIS F. HUBENER