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 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

Respondent, SOLDOVERE, agrees with the DEPARTMENT OF TRANSPORTATION'S Statement of Case and Facts, subject to the following additions: Keith v. Dykes, 430 So.2d 502 (Fla. 1st DCA 1983) held the venue provisions of 768.28(1) (1981) (abrogating the common law venue privilege) applied to Soldovere, (Department of Transportation v. Soldovere, 452 So.2d 11 (Fla. 1st DCA 1984); the Supreme Court denied certiorari review of this point at 458 So.2d 272 (Fla. 1985).

Since the venue provision of subsection (1) of the 1981 amendments to 768.28 had been held to apply to Soldovere, the trial court in Palm Beach County held the liability limits of subsection (5) of the 1981 amendments to 768.28 also applied. The Fourth District held Soldovere I amounted to a determination that Soldovere's cause of action accrued after October, 1981 and that law of the case doctrine compelled affirmance of the trial court ruling.

SUMMARY OF ARGUMENT

DEPARTMENT OF TRANSPORTATION incorrectly argues the issue is when a cause of action for personal injuries accrues. The correct issue is whether the Fourth District's application of law of the case doctrine conflicts with other District Court decisions on application of law of the case.

Where the Florida Supreme Court declines to exercise its certiorari jurisdiction from a District Court decision, the decision of the District Court becomes law of the case with respect to issues actually decided, Greene v. Massey, 384 So.2d 24 (Fla. 1980). DEPARTMENT OF TRANSPORTATION is incorrect in its argument that law of the case does not apply to this appeal and that there is no Florida authority directly on point. (DEPARTMENT OF TRANSPORTATION brief at bottom of page 7.)

The First District decision in Soldovere I, supra, (on reh.) held the 1983 amendments to 768.28 (legislatively reversing the Keith v. Dykes, supra, holding) did not apply retroactively, so it can be assumed the legislature did not intend to retroactively invalidate the Keith v. Dykes holding.

The three cases cited by DOT as basis for conflict jurisdiction do not expressly and directly conflict with Soldovere I and II, (Department of Transportation v. Soldovere, 11 FLW 2519 (Fla. 4th DCA, Dec. 3, 1986); none of the cases discuss or cite the Soldovere case and each case involves a different point of law.

ARGUMENT

The Fourth District decision in Soldovere II, supra, involves application of law of the case doctrine; it does not decide the issue of when Soldovere's cause of action, "accrues". DOT has already presented the Florida Supreme Court with its claim of error in the First District Soldovere I, supra, decision which passed directly on the question of when Soldovere's cause of action accrues. The Florida Supreme Court denied certiorari review of the DOT appeal at 458 So.2d 272 (Fla. 1985). By this appeal the DOT attempts an end run around the Florida Rules of Appellate Procedure which require express and direct conflict for Supreme Court Jurisdiction. There would be an obvious incongruity in the Supreme Court's denying review of the Soldovere I decision determining her cause of action did not accrue until 6 months after notice of claim, followed by the Supreme Court's acceptance of jurisdiction of the Soldovere II, supra, decision which simply held it was bound by the law of the case as established by Soldovere I, supra.

The Department of Transportation is wrong in its argument that law of the case does not apply to this appeal because the Florida Supreme Court is a superior appellate court. Greene v. Massey, 384 So.2d 24 (Fla. 1980) holds that upon denial of certiorari by the Supreme Court, a District Court of Appeal

decision becomes law of the case. Also see 3 Fla. Jur. 2d, Appellate Review, Section 420.

The cases cited by the DOT as basis for conflict jurisdiction do not expressly and directly conflict with Soldovere I and II, supra. McSwain v. Dussia, 11 FLW 2560 (Fla. 1st DCA Dec. 8, 1986) involved two points: (1) whether the notice requirement of 768.28 is waivable, and (2) whether the Duval County Hospital authority is an agent of a municipality so that there is no requirement for giving notice of claim to the Department of Insurance.

Griffin v. City of Quincy, 410 So.2d 170 (Fla. 1st DCA 1982) involved the question whether the court should apply the damage limitations provisions of 768.28 in effect at the time the cause of action accrues or the damage limitations in effect at the time the judgment is entered. The court held the statute in effect at the time the cause of action accrued controls. The court rejected the argument for retroactive application of the statute in effect at the time the judgment was entered.

City of Panama City v. Florida Deparment of Transportation, 477 So.2d 646 (Fla. 1st DCA 1985), in a footnote, noted that where the decedent's death was alleged to have occurred on or about August 13, 1981, that the cause of action thus accrued prior to October 1, 1981. The case has no discussion of the issue of when a cause of action, "accrues"; it

makes no reference to Soldovere I, supra, and; the issue in the City of Panama City, supra, was application of the "home venue privilege" where governmental entities are joint defendants. City of Panama City, supra, is the closest case cited by DOT to an express and direct conflict with Soldovere I, supra, and the Panama City, supra, case does not expressly and directly conflict with Soldovere because it does not concern the issue of when a cause of action, "accrues".

The Florida Legislature was presented with the opportunity to do exactly what the DOT now asks the Supreme Court; as discussed by the First District in the Soldovere I, supra, opinion on rehearing, the legislature obviated the Keith v. Dykes, supra, decision in the 1983 amendments to Chapter 768, but specifically did not make the 1983 amendments retroactive, as it must be presumed the legislature would have done had it so intended. In the absence of a clear legislative intent to make a limitation statute retroactive, the court should not presume retroactivity, Soldovere I, supra. It should also be presumed the legislature recognized the Keith v. Dykes decision as an understandable interpretation of the 1981 statute.

The Supreme Court should not accept jurisdiction of this appeal because the legislature has already done what the DOT asks the Supreme Court to do in this appeal. Acceptance of conflict jurisdiction would violate the Appellate Rules, both because

there is no express and direct conflict between Soldovere and the cases cited by the DOT, and because the Supreme Court must necessarily look behind the Fourth District decision in Soldovere II, supra, which involves nothing more than application of the law of the case doctrine, to the underlying facts and earlier decisions in order to find any degree of conflict.

Further, the Supreme Court should not accept conflict jurisdiction because a reversal of Soldovere I and II, supra, would be of very limited precedental value, at best, in view of the legislative amendments to the 1983 version of Chapter 768. Reversal would also weaken the precedental value of a District Court decision as to which the Supreme Court has denied certiorari review, and would also expand the conflict jurisdictional basis beyond that intended by the Appellate Rules.

CONCLUSION

Based on the reasons, cases and authorities cited, the Supreme Court should decline to exercise its conflict jurisdiction and should deny the appeal.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Louis F. Hubener, Esquire, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, FL 32399, this 11th day of March, 1987.

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