IN THE SUPREME COURT OF THE
STATE OF FLORIDA

71,670

SUPREME COURT CASE NO:
DISTRICT COURT CASE NO: 87-431

SUSAN ANN KROPFF,

Petitioner,

vs.

STATE OF FLORIDA, DEPARTMENT OF
HIGHWAY SAFETY & MOTOR VEHICLES,
DIVISION OF HIGHWAY SAFETY,

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Petitioner SUSAN ANN KROPFF invokes this Court's discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) to review a decision of the Third District Court of Appeal, which expressly and directly conflicts with the decisions of the First and Fourth Districts in Keith v. Dykes, 430 So. 2d 502 (Fla. 1st DCA 1983), Department of Transportation v. Soldovere (I), 452 So. 2d 11 (Fla. 1st DCA 1984) and Department of Transportation v. Soldovere (II), 500 So. 2d 568 (Fla. 4th DCA 1987). It is the understanding of the Petitioner that this Court has accepted jurisdiction already to review the decision in Soldovere II, supra under Case No. 70,109 (Fla. June 9, 1987).

The issue in each of these decisions involves the applicability of the 1981 Amendment to Florida Statutes §768.28 in tort cases based upon accidents occurring prior to the effective date of the Amendment, but where suit could not be filed until after the effective date, because of the need to comply with the pre-suit administrative claim provisions of sub-section (6) of the statute. In Keith and both Soldovere decisions, it was held by the First and Fourth Districts that the Plaintiff's "cause of action" could not "accrue" within the meaning of the effective date provisions of Florida Statutes §768.28(14) (1981) until after compliance with the pre-suit administrative claim provisions of the statute, because a lawsuit

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could not be filed until such time. In the present case, the Third District held exactly the opposite, while expressly acknowledging direct conflict with the prior decisions in Dykes and Soldovere. (App. 1-2).

This case arises out of injuries sustained by SUSAN ANN KROPFF on December 29, 1978 as a result of the negligence of an employee of the Respondent in improperly securing the scene of an initial fender-bender and in conducting his investigation in the middle of a busy street at night. As a result of this negligence, the Petitioner was struck by an oncoming vehicle in a second accident, resulting in severe and permanent injuries. Pursuant to the requirements of Florida Statutes §768.28(6), SUSAN ANN KROPFF filed her statutory administrative claim with the appropriate state governmental agencies on December 16, 1981, which was after the effective date of the 1981 Amendment to Florida Statutes §768.28(5), raising the statutory monetary cap in sovereign immunity actions against state agencies from $50,000 to $100,000. Following the Respondent's failure to take any action in response to her statutory claim within six months after it was filed, the Petitioner filed her lawsuit against the Respondent on July 1, 1982. (App. 1-2).

After several years of extensive discovery and an intervening interlocutory appeal filed by the Respondent[1], the underlying cause was tried. Following a week long jury trial, a

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[1] State of Florida v. Kropff, 445 So. 2d 1068 (Fla. 3d DCA 1984) (Kropff I).

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verdict was returned for SUSAN ANN KROPFF in the amount of Five Hundred Eighty Six Thousand and Five Hundred Dollars ($586,500.00). The Respondent filed an appeal from the entry of the judgment asserting that it was immune from suit under the doctrine of sovereign immunity. On July 29, 1986, the Third District Court of Appeal rendered its decision rejecting the Respondent's argument and affirming the judgment in the Petitioner's favor in State of Florida v. Kropff, 491 So. 2d 1252 (Fla. 3d DCA 1986) (Kropff II). (App. 1-2).

Following the Third District's affirmance of the lower court judgment, the Petitioner filed a Petition for Writ of Mandamus to seek enforcement of the judgment, since the Respondent initially refused to pay any portion of the judgment. Subsequently, the lower court entered a Final Judgment determining that the statutory monetary cap applicable to the Petitioner's claim was $100,000 based upon the Fourth District Court of Appeal's decision in Department of Transportation v. Soldovere, 500 So. 2d 568 (Fla. 4th DCA 1987) and granted the Plaintiff's Petition for Entry of Writ of Mandamus in this amount. (App. 1-2).

The Respondent subsequently filed its third appeal (Kropff III) under which the sole issue for consideration was whether the appropriate statutory cap for the Petitioner's claim was in the amount of $50,000 as claimed by the Respondent or $100,000 as found by the trial court. On October 27, 1987, the Third District Court of Appeal entered its opinion reversing the trial court's Final Judgment in favor of the Petitioner and held that

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the appropriate statutory cap for the Petitioner's claim was in the amount of $50,000. In so holding, the Third District Court of Appeal expressly observed:

> We are mindful that our sister court has reached a contrary result in Keith v. Dykes, 430 So. 2d 502 (Fla. 1st DCA 1983) and in Department of Transportation v. Soldovere, 452 So. 2d 11 (Fla. 1st DCA 1984). We acknowledge direct conflict with Dykes and Soldovere. (Emphasis added).

(App. 1-2).

Subsequent to the Third District's opinion, the Petitioner filed a timely Motion for Rehearing and Motion for Certification. The essence of the Motion for Certification was the fact that although the Court had expressly acknowledged the direct conflict of its decision with the prior decisions in Dykes and Soldovere, it had not used the "magic language" certifying the conflict. (App. 3-6). Both the Motion for Rehearing and for Certification were denied on November 24, 1987 without further opinion (App. 7).

SUMMARY OF ARGUMENT

The 1981 Amendment to Florida Statutes §768.28, which raised the monetary cap applicable to lawsuits against state agencies from $50,000 to $100,000 and further abrogated the venue privilege previously enjoyed by state agencies, expressly provided that it would apply "to causes of action which accrue on or after October 1, 1981." In Keith v. Dykes, 430 So. 2d 502 (Fla. 1st DCA 1983), Department of Transportation v. Soldovere, 452 So. 2d 11 (Fla. 1st DCA 1984) and Department of Transporation v. Soldovere, 500 So. 2d 568 (Fla. 4th DCA 1987), the First and

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Fourth District Courts of Appeal held that a "cause of action" cannot "accrue" against a state agency within the meaning of this Amendment, until after the Plaintiff presents its claim in writing to the appropriate agencies as required by Florida Statutes §768.28(6) and the claim is disposed of as set forth in said statute. Each of these cases have therefore held that the increased statutory cap and venue provisions of the 1981 Amendment of Florida Statutes §768.28 apply to tort actions based upon accidents occurring prior to the effective date of the Amendment, but where suit could not be filed until after the effective date, because of the requirement to comply with the pre-suit administrative claim provisions of the statute.

Despite the fact that the present case is virtually identical to the Soldovere and Keith cases from both a factual and legal standpoint, the Third District reached exactly the opposite conclusion and refused to apply the provisions of the 1981 Amendment of Florida Statutes §768.28 to Ms. Kropff's claim. In so holding, the Third District expressly ". . . acknowledge[d] direct conflict with Dykes and Soldovere."

It is therefore clear, as acknowledged by the subject opinion itself, that this Court has jurisdiction over this cause pursuant to the provisions of Article V, §3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and should accept jurisdiction to resolve this conflict.

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ARGUMENT

WHETHER THE THIRD DISTRICT'S DECISION IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FIRST AND FOURTH DISTRICTS IN KEITH v. DYKES, 430 So. 2d 502 (Fla. 1st DCA 1983), DEPARTMENT OF TRANSPORTATION v. SOLDOVERE, 452 So. 2d 11 (Fla. 1st DCA 1984) AND DEPARTMENT OF TRANSPORTATION v. SOLDOVERE, 500 So. 2d 568 (Fla. 4th DCA 1987).

The 1981 Amendment to Florida Statutes §768.28(5), which raised the monetary cap applicable to lawsuits against state agencies from $50,000 to $100,000, expressly provides that it will apply "to causes of action which accrue on or after October 1, 1981". See Florida Statutes §768.28(14) (1981). In Soldovere (I), supra, Soldovere (II), supra and Dykes, supra, the First and Fourth District Courts of Appeal held that a "cause of action" cannot "accrue" against a state agency within the meaning of this Amendment, until after the Plaintiff presents its claim in writing to the appropriate agencies as required by Florida Statutes §768.28(6) and the claim is disposed of as set forth in said statute. The basis of these decisions is the well settled principle that a "cause of action" cannot "accrue" until a lawsuit may be maintained upon it. Therefore, since a plaintiff is not entitled to maintain an action against a state agency until compliance with the administrative claim provisions of Florida Statutes §768.28(6), the "cause of action" cannot accrue until such compliance is completed.

It was, therefore, held in each of these cases that the provisions of the 1981 Amendment to Florida Statutes §768.28 would apply to tort actions based upon accidents occurring prior to the effective date of the Amendment, but where suit could not be filed until after the effective date, because of the need to comply with the pre-suit administrative claim provisions of sub-section (6) of the statute.

The present case is virtually identical to the Soldovere cases from both a factual and legal standpoint. As in the present case, Ms. Soldovere was injured in an automobile accident occurring prior to the effective date of the 1981 Amendment at which time the statutory sovereign immunity cap was only $50,000. Ms. Soldovere subsequently filed her Notice of Claim with the Department of Transportation on December 1, 1981, after the effective date of the Amendment raising the amount of the statutory cap and then filed suit in May of 1982. Under these facts, which are virtually identical with the present case, it was held that Ms. Soldovere's cause of action did not accrue until after her claim had been filed and disposed of under the provisions of Florida Statutes §768.28, since her lawsuit could not be filed before that time. The Court, therefore, concluded that the $100,000 statutory cap, which became effective for causes of action accruing after October 1, 1981, applied to her claim, rather than the $50,000 cap, which was in effect at the time of the subject accident. See Soldovere (II), supra.

In addition to raising the statutory cap, the 1981 Amendment also abrogated the venue privilege previously enjoyed by state agencies for causes of action accruing after October 1, 1981. Both Dykes, supra and Soldovere (I), supra considered the identical issue under the venue portions of the same 1981 Amendment. The First District held the venue privilege had been abrogated by the 1981 Amendment in both Dykes and Soldovere (I), where the required compliance with the administrative claim provisions of Florida Statutes §768.28 had not been completed until after the Amendment's October 1, 1981 effective date, even though the underlying accidents in each case occurred prior, because the Plaintiff's cause of action could not accrue until such pre-suit requirements were met and a suit was capable of being maintained.

It is therefore clear that this Court has jurisdiction of this cause pursuant to Article V §3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), since the present case expressly and directly conflicts with the decisions of the First and Fourth Districts in Dykes, supra, Soldovere (I), supra and Soldovere (II), supra. Not only is such conflict apparent from the face of these decisions, but such conflict is directly acknowledged by the Third District in its very opinion. (App. 1-2).

Inasmuch as this Court has accepted jurisdiction to consider this very issue in Soldovere (II), supra, it is obvious that this is a question of significant public importance and good grounds

exist for this Court to exercise its discretionary jurisdiction to consider this petition as well. It would also be manifestly unfair and inequitable for this Court to refuse to exercise its jurisdiction in this case in light of its acceptable of jurisdiction in Soldovere (II), which involves exactly the same issues and virtually identical facts. For example, if this Court affirms the Fourth District's decision in Soldovere (II) and refuses to accept jurisdiction in this cause, Ms. Soldovere would be entitled to receive the legal benefits of the higher statutory cap, while Ms. Kropff would be denied the same legal benefits, despite a virtually identical legal injury and position.

CONCLUSION

As acknowledged by the Third District Court of Appeal, the decision in the present case is in express and direct conflict with the decisions of the First and Fourth Districts in Dykes, supra, Soldovere (I), supra and Soldovere (II), supra, therefore investing this Court with jurisdiction to resolve said conflict pursuant to the provisions of Article V §3(b) and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). It is therefore respectfully submitted that this Court should accept jurisdiction of this cause in order to resolve the conflict between these decisions.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of December, 1987 to RONALD W. BROOKS, ESQ., 863 E. Park Avenue, Tallahassee, Florida 32301.

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