5-6

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: 71,670

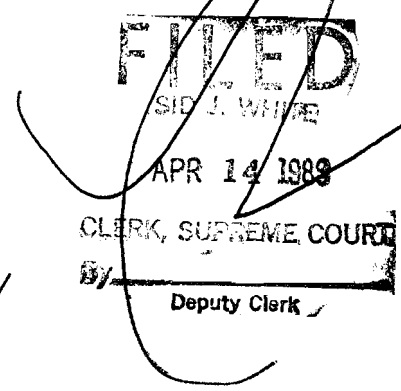
SUSAN ANN KROPFF,

Petitioner,

vs.

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

Respondents.




# PETITIONER'S BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

The Petitioner SUSAN ANN KROPFF initially invoked this Court's discretionary jurisdiction pursuant to Article V, §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, on the basis that it expressly and directly conflicted with prior 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 1978).

Subsequent to the filing of this Petition, this Court rendered its decision in Soldovere (II), quashing the Fourth District's opinion and further indicating its disapproval of the First District's decision in Soldovere (I). Department of Transportation v. Soldovere (II), 1988 FLW 54 (January 28, 1988). This Court's opinion further approved the Third District Court of Appeal's decision in the present case. Although the Petitioner filed a Notice of Supplemental authority on February 24, 1988 citing this Court's decision in Soldovere (II), this Court nevertheless issued its Order accepting jurisdiction in this cause on March 23, 1988.

The sole issue in this appeal is identical to the issue raised in Soldovere (II), which is whether the 1981 Amendment to Florida Statutes §768.28 is applicable to tort cases based upon accidents occurring prior to the effective date of the Amendment, 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 subsection (6) of the statute. The facts in the present case are indistinguisable from those in Soldovere I and II.

SUSAN ANN KROPFF was injured 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 causing the Plaintiff to leave her position of safety to go into the middle of a busy street at night, where the trooper was conducting his investigation. As a result of this negligence, the Petitioner was struck by an oncoing vehicle in a second accident, sustaining 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 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 on July 1, 1982. (App. 1-2).

After several years of discovery and an intervening interlocutory appeal, the case was tried and a 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 (II), 491 So. 2d 1252 (Fla. 3d DCA 1986). (App. 1-2). No further appellate action was taken by the State and the Third District's opinion on the sovereign immunity issue became final.

The Petitioner subsequently filed a Petition for Writ of Mandamus to seek enforcement of the underlying judgment, since the Respondent initially refused to pay any portion of the judgment. Subsequently, the trial 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 Soldovere (II), supra and granted the Plaintiff's Petition for Entry of Writ of Mandamus in this amount. (App. 1-2).

The Respondent subsquently filed its third appeal (Kropff III) under which the sole issue for consideration was whether the appropriate statutory cap for this 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 the appropriate statutory cap for the Petitioner's claim was in the amount of $50,000, recognizing its decision was in direct conflict with the then prior District Court decisions in Soldovere and Dykes.

## SUMMARY OF ARGUMENT

The 1981 Amendment to Florida Statutes §768.28, which raised the monetary cap applicable to actions against State agencies from $50,000 to $100,000, expressly provided that it would apply to causes of action which accrue on or after October 1, 1981. Although this precise issue had been decided in the Petitioner's favor by the District Courts of Appeal in Soldovere (I) and Soldovere (II), this Court has recently quashed the District Court's opinion in Soldovere (II). It is the Petitioner's position that the rationale behind the District Court decisions - that a cause of action cannot accrue until an action may be maintained upon it, thereby postponing accrual of the Plaintiff's cause of action against the State until compliance with the administrative claim provisions of Florida Statutes §768.28 - is the proper rule of law, which has been followed in many other contexts in this State.

A variety of analogous cases have been decided involving both tort and contract claims, which have generally held that a cause of action does not acrue until an action can be instituted upon it. These cases have recognized the general principle that a cause of action will not necessarily begin on the date of the wrong, but instead on the date upon which the Plaintiff has the right to enforce his cause.

Since the administrative claim provisions of Florida Statutes §768.28 are more than a mere procedural requirement, but instead a crucial condition precedent which must be strictly complied with, a cause of action cannot be said to accrue against the State until such compliance. Therefore, since the Petitioner did not have the legal

right to maintain her lawsuit against the Florida Highway Patrol until after compliance with the administrative claim provisions of Florida Statutes §768.28, her cause of action could not accrue until such time, bringing her case directly within the terms of the 1981 Amendment.

## ARGUMENT

### WHETHER THE PETITIONER'S CAUSE OF ACTION AGAINST THE FLORIDA HIGHWAY PATROL ACCRUED AFTER THE EFFECTIVE DATE OF THE 1981 AMENDMENT TO FLORIDA STATUTES §768.28, WHICH RAISED THE MONETARY CAP AGAINST STATE AGENCIES TO $100,000

The 1981 Amendment to Florida Statutes §768.28, which raised the monetary cap applicable to state agencies from $50,000 to $100,000, expressly provided that it would apply "to causes of action which accrue on or after October 1, 1981". Although this precise issue had been decided in the Petitioner's favor by the First District in Soldovere (I), supra and Keith, supra and by the Fourth District in Soldovere (II), this Court on January 28, 1988 reversed Soldovere (II), while disapproving Soldovere (I) in Department of Transportation v. Soldovere (II), 1988 FLW 54 (January 28, 1988). The rationale behind each of the District Court decisions was that a "cause of action" cannot accrue until an action may be maintained upon it and since the plaintiff may not maintain an action against a state agency until compliance with the administrative claim provisions of Florida Statutes §768.28, the "cause of action" therefore does not accrue until such compliance is completed.

This rationale is totally in accord with Florida law considering the issue of when a cause of action accrues in other contexts. In Burleigh House Condominium, Inc. v. Buchwald, 368 So. 2d 1316 (Fla. 3d DCA 1979), which was relied upon in Keith, supra, the Third District

considered the issue of when the statute of limitations began to run in an action by a condominium association against the developer for the recovery of unreasonable and excessive recreation fees, where the cause of action for such damages was first recognized by the Florida Supreme Court in a decision rendered on March 31, 1977. The Third District held that even though the condominium recreation leases in question were executed in 1969, the cause of action against the condominium developer did not accrue until March 31, 1977, the date of this Court's decision recognizing the cause of action. In so holding, the Third District observed at page 1319:

> 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, 156 Fla. 251, 23 So. 2d 265 (1945).
>
> . . .
>
> The period of limitation does not always begin on the date of the wrong. See Cooper v. United States, 7th Cir. 1971, 442 F. 2d 908. No cause of action generally accrues until the Plaintiff has a right to enforce his cause. [citations omitted]. The right to sue is hollow indeed until the right to succeed accompanies. (Emphasis added).

Also see United States v. One, 1961 Red Cheverolet Impala Sedan, 457 F. 2d 1353 (5th Cir. 1972), Neely v. United States, 546 F. 2d 1059 (3d Cir. 1976).

The Third District's opinion in Buchwald, surpa was based upon this Court's earlier decision in Berger, supra in which this Court had considered the issue of when a cause of action against an estate accrued for a debt owed by the decedent, which by its terms was to become due upon the decedent's death. In Berger, this Court held that even though the decedent had died in 1938, that the Plaintiff's cause

of action did not accrue until letters of administration were issued in 1942 following extensive intervening litigation, since an action could not be maintained against the estate until that time. The Court concluded that a cause of action cannot be considered to have accrued until a lawsuit can be filed thereon and that "there must be some person capable of suing or being sued upon the claim in order for the statute to begin to run". Berger, supra at page 269.

In Soldovere (II), this Court dismissed its prior holding in Berger by stating that compliance with the administrative claim provisions of Florida Statutes §768.28(6) was "merely a procedural requirement", so that unlike Berger "there is someone capable of being sued". This Court's statement, however, ignores numerous prior decisions, which have repeatedly held that compliance with the administrative claim provisions of Florida Statutes §768.28 is more than a mere procedural requirement, but instead is a crucial condition precedent with which there must be strict compliance. See e.g. Levine v. Dade County School Board, 442 So. 2d 210 (Fla. 1983), Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), Hardcastle v. Hohr, 483 So. 2d 874 (Fla. 2d DCA 1986), Ryan v. Heinrich, 501 So. 2d 185 (Fla. 2d DCA 1987), Dukanauskas v. Metropolitan Dade County, 378 So. 2d 74 (Fla. 3d DCA 1979), Mrowczynski v. Uizenthal, 445 So. 2d 1099 (Fla. 4th DCA 1981). This rationale has also been followed by the various District Courts in considering the need to comply with the notice provisions of the analogous Medical Malpractice Act of 1985. See Public Health Trust of Dade County v.

Knuck, 495 So. 2d 834 (Fla. 3d DCA 1986), Pearlstein v. Malunney, 500 So. 2d 585 (Fla. 2d DCA 1986), Lynn v. Miller, 498 So. 2d 1011 (Fla. 2d DCA 1986).

Under this line of cases, it is undisputed that the Petitioner did not have the legal right to maintain a lawsuit against the Florida Highway Patrol until after a notice of claim was filed and disposed of pursuant to the provisions of Florida Statutes §768.28. See e.g. Levine, supra, Commercial Carrier, supra. Therefore, the Plaintiff's cause of action could not accrue until such time, bringing her case directly within the terms of the 1981 Amendment.

This same type of rationale has been followed in a number of other contexts as well. For example, Florida Statutes §95.031(1) provides that "a cause of action accrues when the last element constituting the cause of action occurs". Under this statute, it has therefore been held that a cause of action for wrongful death does not accrue until the date of the decedent's death, even though the underlying accident occurs earlier, since the action cannot be maintained until such time. E.g. Moorey v. Eytchison & Hoppes, Inc., 338 So. 2d 558 (Fla. 3d DCA 1976), Walker v. Beech Aircraft Corp., 320 So. 2d 418 (Fla. 3d DCA 1975). Similarly, a cause of action for legal malpractice will not accrue until a final determination by the appellate court on the underying action upon which the claim is bsed, even though the wrongful act occurs much earlier. Haghayegh v. Clark, 1988 FLW 3d DCA 269 (Jan. 26, 1988), Diaz v. Piquette, 496 So. 2d 239 (Fla. 3d DCA 1986).

A similar rationale was also followed in State Ex Rel Division of Administration v. Oliff, 350 So. 2d 484 (Fla. 1st DCA 1977) in dealing with a cause of action against the Department of Transportation for fraud. Oliff filed suit against the Department of Transportation alleging that the state constructed a drainage easement on her property as a result of an agreement obtained by fraudulent misrepresentation. It was alleged that even though the contract was obtained in April of 1974, that the plaintiff did not discover the "fraud" until after the July 1, 1974 effective date of Florida Statutes §768.28 (1975) waiving sovereign immunity. The Court concluded that since "discovery" is an essential element of a cause of action for fraud that the cause of action could not accrue until the fraud was discovered for the purposes of determining the effective date of the sovereign immunity statute, even if the actual fraudulent conduct occurred earlier.

The same rule has also traditionally been followed in contract actions, under which a cause of action does not accrue until all conditions precedent to suit are complied with. See e.g. Gilbert v. American Casualty Company of Redding, 219 So. 2d 84 (Fla. 3d DCA 1969), Briggs v. Fitzpatrick, 79 So. 2d 848 (Fla. 1955). In Gilbert, it was held that a cause of action against an insurer for the wrongful failure to defend its insured did not accrue on the date of the alleged breach of contractual obligation in refusing to defend, but instead accrued many years later when a judgment was entered against the insured in the underlying action. The same principle is involved in the present case.

The Third District's opinion in the present case also totally ignores the express wording of Florida Statutes §768.28(6) and (11). Subsection (6)(a) provides:

> An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency . . . within the three years after such claim accrues . . .

Conversely, the effective date provisions of the 1981 Amendment to Florida Statutes §768.28 provide:

> (14) This section as amended by ch. 81-317, Laws of Florida, shall apply only to causes of action which accrue on or after October 1, 1981.

It is immediately apparent when looking at the actual wording of the above statutory provisions that the Legislature has chosen different language in identifying the appropriate time for the filing of a claim under Florida Statutes §768.28(6) and between the effective date provisions of the 1981 Amendment, which are triggered by the accrual of the cause of action. In Shearn v. Orlando Funeral Home, 88 So. 2d 591 (Fla. 1956), this Court defined a cause of action by observing:

> . . . it is generally conceded under the modern view that a cause of action is the right which a party has to institute a judicial proceeding. (Emphasis added).

A "claim", on the other hand, has a considerably different meaning under the context of the sovereign immunity statute. In Whitney v. Marion County Hospital District, 416 So. 2d 500, 502 (Fla. 5th DCA 1982), it was held that a "claim" under the context of subsection (6)(a) of Florida Statutes §768.28 constituted:

> ". . . any manner of submitting a written notice of the claim to the agency involved that sufficiently describes or identifies the occurrence so that the agency may investigate it . . .

Thus, the Court concluded that a written demand for mediation under the Medical Mediation Act of 1975 constituted a sufficient "claim" to satisfy the provisions of Florida Statutes §768.28.

This definition of a "claim" under Florida Statutes §768.28, was subsequently followed by the Second District in Pearlstein, supra in considering the analogous claim provisions of the Medical Malpractice Act of 1985. The Second District went on to further note that a "claim" was something different than the "filing of a complaint" so that the premature filing of a complaint could not be considered to constitute the requisite pre-suit claim. The Court went on to further observe at page 587:

> Instead, we must presume that the Legislature meant what it said when it distinguished the filing of a complaint from the furnishing of a pre-filing notice.

The same is obviously here in that it must be presumed that the Legislature meant what it said when it distinguished between the accrual of a "claim" and the accrual of a "cause of action".

The importance of the Legislature's distinction between the words "claim" and "cause of action" is further emphasized in the First District's decision in Windham v. Florida Department of Transportation, 476 So. 2d 735 (Fla. 1st DCA 1985). In Windham, the Plaintiffs were landowners who had purchased their property in 1976 and subsequently sustained injury due to the improper disposition of toxic waste on the property back in 1959, prior to their purchase. The Plaintiffs filed

suit against the Department of Transportation on the basis that they had negligently supervised the disposition of the toxic waste in connection with a road project in 1959.

The First District was faced with the issue of determining whether the statutory waiver of sovereign immunity contained in Florida Statutes §768.28 (1973) applied to the Plaintiff's action. The effective date provisions of the statute provided that they would take effect:

> . . . On July 1, 1974, for the executive departments of this state and on January 1, 1975 for all other agencies and subdivisions of the state, and shall apply only to incidents occurring on or after those dates. (Emphasis added).

In concluding that the statutory waiver did not apply to the Plaintiff's injuries, the Court held at page 739:

> To consider the term "incident" as synonymous with "accrual of the cause of action," as urged by [plaintiffs], would be inconsistent with other provisions of the same statute which place limitations on the maintenance of a cause of action based upon the time when such "claim accrues" Section 768.28(6)(a)(11) Florida Statutes (1981). It is reasonable to assume that had the legislature intended the construction urged by [plaintiffs] it would have used "causes of action accruing", instead of "incidents occurring" in Section 768.30. (Emphasis added).

In the 1981 Amendment, the Legislature did choose to utilize such language. The phrase "cause of action" has a definite technical legal meaning and as such it is presumed that the Legislature meant what it said when used this phrase. E.g. Ocasio v. Bureau of Crimes, 408 So. 2d 751 (Fla. 3d DCA 1982), Carson v. Miller, 370 So. 2d 10 (Fla. 1979), Alligood v. Florida Real Estate Commission, 156 So. 2d 705 (Fla. 2d DCA 1963), City of Tampa v. Thatacher Glass Corporation, 445 So. 2d 578, n.2 (Fla. 1984). Accordingly, this meaning should be given effect.

Finally, it is respectfully submitted that this Court's reliance upon its prior decision in State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So. 2d 632 (Fla. 1982) in quashing Soldovere (II) is misplaced. In Kilbreath, this Court held that the statute of limitations for an uninsured motorist claim began to run on the day of the accident, rather than the date that the insurer refused to arbitrate the Plaintiff's claim. This Court's holding was based upon two different considerations, neither of which is applicable in the present case. First, this Court concluded in Kilbreath that because of the nature of uninsured motorist coverage, the insured has "the same cause of action against [his] insurer that he has against the uninsured/underinsured third party tortfeasor for damages for bodily injury." Kilbreath, supra. It was therefore concluded that all the uninsured motorist coverage does is to provide a "new procedure" for the insured to recover his damages, even though the cause of action has not changed. Thus, this Court concluded that the injured party (insured) had one cause of action, which accrued at the time of the accident.

Obviously, this rationale does not apply to the present case. The injured Plaintiff's cause of action against the State arises out of the State's negligence and not the negligence of some other third party as in the uninsured motorist context. Compliance with the administrative claims provisions of Florida Statutes §768.28 is part and parcel of the injured party's cause of action against the State, which has the power to define the causes of action for which it will be liable and to set forth the circumstances under which it may be sued. See e.g. Cauley v.

City of Jacksonville, 403 So. 2d 379 (Fla. 1981).An essential part of this cause of action is compliance with the administrative claim provisions of Florida Statuts §768.28.

The second basis for this Court's opinion in Kilbreath was that the arbitration provision merely provided another "remedy" for the Plaintiff to recover his damages sustained in the underlying accident. Thus, in rendering its Kilbreath decision, this Court merely considered the arbitration provisions as providing an additional remedy without affecting the underlying cause of action. Once again, this is totally opposite to the present case, where the Plaintiff only has one remedy - against the State - which according to Legislative decree must include compliance with the administrative claim provisions of Florida Statutes §768.28 as part of the statutorily defined cause of action.

## CONCLUSION

Based upon the foregoing authorities and arguments, it is clear that the Third District Court of Appeal's decision in the present case was erroneous and should be reversed by this Court with instructions that the lower court's judgment be reinstated.

## CERTIFICATE OF SERVICE

WE HERBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of April, 1988 to RONALD W. BROOKS, ESQ., 863 E. Park Avenue, Tallahassee, Florida 32301.

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