IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: 71,670

SUSAN ANN KROPFF,

Petitioner

v.

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

Respondents.

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RESPONDENT'S BRIEF ON THE MERITS

On Appeal From the Third District Court of Appeal

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CITATIONS OF AUTHORITY

PREFACE

For purposes of the Brief, the following abbreviations shall apply:

1. Susan Ann Kropff, the Plaintiff in the lower proceeding, shall be referred to as "Petitioner."

2. The State of Florida, Department of Highway Safety and Motor Vehicles, Division of Highway Patrol, the Defendant in the lower proceeding shall be referred to as "Respondent."

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

ISSUE I

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

ARGUMENT

The 1981 amendment to Section 768.28, Florida Statutes which raised the monetary cap applicable to state agencies from $50,000 to $100,000 applies to "causes of action which accrue after October 1981." The Petitioner's claim against the Respondent arises from an injury which she received on December 29, 1979. The question on this appeal is when did her cause of action accrue under Section 768.28, commonly referred to as the waiver of sovereign immunity statute? According to this Court's recent decision in Department of Transportation v. Soldovere, 519 So.2d 616 (Fla. 1988), a person's cause of action for the negligence of another accrues on the date of the person's injury. To quote Soldovere: "This rule applies whether the action is against a private party or the state." 519 So.2d at 617. Significantly, this Court relied upon established case law in Florida to reach its decision in Soldovere.

In view of Soldovere, the Petitioner's cause of action accrued on December 29, 1979, the date of her injury. Accordingly, the Petitioner's cause of action accrued before the effective date provisions of the aforementioned amendment to

Section 768.28. As such, the Petitioner is only entitled to a judgment against Respondent in an amount of $50,000, the monetary cap which was in effect on the date the Petitioner's cause of action accrued.

ARGUMENT

ISSUE I

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

The 1981 amendment to Section 768.28, Florida Statutes, which raised the monetary cap applicable to state agencies from $50,000 to $100,000, applies to "causes of action which accrue on or after October 1, 1981." The gravamen of the Petitioner's appeal is that a "cause of action" does not "accrue" against a state agency under the effective date provisions of the 1981 amendment to Section 768.28, Florida Statutes, until a Plaintiff (aggrieved by the state) presents his claim in writing as required by Subsection 768.28(6) and the claim is disposed of as further set forth in that subsection.[1] The Petitioner's argument has no foundation in the Florida statutes. According to this Court's recent decision in Department of Transportation v. Soldovere, 519 So.2d 616 (Fla. 1988):

> "Nothing in Subsection 768.28(6) suggests that the cause of action accrues only after the notice of claim is filed and is then denied by the appropriate agency." 519 So.2d at 617.

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[1] Subsection 768.28(6) provides: "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 three years after the claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing."

Similarly, the Petitioner's argument has no foundation in the case law of Florida. Again, according to this Court's decision in Soldovere, supra, compliance with Subsection 768.28(6), Florida Statutes:

> "is merely a procedural requirement and does not abrogate the general rule that a cause of action accrues when the injury occurs and the damage is sustained." 519 So.2d at 617.

Although stated differently, the issue in this case is identical to the issue addressed in Soldovere.[2] Likewise, as the Petitioner candidly avers, the facts in the instant case are indistinguishable from the facts of Soldovere.[3] Thus, this Court's decision in Soldovere is controlling case law for purposes of this appeal.

As held by this Court in Soldovere, "a cause of action for the negligence of another accrues at the time the injury is first inflicted" - whether the action is against a private party or the state. In reaching this decision, the Court quashed the Fourth District's opinion rendered in the same case - Department of Transportation v. Soldovere, 500 So.2d 568 (Fla. 4th DCA 1986) (Soldovere II); and further disapproved of the First District's

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[2] In Soldovere, this Court was concerned with determining "when a cause of action accrues [under Subsection 768.28(6), Florida Statutes 1981] if a notice of claim for a tort against the appropriate State agency must be filed before suit can be brought." 519 So.2d at 616.

[3] That is to say, the injury to the claimant in Soldovere occurred prior to the effective date of the aforementioned amendment to Section 768.28. However, Soldovere did not file her notice of claim with the Department of Transportation until after the effective date of the amendment to Section 768.28.

decision in Department of Transportation v. Soldovere, 452 So.2d 11 (Fla. 1st DCA 1984) (Soldovere I) to the extent that Soldovere I conflicted with its decision.[4] Both Soldovere I and Soldovere II are progeny of the First District's decision in Keith v. Dykes, 430 So.2d 502 (Fla. 1st DCA 1983). In what amounts to a major departure from established case law in Florida, Keith held that the claimant's cause of action against the Florida Division of Drivers Licenses did not accrue until the claimant had been notified by the Department of Insurance that his claim had been denied. The Court based this conclusion upon its finding that compliance with Subsection 768.28(6) is a condition precedent to maintaining a suit against the state. Clearly, the decision in Keith is aberrational. Cf Seaboard Air Line R. R. Co. v. Ford, 92 So.2d 160 (Fla. 1956), relied upon by this Court in Soldovere.[5]

In the lower proceeding, the Third District held that the Petitioner's cause of action against the Respondent accrued at the time of her injury rather than after her claim had been filed with the Respondent and denied. State, Department of Highway Safety & Motor Vehicles v. Kropff, 514 So.2d 404 (Fla. 3d DCA

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[4] In Soldovere II, the Fourth District affirmed Soldovere I in reliance upon the law of the case doctrine.

[5] As this Court stated in Seaboard:

> "Generally in actions for personal injuries resulting from the wrongful act or negligence of another, the cause of action accrues and the statute begins to run from the time when the injury was first inflicted and not from the time when the full extent of the damages sustained has been ascertained." 92 So.2d at 964.

1987). Thus, the Third District's opinion was rendered in direct conflict with the First District's opinion in Keith and Soldovere I. The Supreme Court recognized this conflict among the districts in Soldovere and resolved it in favor of Kropff (thereby quashing Soldovere I and disapproving of Soldovere II). That is, this Court, in Soldovere, agreed with Kropff and held that, since Soldovere was injured in August of 1981, the Department of Transportation was only liable for $50,000.00. Put another way, Soldovere's cause of action accrued before the effective date (October 1981) of the amendment to Section 768.28 which raised the statutory cap for damage claims against the state to $100,000.

This Court rendered its eminently correct decision in Soldovere in reliance upon its earlier decision in State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632 (Fla. 1982). In that case, Kilbreath brought an action against his automobile insurance company after the applicable statute of limitations had run. However, as required by his policy, Kilbreath had filed a request for arbitration with the company some time prior to the expiration of the limitations period. Thus, Kilbreath argued that his request for arbitration was a condition precedent to the action on his policy and that his claim did not accrue until after compliance with the condition. This Court did not find Kilbreath's fantastic argument

convincing. According to this Court, Kilbreath's claim arose at the time of his accident "since the right of action stem[med] from the Plaintiff's right of action against the tortfeasor." 419 So.2d at 633.

Significantly, this Court in Soldovere found no merit to the claimant's argument that her case was distinguished from Kilbreath on the basis that it involved a statutorily mandated accrual date as opposed to an accrual date determined by contract. Such an argument, according to Soldovere, "appears to beg the question whether the procedural requirement affects the accrual date of the action." 519 So.2d at 617. In the instant case, the Petitioner argues that this Court erred in relying upon Kilbreath to quash Soldovere II. She argues that Soldovere is distinguished from Kilbreath because Kilbreath involved considerations not applicable to Soldovere. (See Petitioner's Brief pages 13 and 14.) The Petitioner's argument fails the credibility test because Soldovere and Kilbreath addressed precisely the same issue, i.e., when does a cause of action for negligence accrue against a Defendant (whether public or private)? Because the two cases involved precisely the same issue, Soldovere correctly relied upon Kilbreath as authority for its finding that a cause of action for the negligence of a state agency accrues at the time the injury is first inflicted. Accord Allstate Insurance Company v. Metropolitan Dade County, 436 So.2d 976 (Fla. 3d DCA 1983), relied upon by the Third District in the lower proceeding.

In her Brief to this Court, the Petitioner relies upon a virtual montage of court decisions which she claims indicts the rationale of Soldovere. (Petitioner's Brief, 5 - 9). According to the Petitioner, her position "is totally in accord with Florida law considering the issue of when a cause of action accrues in other contexts." (Petitioner's Brief, 5). The Petitioner's argument is but a house of cards founded on the Third District's opinion in Burleigh House Condominium, Inc., v. Buchwald, 368 So.2d 1316 (Fla. 3d DCA 1979). Buchwald, in turn, relied upon this Court's earlier decision in Berger v. Jackson, 156 Florida 251, 23 So.2d 265 (1945). The Petitioner depends on these cases to convince this Court that it erred in deciding Soldovere. (In essence, the Petitioner is asking this Court to reverse its decision in Soldovere.) The Respondent submits that this Court did not err in deciding Soldovere.

As indicated, the Petitioner relies upon Berger v. Jackson, supra, to buttress her argument that a cause of action against the state accrues only after the notice of claim is filed and is then denied by the appropriate agency. In Berger, this Court held that where a cause of action accrues after the death of the person against whom it lies, the applicable statute of limitations does not begin to run until there is a grant of administration of the estate. The stated rationale of the Berger decision is that "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. The Petitioner, arguing from Berger,

contends that the state is not capable of being sued until after a claimant has complied with Subsection 768.28(6), Florida Statutes. The rationale of Berger does not apply in this case. It does not apply in this case for the same reason that it did not apply in Soldovere. Contrary to what the Petitioner argues, however, this Court did not, in Soldovere, dismiss its holding in Berger. Rather, Soldovere, after considering the holding in Berger, concluded that the two cases were distinguishable. In the words of Soldovere:

> "Berger is distinguishable from the case under review because the party capable of being sued here, the State, has always been available. There is simply a procedural requirement that a Plaintiff file a notice of claim before bringing suit against the State or its agencies." 519 So.2d at 617.

In further support of her position, the Petitioner cites numerous court decisions which she claims are "similar" or "analogous" to Berger and this case. (The Petitioner asserts that this Court ignored these decisions in deciding Soldovere.) The Petitioner relies upon these cases in an effort to convince this Court that compliance with the administrative claim provisions of Section 768.28 is a crucial condition precedent to the accrual of an action for negligence against the state. Significantly, not one of these cases presents an issue squarely on point with the issue presented in the instant case. However, the precise issue in this case was presented in Soldovere wherein this Court decided that compliance with the administrative claim provisions of Section 768.28 is not a crucial condition precedent to the accrual of an action for negligence against the state.

In sum, the decisional support for the Petitioner's position is undermined by this Court's decision in Soldovere. Thus, the Petitioner's argument from the decisional law collapses for the lack of support.

The Petitioner advances the argument that a claim accrues under Section 768.28 on one date and that a cause of action under the statute accrues on a different date. Specifically, the Petitioner argues that, while a claim accrues under the statute on the date of a claimant's injury, a claimant's cause of action does not accrue under the statute until after her claim is filed and either accepted or rejected by the state agency involved. For the reasons which follow, the Petitioner urges that the legislature did not intend for the term "accrue" to have different meanings under the same statute.

Section 768.28, Florida Statutes is the state's waiver of sovereign immunity statute. As such, it must be strictly construed. Spangler v. Fla. Turnpike Authority, 106 So.2d 421 (Fla 1958); Carlile v. Game and Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1977). The word "accrue" appears in Subsections (1), (6), (11) and (14) of Subsection 768.28, Florida Statutes.

Defining the word "accrue" brings various elementary rules of statutory construction into play. The following rules are of particular significance to the issue on this appeal: 1) The legislative intent behind a statute is the polestar by which courts must be guided in construing the statute. Parker v. State, 406 So.2d 1089 (Fla. 1981). 2) When the meaning of a

statute is at all doubtful, the law favors a rational, sensible construction that avoids an absurd or irrational result. Wakulla County v. Davis, 395 So.2d 540 (Fla. 1981); Dorsey v. State, 402 So.2d 1178 (Fla. 1981). 3) In order to construe the meaning of a word or phrase used in a statute, courts must look to the entire statute and the usage of the word or phrase throughout. Weitzel v. State, 306 So.2d 188 (Fla. 1st DCA 1975). 4) Words or phrases in statutes should be given their plain meaning unless a different connotation is necessarily implied from the context of the statute. City of Winter Park v. Jones, 392 So.2d 568 (Fla. 5th DCA 1981).

Clearly, in order to determine the legislative intent in using the phrase "accrual of a cause of action" we must look to Section 768.28, Florida Statutes, as a whole and at the manner in which the phrase is used.

Subsection (6) of the statute provides that an action shall not be initiated against the state until the claimant presents his claim in writing to both the Department of Insurance and the affected agency. The subsection further provides that the claim must be presented "within 3 years after such claim accrues..." (emphasis supplied).

Subsection 768.28(11), Florida Statutes, is the statute's limitations provision. This subsection reads as follows:

> (11) "Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues." (emphasis supplied)

Clearly, the Legislature intended for a four year statute of limitations to apply from the date of the incident. Yet, under the Petitioner's argument, the statute of limitations would not begin to run until the claim was denied.

Given this predicate, the question before this Court is clear. Has the Legislature, by "specific, clear and unambiguous language" intended for the word "accrue", as that term is used in Subsection (14), to have a different meaning from its use elsewhere in the statute? The answer is clearly no. When one reads Subsections (6), (11) and (14) in pari materia, the undeniable conclusion is that when the word "accrue" is used, it is in the context of from the date of the incident rather than from the date of the administrative denial of the claim.

As indicated, Section 768.28(11), Florida Statutes, states that an action "shall be forever barred" if a complaint is not filed "within 4 years after such claim accrues." Application of the Petitioner's rationale would effectively judicially extend the statute of limitations. That is, under the Petitioner's definition of the term "accrue," if a notice is filed on the last day of the three year period under Subsection 768.28(6), Florida Statutes, and is denied or deemed to be denied six months later, the statute of limitations in Subsection 768.28(11) would be extended by three years and six months. (In other words, a person injured due to the negligence of a state agency would have a total of seven and one half years from the date of his injury

to file a civil action against the state.) This conclusion is, of course, patently absurd. In any case, if this logic were to be accepted, the statute of limitations in Section 768.28(11) would be deprived of all significance.

It is well established that statutes must be rationally and sensibly construed. Realty Bond & Share Co. v. Englar, 104 Fla. 329, 143 So. 152 (Fla. 1932). Moreover, it is axiomatic that an interpretation of a statute which leads to unreasonable or illogical conclusions or results obviously not intended by the legislature, should not be adopted. See Drury v. Harding, 461 So.2d 104 (Fla. 1984). Adoption of the Petitioner's rationale most assuredly leads to unreasonable conclusions and illogical results. This becomes especially clear when one compares the legislature's use of the term "accrue" with the interpretation placed on the term by the Petitioner. Such a comparison makes it clear that the Petitioner misinterprets the clear intent of the legislature. After the Court ruled in Keith v. Dykes, supra, the Legislature, in 1983, clarified its original intentions by amending Subsection 768.28(6) and adding Subsection (b) which states:

> (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."

CONCLUSION

For all the reasons set forth in the Respondent's Brief on the Merits, the Petitioner's claim against the Respondent accrued on the date her injury occurred. Therefore, since Subsection 768.28(6), Florida Statutes (1977), was in effect at the time Petitioner's cause of action accrued, she is only entitled to a judgment against Respondent in the amount of Fifty Thousand Dollars ($50,000). The Respondent, thus, requests this Honorable Court to affirm the decision rendered in the lower proceeding.

RESPECTFULLY SUBMITTED this 6th day of May, 1988.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail on this 6th day of May, 1988, to WILLIAM PEEPLES, ESQ., Co-Counsel for Appellant, 6101 S.W. 76th Street, South Miami, FL 33143, and to ROBERT D. PELTZ, ESQ., of Rossman, Baumberger & Peltz, P.A., Attorneys for Appellee, Suite 1207, Biscayne Building, 19 West Flagler Street, Miami, FL 33130.

Ronald W. Brooks

RONALD W. BROOKS, ESQ.