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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 71,725

DANIEL MENENDEZ, a minor, by and through his father and next friend, MARIO MENENDEZ, and his mother, CANDACE MENENDEZ,

Petitioners,

vs.

THE BROWARD GENERAL MEDICAL CENTER, etc.,

Respondents.
_____/

BRIEF OF PETITIONER ON THE MERITS

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CITATIONS OF AUTHORITY

PREFACE

This is a Petition for review of a question certified by the District Court as being a question of great public importance. Petitioners were the Plaintiffs below and Respondent was the Defendant. The following symbol will be used:

(R) - Record-on-Appeal

(SR) - Supplemental Record-on-Appeal

STATEMENT OF THE CASE AND FACTS

In April 1980, Plaintiffs, Daniel Menendez, a minor, by and through his parents, and his parents individually, filed a Complaint for medical malpractice against the North Broward Hospital District, d/b/a Broward General Medical Center ("Medical Center"). Plaintiffs alleged that in October 1978 Daniel was born in the Medical Center's neonatal intensive care unit which, unbeknownst to Plaintiffs, had prior instances of babies developing meningitis as a result of a highly contagious organism that existed in that unit; and that Daniel did in fact contract meningitis which resulted in brain damage (R1-4).

The Medical Center filed an Answer in May 1980, alleging as a defense that the Medical Center (Hospital District) was a governmental agency, and therefore the $50,000 liability limit set forth in §768.28 Fla. Stat. was applicable. The Medical Center did not raise lack of notice under that statute as a defense (R5-6).

This case proceeded forward for the following four years during which it was set for trial on several occasions. In April 1984, four years after answering the Plaintiffs' Complaint, the

Medical Center filed a Motion to Dismiss the Complaint alleging for the first time that Plaintiffs had failed to give notice to both the Medical Center and the Department of Insurance as required by §768.28 Fla. Stat. (SR50-52). The trial court granted the Medical Center's Motion to Dismiss with leave to Plaintiffs to amend their Complaint (R7).

Plaintiffs filed an Amended Complaint which alleged that the Medical Center had in fact been given actual notice of Daniel's claim as a result of being served with Daniel's medical mediation claim, which the Medical Center answered and defended prior to commencement of this lawsuit. This notice had been given within the three year notice requirement.

Plaintiffs also asserted that the Medical Center and the Department of Insurance had waived any right to now claim lack of notice and/or were estopped from now making such claim. Plaintiffs alleged that both the Medical Center and the Department of Insurance had actual knowledge of this claim because Daniel had contracted meningitis as a result of an epidemic in the Medical Center's neonatal unit, of which the Medical Center and Department were fully aware; that the epidemic was fully investigated by the State of Florida in conjunction with the Center for Disease Control; that the Medical Center and the Department of Insurance had learned of Daniel's claim as a result of that investigation; and that the Medical Center had litigated or settled other similar claims resulting from the epidemic without invoking the notice provisions of §768.28 Fla. Stat. (R10-11).

Plaintiffs alleged that subsequent to the mediation proceeding, the Medical Center had thoroughly investigated Plaintiffs' claim presented in this lawsuit, and had in fact hired an infectious disease specialist to testify on its behalf in the litigation; that the parties had engaged in settlement negotiations during which the Medical Center's attorneys had advised counsel for Plaintiffs that the case could be settled for the $50,000 statutory limits at any time; that Plaintiffs had relied upon the Medical Center's representations and its silence and acquiescence in not asserting lack of notice as a defense within the three year notice period, as evidenced by the fact that the parties had conducted settlement negotiations beyond that three year period (R11-12).

In addition, Plaintiffs alleged that this case had been set for trial four different times between May 1982, and October 1983, during which the Medical Center had never once indicated any reliance upon lack of statutory notice; and that even if the Department of Insurance had been given formal notice, it would not have been actively involved in the defense of the case, but would have done nothing more than forward the notice to the Medical Center, which was already actively defending the claim (R11).

In sum, Plaintiffs alleged that the conduct of the Medical Center constituted a waiver, and estopped the Medical Center from raising the failure to comply with the notice provisions as a defense at such a late date (R10).

The Medical Center moved to dismiss Plaintiffs' Amended Complaint once again alleging failure to give notice of the claim within three years as required by §768.28 Fla. Stat. Importantly, this Motion to Dismiss confined itself to the contention that the Department of Insurance had not been given notice, admitting that the Medical Center had (R37-46). The trial court granted the Motion to Dismiss, finding that Plaintiffs had failed to comply with the notice provisions of §768.28 F.S., which was a condition precedent to institution of this lawsuit (R47-48).

Plaintiffs appealed to the Fourth District Court of Appeal which affirmed stating:

> As we view this record, the hospital district may well have waived notice because of its four-year delay in raising the notice question via its motion to dismiss. However, we are unable to find any authority for the agency to waive notice to the Department as mandated by the legislature. Accordingly, we feel compelled to affirm the order of the trial court dismissing appellants' amended complaint.
>
> Because the Department is rarely made a party to these cases, the question of the agency's standing to waive notice for the Department appears to be a question of great public importance. Therefore, we certify the following question to the Supreme Court of Florida:
>
> > IN A TORT ACTION BROUGHT AGAINST A GOVERNMENTAL AGENCY WHERE THE DEPARTMENT OF INSURANCE IS NOT MADE A PARTY, CAN THE STATUTORY REQUIREMENT OF NOTICE TO THE DEPARTMENT CONTAINED IN SECTION 768.28(6) BE WAIVED BY CONDUCT OF THE DEFENDING AGENCY?

SUMMARY OF ARGUMENT

Where, as in the case at bar, the governmental subdivision has been given notice of and, in fact, has been defending a suit filed within the statutory period, the failure to give notice to the Department of Insurance (an unrelated governmental entity) should not bar the plaintiff's cause of action.

In the alternative, the requirement of notice to an unrelated agency which deprives an injured party of access to the Florida courts is unconstitutional since it violates the due process and equal protection clauses of the Florida and the U.S. Constitutions (Florida Constitution Article I Sections 2 and 9, U.S. Const. amend. XIV §1) and violates the Florida Constitutional right to access to the courts (Florida Constitution Article I, Section 21).

ARGUMENT

POINT I

THE STATUTORY REQUIREMENT OF NOTICE TO THE DEPARTMENT OF INSURANCE CONTAINED IN 768.28(6) CAN BE WAIVED BY THE DEFENDING AGENCY.

Section 768.28(6) of the Florida Statutes is a section of the Insurance Code of Florida which deals with suits against municipalities and their agents or governmental subdivisions of the state. It is not a statute which focuses upon or deals with the liability of hospitals. In fact, until the decision of the Fourth District Court of Appeal on April 10, 1985 in the case of ELDRED v. NORTH BROWARD HOSP. DIST., 466 So.2d 1211 (Fla. 4th DCA 1985), no Florida court had determined that hospitals were even

the type of governmental agency intended to be included within §768.28. Responding to the Fourth District's certified question, this Court finally so determined in November 1986 in ELDRED v. NORTH BROWARD HOSP. DIST., 498 So.2d 911 (Fla. 1986).

Under §762.28, an action may not be maintained against a governmental agency or subdivision, except for a municipality, unless notice is given to the agency or subdivision and also to the Department of Insurance. It is clear that under the terms of the statute, the Department of Insurance is not intended to be a defendant nor to have any role in the defense of the case. Rather, as subsection 3 of the statute provides the defending agency simply may, at its discretion, request the assistance of the Department of Insurance in the consideration and settlement of a claim. While the statute does not explain why (except for municipalities) the failure to give notice to the Department of Insurance is a bar to an action against an agency or subdivision, it is believed that the purpose of such notice is to provide the Department of Insurance with statistical information, but that it is not in any way involved with respect to the defense of any litigation.

The case law emphasizes that the Department of Insurance is not a proper party to any lawsuit against a state agency or subdivision. As shown by an affidavit filed by the Department in the case of LEVINE v. DADE COUNTY SCHOOL BOARD, 442 So.2d 210 (Fla. 1983), the Department has no financial interest in the outcome of suits brought against an agency of the state and has no role or function in the defense of those claims. Under the

Department's own affidavit, its role was clearly limited to gathering information, keeping records and using that information to report to the legislature from time to time. Obviously, the gathering and reporting of information to the legislature is no reason to bar legitimate claims against state agencies who have had proper notice of the claims and have been sued within the specified statutory period.

In WHITNEY v. MARION COUNTY HOSPITAL DISTRICT, 416 So.2d 500 (Fla. 5th DCA 1982), the Department of Insurance, when notified of the claim, "disclaimed any interest in the matter".

The Department of Insurance is not a necessary party to the litigation. It has no liability arising out of the actions of any other state agency or subdivision. The only entity that has standing to raise the lack of notice defense is the state agency whose conduct caused the injury, and who is the actual defendant in the lawsuit. Notice to the Department of Insurance should not be a condition precedent to suing the Medical Center, since it is not a party to the lawsuit in the first place.

Where notice has been given to a state agency, but the state agency has sought to avoid liability to injured parties solely on the basis that notice was not given to the Department of Insurance, the appellate courts of Florida have found that the state agency's conduct can waive the notice requirements of §768.28(6) for itself and for the Department of Insurance.

The closest case factually to the case at bar was MELI v. DADE COUNTY SCHOOL BOARD, 490 So.2d 120 (Fla. 3d DCA 1986) where

the plaintiff gave written notice of the accident and the claim to the school board and its insurer but had not, according to the school board, provided notice to the Department of Insurance in a timely manner.

After giving notice to the school board, the insurer sent the plaintiff's attorney a letter indicating that the claim was being investigated. Thereafter, the insurer told the plaintiff's attorney that the investigation was complete and the insurer was interested in settling. Negotiations resulted in a tentative settlement but then after the three year statutory notice period expired, the school board's insurer refused to settle.

The plaintiff's attorney gave notice to the Department of Insurance before filing suit, but the notice was after the three year period. The trial court agreed with the school board and dismissed the action because of failure to give the Department of Insurance timely notice.

The Third District reversed holding that a question of fact existed as to whether the failure to give notice to the Department of Insurance within the three year period had been waived by the school board. The court relied upon RABINOWITZ v. TOWN OF BAY HARBOUR ISLAND, 178 So.2d 9 (Fla. 1965) where this Court had before it the issue of whether a municipality could be estopped to assert as a defense that the claimant had failed to give formal notice of a claim as required by the town charter. The municipality had direct notice of the claim, and had conducted itself so as to lead the claimant to believe that

formal notice would not be necessary. The holding of that court was that:

> [W]hen responsible agents or officials of a city have actual knowledge of the occurrence which causes injury and they pursue an investigation which reveals substantially the same information that the required notice would provide, and they thereafter follow a course of action which would reasonably lead a claimant to conclude that a formal notice would be unnecessary, then the filing of such a notice may be said to be waived. If the claimant, as a result of such municipal conduct, in good faith fails to act, or acts thereon to his disadvantage, then an estoppel against the requirement of the notice may be said to arise.

The court distinguished the cases relied upon by the School Board, LEVINE v. DADE COUNTY SCHOOL BOARD, 442 So.2d 210 (Fla. 1983), and MROWCZYNSKI v. VIZENTHAL, 445 So.2d 1099 (Fla. 4th DCA 1984), since in those cases no issue of waiver or estoppel had been raised. Those are the very cases relied upon by the Medical Center in this case.

Other waiver by the agency cases are HUTCHINS v. MILLS, 363 So.2d 818 (Fla. 1st DCA 1978) holding that state agencies may waive the notice requirements of 768.28(6) without distinguishing between notice to the state agency or the Department of Insurance; CITY OF PEMBROOK PINES v. ATLAS, 474 So.2d 237 (Fla. 4th DCA 1985) and in IN RE: FORFEITURE OF 1978 GREEN DATSUN PICK-UP, 475 So.2d 1007 (Fla. 2d DCA 1985).

In McSWAIN v. DUSSIA, 499 So.2d 868 (Fla. 1st DCA 1986), a hospital first raised the defense of failing to notify the Department of Insurance under §768.28 in a motion to dismiss filed two years after filing a motion to dismiss on other

grounds, and after the three year notice period had expired. The trial court granted summary judgment in favor of the hospital on the basis that the notice requirement could not be waived.

The First District reversed the summary judgment holding that failure to give notice to the Department of Insurance could be waived by the state agency since the requirement of giving notice to the Department of Insurance was a condition precedent to bringing suit against the state agency and stated that:

> Failure to give the requisite notice (to the Department of Insurance) may be waived by the hospital authority.

The court distinguished this Court's decision in LEVINE v. DADE COUNTY SCHOOL BOARD, supra, "because it did not decide any question of waiver".

The factors in this case show that the Medical Center waived notifying the Department of Insurance. For four years it defended the case on the merits and then only raised the issue of notice after the time for giving notice had expired. This Court should not permit such conduct particularly when the Medical Center had full knowledge of all of the facts.

POINT II

> THE NOTICE REQUIREMENT OF SECTION 768.28(6) IS UNCONSTITUTIONAL AND VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF BOTH THE U.S. AND FLORIDA CONSTITUTIONS AS WELL AS THE RIGHT TO ACCESS TO THE COURTS FOR THE REDRESS OF ANY INJURY AS REQUIRED BY THE FLORIDA CONSTITUTION.

One of the purposes of §768.28 was to further the philosophy of the Florida Constitution so that all governmental entities

would be treated equally and have uniform liability by eliminating inconsistencies in the case law as to the application of governmental liability. CAULEY v. CITY OF JACKSONVILLE, 403 So.2d 379, 385 (1981). The purpose of notice of claim provisions in various state statutes similar to §768.28 is to give the state agency or governmental entity notice of injury in order to allow investigation of the facts, to determine if there is liability in order to make a prompt settlement of claims or prepare for suit, to prevent fraud, to prevent needless litigation and to save costs and expenses. 59 ALR 3d 93 §2, Modern Status of the Law as to Validity of Statutes or Ordinances Requiring Notice of Tort Claims Against Local Governmental Entities; Also see BROOKS v. CITY OF MIAMI, 161 So.2d 675 (Fla. 3d DCA 1964).

Section 768.28 carries out these purposes by allowing the Medical Center or defending state agency to timely investigate a claim, determine liability, settle a claim if appropriate and avoid the costs of unnecessary litigation or prepare for litigation. While notice to the Medical Center under §768.28(6) carries out this intent, notice to the Department of Insurance does not.

Although the majority of state statutes which require notice to carry out certain objectives have been held to be constitutional, where the legislature has passed statutes which are similar to §768.28 and require notice to an unrelated governmental agency, the courts have found such statutes are a trap and unconstitutional. In ERNEST v. FALER, 697 P.2d 870, 871 (Kan. 1985), where the plaintiff was damaged by chemical drift

due to aerial application of pesticides, a Kansas statute which is similar to §768.28, provided in part as follows:

> In order to maintain a civil action, a person damaged from pesticide application shall have filed with the county attorney of the county in which the damage occurred, a written statement, on a form prescribed by the secretary...(emphasis supplied)

The statute goes on to provide that the county attorney will notify those who may be liable for the loss and send a copy of the statement to the Secretary of Agriculture.

The plaintiff notified the Secretary of Agriculture, the pesticide applicator, and the adjoining land owner but did not notify the county attorney. The Department of Agriculture examined the plaintiff's property and took samples rendering a report showing the presence of the pesticide on plaintiff's property. The plaintiff then filed suit against the aerial applicator for negligent spraying. The aerial applicator moved for summary judgment on the basis that the plaintiff had failed to notify the county attorney. The trial court dismissed the suit.

The Kansas Supreme Court reversed finding that the statute violated both due process of law and equal protection of law stating:

> The statute now before us, in our judgment, creates an unreasonable barrier and impediment to a civil remedy which simply is not fair and reasonable under the circumstances. In reaching this conclusion, we have considered the following factors. In the first place, the requirement that an injured person file a statement with the

> county attorney within 60 days after the date the pesticide damage is discovered does little, if anything, to achieve the legislative purpose. We certainly agree with the defendant that the Kansas pesticide law was enacted by the legislature in order to protect the public and to regulate pesticide applicators because of the serious consequences that can and have resulted from negligent application. There is certainly an advantage to the public for the applicator and the secretary of agriculture to be promptly notified as soon as possible after pesticide damage has occurred. In this particular case, the plaintiff promptly gave notice to the secretary of agriculture, who immediately conducted tests on the plaintiff's property and found the presence of a chemical pesticide. But the requirement of serving a notice on the county attorney would seem to us to be a vain and useless act and clearly a trap for the unwary. (emphasis original) 697 P.2d at 876-77
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> * * *
>
> The statute places an unreasonable impediment and barrier in the path of an injured citizen who seeks his remedy by due course of law. K.S.A. 2-2457 [The Pesticide Statute] violates constitutional requirements of due process of law and equal protection of the law. 697 P.2d at 879

As pointed out by this Court in JOHNS v. MAY, 402 So.2d 1166, 1169 (Fla. 1981), the test to determine if a statute violates due process is:

> [W]hether it bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive.

The requirement of notice to an agency which has no interest in the litigation or its outcome, which serves no legitimate purpose for carrying out the intent of the statute and does not

bear "a reasonable relation to a permissible legislative objective" is in violation of due process and equal protection.

The Kansas Supreme Court in ERNEST also found that the requirement of notice to an unrelated entity violated the Kansas constitutional provision providing access to the courts, and stated:

> The right of the plaintiff involved in this case is the fundamental constitutional right to have a remedy for an injury to person or property by due course of law. The right is recognized in the Kansas Bill of Rights, §18, which provides that all persons, for injuries suffered in person, reputation or property, shall have a remedy by due course of law, and justice administered without delay. 697 P.2d at 874.

The Florida Constitution Article I, Section 21 also guarantees to Florida citizens access to the courts and provides that:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Where this fundamental right is impinged upon by a legislative statute, the State must have a compelling reason for the law. SOTTO v. WAINWRIGHT, 601 F.2d 184, 191 (5th Cir. 1979).

Clearly, the plaintiffs' rights were impinged in this case where the wrongdoing agency, the Medical Center, knew from the very day of the injury to this Plaintiff that it had a potential liability for its conduct. Notice was given to the Medical Center, mediation proceedings were initiated and liability denied and this lawsuit was filed and discovery undertaken all within the three year statutory period for filing such suits. To bar

the Plaintiffs' fundamental right to have access to the courts or redress for their injury because they did not give notice to a totally unrelated agency, the Department of Insurance, is in direct violation of The Florida Constitution Article I, Section 21.

CONCLUSION

Florida Statute, §768.28, as it has been interpreted by the trial and appellate courts to bar an injured person's access to the Florida courts merely because of failure to notify an unrelated entity, the Department of Insurance, is unconstitutional.

In any event, the Medical Center's conduct in defending the claim should be found to be a waiver of the notice requirement as to not only itself, but also the Department of Insurance. The Medical Center had actual knowledge of and defended this lawsuit for four years. It failed to raise the easily correctable notice requirement within the three year notice period. In fact, the Medical Center negotiated settlement of the case both prior to, and subsequent to, the running of the three year period. These facts should foreclose the Medical Center from raising the notice requirement as a bar after the three year period has run. This Court should either find the notice requirement to the Department of Insurance was waived by the Medical Center or that it is unconstitutional because it violates due process, equal protection and the Florida Constitutional guarantee of access to the courts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 24TH day of FEBRUARY, 1988, to: WILLIAM ZEI, ESQ., 633 S.E. Third Avenue, Suite 300, Ft. Lauderdale, FL 33301; and JOHN W. MAURO, ESQ., P.O. Box 14126, Ft. Lauderdale, FL 33301.

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