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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 RESPONDENT ON THE MERITS

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PREFACE

This is the brief of the Respondent pertaining the Petitioners' request for review of a question certified by the Fourth District Court of Appeals as being a question of great public importance.

Petitioners were the Plaintiffs below and the Respondent was the Defendant below. The following symbols will be used:

(R) - Record-on-Appeal

(SR) - Supplemental Record-on-Appeal

STATEMENT OF THE CASE AND FACTS

The Respondent objects to the Petitioners' Statement of the Case and the Facts in that the Petitioners' Statement contains matters which are not entirely complete and includes other matters which are not necessary for this Court's consideration in the resolution of the question certified. Specifically, the Respondent objects to any reference of the particular alleged negligence or alleged injury sustained by the Plaintiff as such matters have nothing to do with the Statement of the Case and Facts as necessary for this Court to make its determination on the appeal. The Respondents' Statement of the Case and Facts is as follows:

In April 1980, the Plaintiffs filed a complaint for medical malpractice against the Respondent based on alleged negligence occurring in October of 1978.

The Hospital filed its answer in May of 1980. Contrary to the Petitioners' assertion in its Statement of Facts, the Defendant's answer was not in any way limited in its reference to the sovereign immunity defense. In fact, the specific answer was as follows:

> Further answering, the Defendant, BROWARD GENERAL MEDICAL CENTER, alleges that as a Division of the State of Florida, it is entitled to governmental immunity pursuant to F.S. 768.28. The Defendant pleads that immunity along with the other provisions of the Florida Statutes as a limitation and a defense to the above-captioned matter. (R. 5-6)

The Hospital District claimed immunity pursuant to the whole Statute with all of its provisions, not just selected sections of this Statute, as the Petitioners' Statement of the Case and Facts would imply.

On December 8, 1983, the Supreme Court issued its opinion in Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983). Pursuant to the Supreme Court's decision, the Hospital District filed a Motion to Dismiss in April of 1984 alleging that the Plaintiffs had failed to give notice to both Medical Center and the Department of Insurance as required by the Florida Statute. (SR 50-52) The Trial Court granted the Hospital District's Motion to Dismiss with leave to Plaintiffs to amend their complaint. (R. 7)

The Plaintiffs filed an amended complaint. (R. 8-10) In this complaint, the Plaintiffs alleged that the Hospital District had in fact been given actual notice of the claim and that the Hospital District answered and defended prior to the commencement of this lawsuit. However, the Plaintiffs could not and did not allege that the Department of Insurance had actually received notice of this claim from the Plaintiffs, as required by the Statute. The Plaintiffs' amended complaint alleged waiver of this requirement by the actions of the Hospital District.

The Hospital District moved to dismiss the Plaintiffs' amended complaint, arguing that even assuming that notice may have been given to the Hospital District within the confines of the medical mediation, the Plaintiffs could not and did not allege that proper notice had been given to the Department of Insurance. (R. 37-46) The Trial Court granted the Motion to Dismiss, finding that the Plaintiffs had failed to comply with the notice provisions of §768.28 F.S. (R. 47-48)

The Plaintiffs' appealed to the Fourth District Court of Appeal which affirmed the lower court. The Fourth District did not hold that the Hospital District had waived notice as to itself. Rather, the Fourth District only stated that "The Hospital District may well have waived notice" that it ws entitled to receive. However, the Fourth District stated that it found no authority for the proposition that the Hospital District could waive the required notice to the Department of Insurance as mandated by the legislature. Therefore, it was

unnecessary for the Fourth District to make the determination as to whether the Hospital District actually waived notice in this case.

The Fourth District did certify the following question to the Supreme Court:

> 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 §768.28 (6) be waived by the conduct of the defending agency?

SUMMARY OF ARGUMENT

The Respondent, North Broward Hospital District d/b/a Broward General Medical Center, is entitled to all of the rights and benefits of §768.28, Fla. Stat. This Statute is clearly constitutional.

The Statute mandates that prior to any suit being brought against the Hospital District, the plaintiff must comply with the notice requirements contained in Subsection (6). The notice provision sets forth that the Department of Insurance must be so notified of the potential claim. It is clear in this matter that the Plaintiff failed to so notify the Department of Insurance and therefore failed to comply with the provisions of the Statute.

There is no authority for the proposition that one entity (Hospital District) can waive the rights of another entity (Department of Insurance). This is particularly true in matters such as this where the Department of Insurance can be made a party to the action pursuant to the terms of the sovereign immunity statute. Therefore, the trial court's dismissal of the amended complaint, later affirmed by the Fourth District Court of Appeal, should be affirmed by the Supreme Court and the certified question should be answered in the negative.

ARGUMENT

POINT I

THE NORTH BROWARD HOSPITAL DISTRICT, AS A SPECIAL TAX DISTRICT OF THE STATE OF FLORIDA, IS ENTITLED TO ALL OF THE RIGHTS AND BENEFITS OF §768.28, FLA. STAT.

The Supreme Court in Eldred v. North Broward Hospital District, 498 So.2d 911 (Fla. 1986) conclusively established that the North Broward Hospital District, as a special taxing district hospital and a constitutionally established governmental entity, was an "independent establishment of the state" entitled to the protection of §768.28, Fla. Stat.

POINT II

§768.28, FLA. STAT. IS CONSTITUTIONAL, SPECIFICALLY INCLUDING THE NOTICE PROVISION TO THE DEPARTMENT OF INSURANCE.

§768.28 Fla. Stat. is a granting and extension of rights to the general public for actions against governmental entities. Recovery against a public body now exists where historically there was no such right. See: Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981) for excellent discussion of the history of sovereign immunity. Further, in certain cases the time to being the action against a governmental entity is extended beyond the time in which the same cause of action would have to be brought against a private entity. For example, the statute of limitations for wrongful death and medical malpractice is two years against private parties. These identical causes of action may be brought within four years if

the defendant is a public body. Whitney v. Marion County Hospital District, 416 So.2d 500 (Fla. 5th DCA 1982) and Beard v. Hambrick, 396 So.2d 708 (Fla. 1981).

In return for this waiver of sovereign immunity and extended statute of limitations period for certain actions, the Florida legislature has placed certain duties and limitations on claimants who bring actions against governmental entities. One such limitation is the requirement of notice as set forth in Subsection (6) of the waiver of sovereign immunity statute. This court has already specifically addressed the notice provision of §768.28 and upheld the notice requirement. Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979) and Levine.

The Petitioner asks this Court to now overrule its prior decisions and state that this notice provision is somehow unconstitutional because there does not appear to be any substantive basis for the requirement. However, it is to be noted that within the Statute itself, the Department of Insurance's role is said to include "the consideration, adjustment and settlement" of any claim. To do this, the Statute provides that the Department of Insurance is to receive notice of the claim and later notice of the suit. In fact, Subsection (7) permits the Department of Insurance to even file a responsible pleading within thirty days and thereby become a party to the action if it chooses to do so. This is certainly involvement in the litigation justifying the requirement of notice to the Department of Insurance.

In any event, this Supreme Court in the Levine case addressed that specific point.

> In the face of such a clear legislative requirement, it would be inappropriate for this Court to give relief to the Petitioner based on his or our own beliefs about the intended function of the Department of Insurance in the defense of suits against school districts. Our views about the wisdom or propriety of the notice requirement are irrelevant because the requirement is so clearly set forth in the Statute. (Cites omitted) Levine, at 212.

Based on the above, the Plaintiffs' allegation that the notice requirement is unconstitutional is not founded on any authority and in fact is directly contradictory to prior decisions of this very Court.

POINT III

THE STATUTORY REQUIREMENT OF NOTICE TO THE DEPARTMENT CONTAINED IN §768.28 (6) CANNOT BE WAIVED BY THE CONDUCT OF THE DEFENDING AGENCY.

A. THE DEPARTMENT OF INSURANCE IS A PROPER PARTY TO A SUIT INVOLVING THE APPLICATION OF §768.29 (6). FLA. STAT.

Although the Department of Insurance may not be a necessary party to an action where a State agency is sued pursuant to §768.28, a reading of the statute indicates that the Department of Insurance is a proper party to such a suit if either joined directly by a plaintiff or by Motion to Intervene by the Department of Insurance itself.

The authority for this lies within the statute itself. Subsection 3 of the statute provides:

> Except for municipality, the affected agency or subdivision may, at its discretion, request the assistance of the Department of Insurance in the consideration, adjustment, and settlement of any claim under this act.

Subsection 6 (a), the notice provision of the act, provides that before suing the state or one of its agencies, the claimant must present his claim in writing to not only the state or its agency, but to the Department of Insurance. Subsection 7 of the same act goes on to say:

> In actions brought pursuant to this section, process shall be served upon the head of the agency concerned and also, except as to the defendant municipality, upon the Department of Insurance; and the department or the agency concerned shall have 30 days within which to plead thereto. (Emphasis supplied.)

This particular subsection provides that service of process "shall be served" upon the Department of Insurance in all tort claim actions except those where a municipality is the defendant governmental body. If the Department of Insurance is entitled to receive the actual service of process, then the Department of Insurance is certainly entitled to respond to the service of process by filing an answer or other responsive pleading and thereby becoming a party to the action. In fact, this section states that "the department or the agency concerned shall have 30 days to plead thereto."

There is no question in reading the subsection and the entire statute that the word "department" refers to the Department of Insurance.

While it is true that there is no appellate decision that specifically makes reference to the fact that the Department of Insurance is a proper party, there are no decisions which say that it is not. Indeed, if the Department of Insurance's role includes "the consideration, adjustment and settlement" of any claim, then the Department of Insurance must have the ability to monitor actions filed against that State. The statute provides that the Department of Insurance is to receive Notice of the Claim and later Notice of the Suit. The latter part of Subsection (7) permits the Department of Insurance to file a responsive pleading within 30 days and thereby become a party to the action if it chooses to do so.

In most cases the Department of Insurance simply disclaims any interest in the matter and does not choose to directly participate. Whitney v. Marion County Hospital District, 416 So. 2d 500 (Fla. 5th DCA). However, none of these cases state that it would be inappropriate for the Department of Insurance to be a party to the lawsuit. This would be much in the same way as the Florida Patient's Compensation Fund is joined in lawsuits based on its monetary interests in the case, albeit as a necessary party based on the terms of its particular statute.

There is little question that the Department of Insurance has a vested interest in all actions brought pursuant to §768.28. Pursuant to Subsection (5) of the statute, any judgment claimed or rendered in excess of the monetary limitations of this section "may be reported to the legislature...(and) may be paid in part or in whole... by further act of the legislature."

Further, it is the responsibility of the Department of Insurance to monitor actions filed against the State so as to allow it to report to the legislature the necessary information regarding claims being made against the State and its agencies and subdivisions.

Based on the above, the Department of Insurance is clearly a proper party to a suit involving the application of §768.28.

B. THE DEPARTMENT OF INSURANCE AND THE STATE AGENCY BOTH HAVE STANDING TO RAISE THE QUESTION OF LACK OF NOTICE TO THE DEPARTMENT OF INSURANCE.

Certainly, the Department of Insurance has standing to raise the issue of lack of notice.

However, in instances such as this where the Department of Insurance simply has not received the appropriate notification of the claim or the lawsuit as dictated by the Statute, then the right to raise this lack of notice also belongs to the state agency which is involved in the lawsuit. If this were not the case, then the notice provision of the Statute would be rendered a nullity.

The Supreme Court in Commercial Carrier Corporation v. Indian River County, 371 So. 2d 1010 (Fla. 1979) and Levine v. Dade County School Board, 442 So. 2d 210 (Fla. 1983) held that notice pursuant to Subsection (6) not only must be given before suit can be maintained, but also the Complaint must contain an

allegation of such notice. The Supreme Court's interpretation is based on the straight forward language of the notice provision of the Statute.

> (6) An action shall not be instituted on a claim against the State or one of its agencies or subdivision unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality, present such claim in writing to the Department of Insurance, within three years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing.

(Emphasis supplied.) If the State or its agencies were not allowed standing to challenge the failure to raise such notice, then this particular provision of the Statute would be rendered a nullity. The plaintiff could simply ignore this provision and the State and its agencies would be powerless to raise the failure to give such notice. As the statute and the above-cited cases indicate, the notice is required before any action can be brought.

Therefore, under §768.28, the state agency, in addition to the Department of Insurance has standing to raise the question of lack of notice to the Department of Insurance.

C. UNDER THE FACTS OF THIS CASE, THE DEFENDING AGENCY DID NOT WAIVE THE NOTICE REQUIREMENT AS TO ITSELF AND FURTHER DID NOT AND COULD NOT WAIVE THE NOTICE REQUIREMENT AS THE DEPARTMENT OF INSURANCE.

To assert that a state agency by its conduct could somehow waive the notice requirement directed to the Department of Insurance is to maintain that one entity is capable of waiving the rights of another entity.

Such a principle has never been a part of law or equity. Only recently the First and Third District in distinguishable cases ave attempted to create such legal fiction in order to avoid what they considered a harsh result.

However, it is to be noted that harsh or adverse results are a part of any system which prides itself on consistency and fairness to all based on the promulgation and following of certain rules. In this case, the rules are found in §768.28 and these are the rules that the plaintiff did not follow in this case. Further, these are rules that need to be strictly followed and strictly interpreted by the courts of this state as they were promulgated to provide a limited waiver of sovereign immunity. Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983). These rules were not followed by the plaintiff in the instant case and, therefore, this court, strictly interpreting those rules as required by the controlling precedent of this state, must now bar the continued maintenance of this suit by the plaintiff.

The Plaintiff has cited three decisions in which the First and Third Districts have purportedly held that the state agency may waive the notice requirement as to the Department of Insurance. McSwain v. Dussia, 400 So. 2d 868 (Fla. 1st DCA, 1986); Meli v. Dade County School Board, 490 So. 2d 120 (Fla.

3rd DCA, 1986); and Bryant v. Duvall County Hospital Authority, 502 So. 2d 459 (Fla. 1st DCA 1987). In addition to the fact that these decisions are easily distinguishable from the case at bar, the very principle of law that they attempt to establish is nothing more than a legal fiction and is not based upon any controlling precedent. In fact, in order for these decisions to have any validity at all, one must make the quantum leap that somehow one entity, without express or implied authority, can somehow waive the legal rights of another entity. None of these three decisions cite any precedent for this particular principle of law since no such legal precedent exists.

The two First District cases of Bryant and McSwain and the Third District case of Meli, all have to overlook or explain away the Supreme Court's Levine decision. They do so by simply stating that the Supreme Court never discussed the issue of waiver in its decision. Therefore, all three of these decisions make an assumption that if the Supreme Court in Levine had considered waiver, the case would have been decided differently.

First, this assumption is contradictory to the clear language of Levine.

> Having failed to give the required notice within three years of the incident, Levine was unable to amend his Complaint to allege that the notice had been timely given. (Emphasis supplied.)

Levine, at 211. If waiver was an issue that could have changed the outcome of this decision, the Supreme Court would have so noted this in its decision by permitting the plaintiff the opportunity to amend his Complaint to either allege that notice

had been timely given or that notice was not necessary because of conduct of the state agency. Instead, the Supreme Court went out of its way to clearly state that notice to the Department of Insurance within the three year period was mandated by the statute. This is regardless of the role that the Department of Insurance might take in the claim or the lawsuit. The Court simply could not "ignore the plain language of the statute." Levine, at 212. The Court then goes on to provide, in the strongest language possible, the holding of the case.

> §768.28 (6) clearly requires written notice to the Department within three years of the accrual of the claim before suit may be filed against any state agency or subdivision except a municipality. Because this subsection is part of the statutory waiver of sovereign immunity, it must be strictly construed.

(Emphasis supplied.) Levine, at 212. Contrary to what the First and Third District have assumed, this particular language does not leave open any question as to the requirement of notice or that this notice to the Department of Insurance can somehow be waived by the actions of a separate entity. The door is not even open a crack.

Even assuming that there is any validity to the decisions of the First and Third District Court of Appeals, the facts of those cases bear no resemblance to the facts of the case at bar.

In Meli, the conduct of the state agency led the plaintiff to not file suit until more than three years had passed from the date of the incident. In that case, the state agency kept

representing to the plaintiff that a settlement would be made until after the three year period had lapsed. By that time, it was impossible for the plaintiff to give notice to the Department of Insurance within the three year period as mandated by the Statute. In the instant case, the plaintiff filed its lawsuit a year and a half after the incident. In filing its answer, the Hospital District made specific reference to §768.28 and the fact that the Hospital District would rely on that statute as a defense. Therefore, all the plaintiff had to do was to read that Statute and it would have had another year and a half in order to give notice to the Department of Insurance. The plaintiff failed to do so.

In McSwain, the plaintiffs alleged that medical malpractice occurred in June of 1980. In August of 1982, the defendants filed a Motion to Dismiss alleging as the only ground that the action was barred by §768.28 (9) (a). Over two years later and, therefore, beyond the three year period during which notice could be given to the Department of Insurance, the defendant filed another Motion to Dismiss alleging for the first time that proper notice had not been given. Again, it was not until after the three year period had expired that the state agency indicated that it was going to rely on all of the provisions of 768.28. Up until that point, the state agency had limited its reliance to a Motion to Dismiss specifically directed toward the joinder of an individual doctor without allegations of bad faith (§768.28 (9).

In Bryant, the plaintiffs alleged in their original complaint that they had complied with Florida Statute 768.28 with notice having been given to the defendant hospital authority. In its answer, the defendant, raised as a defense that its "liability is limited by §768.28, Florida Statutes to $50,000 per person, per claim or a maximum of $100,000 per occurrence." Other then this specific reference in the answer to a limitation of monetary liability, there was no reference to a reliance on the provisions of §768.28 in general or specifically as to any other matter. The issue was not raised for the first time until beyond the three year notice time. By that time, the plaintiffs could not allege compliance with the statute nor could they comply. Again, this factual pattern bears no resemblance to the case at bar. First, the plaintiffs never alleged in their original complaint that notice had been given. Second, despite this failure of the plaintiff to allege notice, the defendant Hospital District in its first responsive pleading (its Answer) raised specifically §768.28 and the fact that the Hospital District was relying on that Statute. In fact, the specific language contained in the Hospital District's May, 1980 Answer is as follows:

> Further answering, the Defendant, Broward General Medical Center, alleges that as a division of the State of Florida, it is entitled to governmental immunity pursuant F.S. 768.28. The Defendant pleads that immunity along with other provisions of the Florida Statutes as a limitation and a defense to the above-captioned matter.

(R. 5-6). The plaintiff had a year and one half to read the statute and to send the appropriate notice to the Department of Insurance. Nothing within the conduct of the Defendant Hospital District can be pointed to as even remotely waiving this requirement. To argue such would be to argue that because a defendant merely alleges that a claim is barred by the statute of limitations in its answer, that it somehow is not entitled to a summary judgment on that issue later because it should have raised such a defense in a motion to dismiss at the very outset of the case.

The Fourth District has already upheld the requirement of the notice provision. Mrowczynski v. Vizenthal, 445 So. 2d 10999 (Fla. 4th DCA 1984). In that action against a County, the case is replete with references to contact between the plaintiff and the County within the three year period after the accident. Yet, because the plaintiff failed to notify the Department of Insurance within the three year period, the Fourth District Court of Appeal upheld a summary judgment on behalf of the County. The Summary Judgment aspect of this case is significant since this parallels the action taken by the Hospital District in the instant case in having this case dismissed after the passage of the three year period of time when it was apparent that the plaintiff had failed to notify the Department of Insurance within the three year period. The Fourth District, in Mrowczynski did not hold or even consider that the County somehow waived the requirement of notice to the Department of Insurance by its course of dealings with the plaintiff during

the pre-suit period. Certainly, the County knew of the claim and according to the opinion was involved in investigation and including taking a recorded statement from the plaintiff.

The Petitioner cites the decisions of City of Pembroke Pines v. Atlas, 474 So.2d 237 (Fla. 4th DCA 1985) and Rabinowitz v. Town of Bay Harbor Island, 178 So.2d 9 (Fla. 1965). However, it should be noted that both decisions deal with municipalities and under the clear provisions of §768.28 (6), notice to the Department of Insurance is not required in matters involving municipalities. Further, Rabinowitz predated the enactment of §768.28.

In the instant case, even if one would take the tenuous position that one entity can waive the rights of another, it is clear that the conduct of the Hospital District did not constitute any waiver. The plaintiff filed its lawsuit within a year and one half after the cause of action arose. The Hospital District, in its Answer, advised the plaintiff that it would be relying on its sovereign immunity and the provisions of §768.28. The plaintiff had ample opportunity to read the statute and to comply by sending notice to the Department of Insurance. Not only was notice not sent, but the plaintiff failed to serve a copy of the Complaint and Summons on the Department of Insurance as required by §768.28 (7). Finally, when the three year notice provision had passed, the Hospital District, as it was entitled to do, filed a Motion to Dismiss to

terminate this litigation because the plaintiff had failed to comply with the requirements set forth by the Waiver of Sovereign Immunity Statute.

CONCLUSION

Based on the above authorities, the Respondent, North Broward Hospital District, respectfully requests this Court:

1. To answer the certified question in the negative making it clear that the statutory requirement of notice to the Department of Insurance contained in §768.28 (6) cannot be waived by the defending agency;

2. If not rendered moot by the above, to hold that the actions of the Defendant, North Broward Hospital District, in the instant case did not constitute any waiver by the Hospital District of its own right to notice under the Statute and certainly did not constitute a waiver of any notice to the Department of Insurance;

3. To hold once again that the notice provisions of §768.28 are constitutional.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed March 14, 1988 to: EARL L. DENNY, ESQ., Montgomery, Searcy & Denney, P. O. Drawer 3626, West Palm Beach, FL 33402; EDNA L. CARUSO, ESQ., Suite 4-B, Barristers Building, 1615 Forum Place, Wet Palm Beach, FL 33401; JOHN MAURO, ESQ., Billings, Cochran & Heath, 707 S. E. Third Avenue, Fort Lauderdale, FL; and ELLEN MILLS GIBBS, ESQ., Gibbs & Silverberg, 224 S.E. 6th Street, Fort Lauderdale, FL.

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