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.
_____/

REPLY BRIEF OF PETITIONERS ON THE MERITS

MONTGOMERY, SEARCY & DENNEY, P.A.
Post Office Drawer 3626
West Palm Beach, Fl 33402
and
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
Tel: (305) 686-8010
Attorneys for Petitioners

INDEX

	PAGE
CITATIONS OF AUTHORITY	i
STATEMENT OF THE FACTS	2-3
SUMMARY OF ARGUMENT	3-4
ARGUMENT	4-15
POINT I	
THE STATUTORY REQUIREMENT OF NOTICE TO THE DEPARTMENT OF INSURANCE CONTAINED IN 768.28(6) CAN BE WAIVED BY THE DEFENDING AGENCY.	3-13
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.	13-15
CONCLUSION	15
CERTIFICATE OF SERVICE	15-16

CITATIONS OF AUTHORITY

ARBOGAST v. BRYAN 393 So.2d 606 (Fla. 4th DCA 1981)	10
BRYANT v. DUVALL COUNTY HOSP. AUTHORITY 502 So.2d 459 (Fla. 1st DCA 1987)	9
CITY OF PEMBROKE PINES v. ATLAS 474 So.2d 237 (Fla. 4th DCA 1985)	12
COLONIA PENN CONSTRUCTION, INC. v. CROSLEY 443 So.2d 1030 (Fla. 5th DCA 1983)	9
COMMERCIAL CARRIER CORP. v. INDIAN RIVER COUNTY 371 So.2d 1010 (Fla. 1979)	14
ELDRED v. NORTH BROWARD HOSPITAL DISTRICT 466 So.2d 1211 (Fla. 4th DCA 1985)	2
ERNEST v. FABER 697 P.2d 870 (Kan. 1985)	14
KILPATRICK v. McLUTH 392 So.2d 985 (Fla. 5th DCA 1981)	10

LEVINE v. DADE COUNTY SCHOOL BOARD
442 So.2d 210 (Fla. 1983) 2
McSWAIN v. DUSSIA
499 So.2d 868 (Fla. 1st DCA 1986) 9
MELI v. DADE COUNTY SCHOOL BOARD
490 So.2d 120 (Fla. 3d DCA 1986) 9
MROWCZYNSKI v. VIZENTHAL
445 So.2d 1099 (Fla. 4th DCA 1984) 12
RABINOWITZ v. TOWN OF BAY HARBOR ISLAND
178 So.2d 9 (Fla. 1985) 12
WHITNEY v. MARIAN COUNTY HOSPITAL DIST.
416 So.2d 500 (Fla. 5th DCA 1982) 8

Fla. Stat. §768.28

22 Fla. Jr 2d, Estoppel and Waiver §87 10

STATEMENT OF FACTS

The sequence of relevant events in this case are summarized in order to place the issues in their proper perspective.

In October, 1978 Daniel Menendez contracted meningitis at the defendant Medical Center's neo-natal intensive care unit which resulted in brain damage.

Approximately one year later in December, 1979 a Medical Liability Mediation Claim was filed against the Medical Center on behalf Daniel Menendez. The required notice for the mediation claim was given to the Medical Center.

In April, 1980 suit was filed on behalf of Daniel Menendez against the Medical Center.

In May, 1980 the Medical Center filed an answer which alleged:

> 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 statute as a limitation and a defense to the above captioned matter. (R5-6).

While the Medical Center's Answer pleaded governmental immunity, and its attendant limitation of liability with respect to the Medical Center, it failed to make any mention of the application of the statute to the Department of Insurance. Nor did it claim that the notice requirements of §768.28 had not been met because of a failure to give notice to the Department of Insurance. This omission is significant because when the

Medical Center filed its answer in May, 1980 plaintiffs still had until October, 1981 to give notice to the Department of Insurance in the event such notice was required.

After the time ran for giving notice to the Department of Insurance in this case, this court on December 8, 1983 in the case of LEVINE v. DADE COUNTY SCHOOL BOARD, 442 So.2d 210 (Fla. 1983) held that an action against a school board could not be maintained under section 768.28 where notice had not been given to the Department of Insurance within three years from the date of the cause of action. This was the first case involving interpretation of the requirement of notice to the Department of Insurance to sue governmental entities. The issue of waiver by the school board was not involved.

The first case to decide that a hospital was a governmental entity to which notice to the Department of Insurance may apply was decided on April 10, 1985 three and one-half years after the time ran for giving notice to the Department of Insurance in the present case. In ELDRED v. NORTH BROWARD HOSPITAL DISTRICT, 466 So.2d 1211 (Fla. 4th DCA 1985) the Appellate Court held for the very first time that a hospital such as the Medical Center involved here was the type "governmental agency" intended to be included within the ambit of section 768.28. Again, waiver was not involved.

SUMMARY OF ARGUMENT

Plaintiffs raised two arguments in their brief on the merits. They first argued that the Medical Center's conduct in

defending a medical malpractice claim for four years without raising the notice requirement waived its right to rely on the statutory requirement of notice to the Department of Insurance to avoid its own liability.

In reply, the Medical Center's defense is that it cannot waive the rights of the Department of Insurance. However, the rights of the Department of Insurance are not at issue in this case.

Plaintiff's second argument was that the notice to the Department of Insurance in a medical malpractice case against a hospital is unconstitutional as a violation of due process, equal protection and in depriving the plaintiff of the Florida guaranty of access to the courts.

In response, the Medical Center does not argue or cite any authority upholding the constitutionality of such a notice provision to an unrelated entity.

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

The Medical Center can raise and can waive its right to notice under the statute, as both parties agree. However, that issue is not involved herein as plaintiffs gave notice to the Medical Center. The Medical Center argues that although it has the right to raise lack of notice to the Department of Insurance

as a defense, it has no right to waive the defense of another entity, the Department of Insurance. (respondent's brief pages 5 and 12-14). Certainly, if the Medical Center can raise a defense, it can waive that defense or become estopped to assert it. The Medical Center is the only entity entitled to raise this defense as the Department of Insurance is not a proper party to the litigation.

The Medical Center Can Waive Its Own Rights

While the Medical Center argues that it cannot waive the rights of another entity, (the Department of Insurance), the Medical Center does not explain what rights the Department of Insurance has which the Medical Center is alleged to have waived. The Medical Center can be liable for its malpractice without having the Department of Insurance joined as a defendant in any litigation. The issue in this case is not whether the Medical Center can waive the rights of another entity, the Department of Insurance, but whether the Medical Center has waived its right to raise as a defense to its own liability the notice requirement to the Department of Insurance. The facts clearly show that by its conduct it has.

If Agency "May" Request Assistance It "May" Waive Assistance

The Medical Center claims that under Subsection (3) of the statute, its role includes "the consideration, adjustment and settlement" of any claim. Subparagraph (3) in its entirety states:

> Except for a municipality, the effected 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. (emphasis added)

Under this section, if the effected agency "may at its discretion" request assistance, it necessarily follows that the agency "may" waive that right. In this case, the Medical Center did, in fact, waive the right to any assistance. There is no evidence that the Medical Center ever requested the assistance of the Department of Insurance or that the Department of Insurance could have provided any assistance with regard to this claim even if asked. The Medical Center's brief does not explain how notice to the Department of Insurance could have been of any assistance whatsoever in the "consideration, adjustment, and settlement" of this claim. The Medical Center fully investigated the claim itself and had all the facts from the beginning whereas the Department of Insurance in this medical malpractice case had none.

Standing To Raise Lack Of Notice

After stating at page 5 of its brief that there is no authority for the proposition that the Medical Center cannot waive the rights of another entity, the Medical Center states at page 11 that while it cannot waive the rights of another entity (the Department of Insurance) it has the "right to raise this lack of notice which belongs to the state agency". Assuming the statement at page 11 is accurate, and that the Medical Center

does have "the right to raise this lack of notice", then it must also have the corresponding right to waive its (the Medical Center's) rights with regard to the notice to the Department of Insurance to act as a bar against itself (the Medical Center).

The argument that the Department of Insurance has standing to raise the question of lack of notice to itself may be true (respondent's brief pages, 5, 12) but it is an issue which is not presented by this litigation. As far as we know, the Department of Insurance has never sought to raise any question of lack of notice to it for conduct of another governmental agency in this or any other case. While it is not unreasonable for state agencies such as a Medical Center or the Department of Insurance to be able to raise the lack of notice to itself within any required statutory period, it is clearly not reasonable to have a negligent Medical Center use lack of notice to an unrelated state agency not involved in any way in the wrongdoing, and without liability for the wrongdoing, to avoid its own liability.

The Department Of Insurance Is Not A Proper Party

To bolster its argument that notice to the Department of Insurance cannot be waived by the Medical Center, the Medical Center incorrectly assumes that the Department of Insurance is a proper party to the litigation. The Medical Center states that Subsection (7) of Section 768.28 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".

The Medical Center has misread the statute. Subsection (7) provides:

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

Under the above subsection, though the Department of Insurance must be served with a copy of the complaint being filed against the state agency, it is not contemplated that the Department of Insurance will participate in the litigation as a "party". While the above subsection provides that the "department or the agency concerned" shall have 30 days to plead, this refers to the state "department or agency" being sued. The word "department" as used therein is not capitalized and therefore does not refer to the Department of Insurance. Whenever the "Department of Insurance" is referred to throughout Section 768.28 it is referred to as the "Department of Insurance" and the word "department" is capitalized. Therefore, under Subsection (7) the Department of Insurance is not allowed to file an answer because it is not a party to the lawsuit.

The Medical Center admits that no Florida appellate court has ever indicated that the Department of Insurance is a proper party to a suit against the state under Section 768.28 (respondent's brief, page 10). Rather, the Medical Center simply argues that no appellate decision indicates that it would be "inappropriate for the department of insurance to be a

party". Certainly, both LEVINE, and WHITNEY v. MARIAN COUNTY HOSPITAL DIST., 416 So.2d 500 (Fla. 5th DCA 1982) indicate that the Department is not a proper "party" to litigation against the state or its agencies. In LEVINE, this court referred to an affidavit filed in that case by an official with the Department of Insurance which indicated that the Department of Insurance had no financial interest in the outcome of a suit brought against an agency of the state and had no role or function in the defense of those claims. According to the affidavit, the role of the Department of Insurance in cases "such as this" was limited to gathering information and keeping records about such claims and reporting that information to the legislature from time to time. Likewise, in WHITNEY the court referred to the fact that the case was against a state agency and that the Department of Insurance had been notified of the claim and "disclaimed any interest in the matter".

The fact that the Department of Insurance is involved in the record keeping of claims against the state does not and cannot constitutionally require notice of a claim against the State to be given to the Department of Insurance, a non-party, the failure of which forever bars the plaintiff's claim.

A State Agency May Waive Notice To The Department Of Insurance

The Medical Center makes a weak attempt at trying to distinguish the three Florida cases which have held that a state agency can waive the requirement of notice to the Department of Insurance. McSWAIN v. DUSSIA, 499 So.2d 868 (Fla. 1st DCA

1986); MELI v. DADE COUNTY SCHOOL BOARD, 490 So.2d 120 (Fla. 3d DCA 1986); and BRYANT v. DUVALL COUNTY HOSP. AUTHORITY, 502 So.2d 459 (Fla. 1st DCA 1987). The Medical Center first argues that these cases make the quantum leap that one entity can waive the legal rights of another. However, the rights of the Department of Insurance are not at issue in this case. Furthermore, this statement demonstrates a basic misunderstanding of in whose favor §768.28 provides the defense of lack of notice. The defense can only be raised by a party to the lawsuit, i.e. the state agency. Accordingly, the defense of lack of notice either to the Medical Center or the Department of Insurance belongs to the state agency, not the Department of Insurance and the Medical Center can and has waived that defense. In so doing, the Medical Center is not waiving the rights of the Department of Insurance (which rights are not at issue here), another entity. Rather, it is waiving its own rights.

Case law generally holds that the rights conferred by statute, contract or the constitution may be waived by the beneficiary of such rights. COLONIAL PENN CONSTRUCTION, INC. v. CROSLEY, 443 So.2d 1030 (Fla. 5th DCA 1983). As stated under §768.28 the requirement of notice as a condition precedent to bringing an action against the state or one of its agencies, [and the concomitant right to raise the failure to give that notice as a defense to the action] is a right given the state agency (Medical Center) being sued. The beneficiary of this

statutory prohibition against instituting suit before giving notice is the state agency, not the Department of Insurance. Therefore, it follows that the state agency can waive that right.

The Medical Center incorrectly argues that BRYANT, McSWAIN and MELI were wrong in holding that LEVINE did not involve waiver. In fact, those cases were entirely correct in concluding that LEVINE did not involve waiver. The Medical Center's argument is actually that under LEVINE waiver would not have made a difference in any event because the Florida Supreme Court held that §768.28 must be strictly construed, but strict construction of the language of a statute does not preclude waiver of rights under that statute. Clearly, statutory rights can be waived. KILPATRICK v. McLUTH, 392 S0.2d 985 (Fla. 5th DCA 1981); ARBOGAST v. BRYAN, 393 So.2d 606 (Fla. 4th DCA 1981); 22 Fla. Jur 2d, Estoppel and Waiver §87.

The Medical Center tries to distinguish McSWAIN and BRYANT by arguing that in those cases the state agencies did not allege in their initial answers, that were filed before the three years ran, that they were relying upon the notice provisions of §768.28; whereas, the Medical Center claims that it did do so in this case. In fact, the Medical Center did not allege reliance upon the notice provisions in its answer. It merely alleged that it was relying upon the monetary limitation contained in §768.28 and never raised the notice provisions of the statute until after the three year notice period had run.

Moreover, BRYANT is almost identical to the case at bar and

held that the defendant hospital authority waived notice to the Department of Insurance. Like the Medial Center in this case, the hospital authority in BRYANT raised as an affirmative 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", as here. It did not raise the failure to give notice to the Department of Insurance as a defense. For this reason, the First District found a "waiver" stating:

> It is also undisputed that appellees filed responses to the initial complaint, to the amended complaint, and to the second amended complaint, and in so doing made no reference to the failure to provide written notice to the Department of Insurance. The motion to dismiss predicated on failure of such notice was filed nearly two years after the time appellants could have complied with this provision. We conclude, therefore, that the DCHA's conduct in failing to plead the notice requirement as a defense while at the same time affirmatively asserting entitlement to the section 768.28 limitation of liability, constitutes a waiver of the intention to rely on the notice provision applicable to the Department of Insurance.

Similarly, the answer of the Medical Center here also relied on section 768.28 only in a general manner and did not raise the issue of notice to the Department of Insurance until after the three year notice period had expired. As accurately pointed out by the Medical Center in this case (respondent's brief page 17) "by that time, the plaintiffs could not allege compliance with the statute nor could they comply."

The facts in BRYANT and in this case are the same. The fact that the Medical Center pleaded that "it is entitled to

governmental immunity pursuant to F.S. Section 768.28" does not raise as an affirmative defense that it intended to rely on a failure to give notice to an unrelated entity, the Department of Insurance. By the time the Medical Center specifically raised as a defense lack of notice to the Department of Insurance in April 1984, the three year notice period had expired in October, 1981.

The Medical Center relies on MROWCZYNSKI v. VIZENTHAL, 445, So.2d 1099 (Fla. 4th DCA 1984) but fails to point out that the case did not concern waiver. It was for that very reason that the case was distinguished in MELI. MROWCZYNSKI clearly does not stand for the proposition that notice to the Department of Insurance cannot be waived by the state agency.

The Medical Center attempts to distinguish 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. 1985) because municipalities were involved. Regardless, those cases demonstrate that the notice requirement can be waived by a governmental agency. Although RABINOWITZ predates section 768.28 that case was relied upon by the Third District in MELI.

"Pride" And "Harsh" Or "Adverse Results"

The Medical Center (which is charged with malpractice and causing brain damage to a baby who was entrusted to its care in its neo-natal intensive care unit) argues that this court should not consider the "harsh or adverse results" of the 4th District's decision because such results are "a part of any

system which prides itself on consistency and fairness to all based on the promulgation and the following of certain rules". No Florida case urges "consistency" to promote "harsh or adverse results". We know of no judicial system which proudly causes "harsh or adverse results" in the name of "consistency and fairness". The Medical Center relies upon this court's holding in LEVINE as advancing the doctrine of a "harsh and adverse" result in the name of consistency. LEVINE does not so hold. LEVINE did not deal with waiver, and notice to the Department of Insurance was not challenged on constitutional grounds in LEVINE.

From the cases cited in both briefs before this court, it is clear that the Florida Appellate Courts have been troubled by the unjust results which have flowed from a narrow interpretation of LEVINE. It is submitted that this court never intended to have its opinion in LEVINE interpreted so as to create "harsh or adverse" results.

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

The Medical Center first argues that Section 768.28 is clearly constitutional. The statute is arguably constitutional only insofar in that it requires notice to the Medical Center within three years of the malpractice. In this case, notice was given to the Medical Center of the problems in their neo-natal

intensive care unit immediately and suit was filed within 18 months after Daniel Menendez birth. However, the fact that the statute may be constitutional insofar as the propriety of requiring notice to the Medical Center for its malpractice does not make the statute constitutional when notice is required to be given to the Department of Insurance which could have no liability whatsoever for the Medical Center's negligence.

While the hospital's brief asserts that §768.28 is constitutional, it does not cite one Florida case or any cases from other jurisdictions upholding the constitutionality of a similar provision requiring notice to be given to the Department of Insurance. The fact that §768.28 may otherwise be constitutional does not make the requirement of notice to the Department of Insurance constitutional. As pointed out in ERNEST v. FABER, 697 P.2d 870 (Kan. 1985) statutes are unconstitutional which require a "vain and useless act". Notice to the Department of Insurance as used in the statute violates the constitutional requirements of due process of law, equal protection and deprives Florida citizens of their constitutional access to the courts in such manner as the requirement of notice to the county attorney in the ERNEST case violated the Kansas constitution (see petitioner's brief on the merits pages 10-15).

The Medical Center states that this court previously "upheld" the notice requirement in COMMERCIAL CARRIER CORP. v. INDIAN RIVER COUNTY, 371 So.2d 1010 (Fla. 1979) and in LEVINE v. DADE COUNTY SCHOOL BOARD, 442 S.2d 210 (Fla. 1983) as if to

imply that a challenge to the constitutionality of the notice requirement was raised in those cases and rejected. In neither case were constitutional issues raised. Rather, in those cases the court simply construed section 768.28. Because COMMERCIAL CARRIER and LEVINE did not even address the issue of whether the statute's notice requirements could withstand constitutional attack, reliance by the Medical Center upon the quotation from LEVINE set forth at page 8 of its brief is misplaced.

At page 20 in its conclusion, the Medical Center argues that this court should once again hold that the notice provisions of §768.28 are constitutional. However, this court has never held that the provision requiring notice to the Department of Insurance to maintain an action against a separate governmental agency is constitutional. The Medical Center does not cite any authority for its statement because there isn't any.

CONCLUSION

The Medical Center waived its rights to assert any defense based upon failure to give notice to the Department of Insurance as it had every right to do.

Alternatively, if the notice to the Department of Insurance cannot be waived by the Medical Center and deprives an injured party of access to the courts, this violates the Florida constitution, due process and equal protection.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 25TH day of April, 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.

MONTGOMERY, SEARCY & DENNEY, P.A.
Post Office Drawer 3626
West Palm Beach, FL 33402
and
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
Tel: (305) 686-8010
Attorneys for Petitioners

By: _____
EDNA L. CARUSO