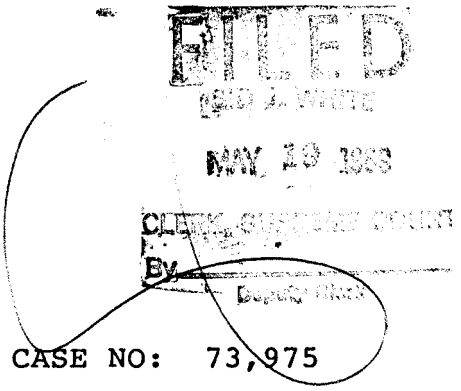
IN THE SUPREME COURT OF FLORIDA



ORANGE COUNTY, FLORIDA,

Petitioner,

vs.

CASE NO: 73,975

CITY OF ORLANDO and CIGNA,

Respondents.
_____/

RESPONDENTS'. .ANSWER BRIEF

On Review from the District Court
of Appeal, Fifth District,
State of Florida
Appeal No. 88-1112

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TABLE OF CITATIONS

STATUTES

PRELIMINARY STATEMENT

City and CIGNA accept and adopt County's Preliminary Statement.

STATEMENT OF CASE AND FACTS

City and CIGNA accept and adopt County's Statement of the Case with the following additions.

Plaintiffs filed suit against City, CIGNA and County on July 6, **1981** (R **1589-1594**). Following that suit County vigorously defended answering the Plaintiffs' Amended Complaint on February **4, 1983 (R 1589-1594).**

Plaintiffs' Amended Complaint alleged, among other things, the following (R **1589-1594**):

> **6.** The defendant, CITY and COUNTY, did construct or cause to be constructed a drainage canal across which was constructed a pipeline located at or near the **4000** block of CEPEDA STREET, directly south of CARVER JR. HIGH SCHOOL, in Orange County, Florida. At all times material to this Complaint the said defendants did control the use and maintain the physical condition of said canal and pipeline.
>
> **7.** Written notice of foregoing claims was given by letter to the defendants, CITY and COUNTY, as well as the Florida Department of Insurance, in compliance with Section 768.28 (6) of the Florida Statutes.

County's Answer alleged, inter alia:

> **14.** The Defendant affirmatively alleges that the liability of this Defendant, if any, is limited by the provisions of Florida Statute 768.28 and any recovery, if any, is limited to **$50,000** per person or $100,000 in the aggregate. Any liability on the part of Orange County, if any, is subject to the terms, provisions, restrictions, limitations, exclusions and requirements set forth in Florida Statute **768.28.**
>
> 15. The Defendant affirmatively alleges that Orange County is entitled to a setoff for any monies paid to the Plaintiffs' survivors or which

are payable to the Plaintiffs' survivors as a consequence of the accident alleged in the Plaintiffs' Amended Complaint.

Prior to City's settlement of this case with Plaintiffs, County initiated or participated in the following discovery in its defense of Plaintiffs' suit, to-wit:

1. County's interrogatories to plaintiff, Postell, served April 2, 1980 (R2636-2663).

2. County's interrogatories to plaintiff, Gipson, served April 2, 1980 (R 862-889).

3. County's expert interrogatories to plaintiff, Gipson, served April 1, 1981 (R 1296-1305).

4. County's expert interrogatories to plaintiff, Postell, served April 1, 1981 (R 1286-1295).

5. County's expert interrogatories to plaintiffs, Gipson and Postell, served December 30, 1981 (R 1598-1607).

6. County's supplemental interrogatories to plaintiff, Gipson, served August 9, 1983 (R 1646-1652).

7. County's supplemental interrogatories to plaintiff, Postell, served August 9, 1983 (R 1639-1645).

8. County's expert interrogatories to plaintiffs, Gipson and Postell, served August 9, 1983 (R1663-1664).

9. County's Request to Admit to plaintiff, Gipson, served September 21, 1983 (R 1619-1624).

10. County's Request to Admit to plaintiff, Postell, served September 21, 1983 (R 1625-1630).

11. Deposition of Tiajuana Postell, a witness to accident, obtained August 21, 1980 (R 1848-1957).

12. Deposition of Hurvis Postell, a witness to accident, obtained August 21, 1980 (R 1958-2021).

13. Deposition of Rene Gipson, a witness to accident, obtained August 22, 1980 (R 2022-2078).

14. Deposition of Thomas Postell, a witness to accident, obtained August 22, 1980 (R 2079-2191).

15. Deposition of plaintiff, Gipson, obtained December 18, 1980 (R 2192-2270).

16. Deposition of Jack Swarm, Assistant Manager for County's Highway Department, obtained March 30, 1981 (R 2271-2328).

17.. Deposition of Allen M. Eberly, City's Engineering Department, obtained April 8, 1981 (R 1215-1285).

18. Deposition of Harold Severns, City's Record Department, obtained April 8, 1981 (R 1194-1214).

19. Deposition of Alfred J. Dagon, City's Industrial Safety Management Department, obtained April 8, 1981 (R 1118-1142).

20. Deposition of Lieutenant Bruce Henson, City's Police Department, obtained April 8, 1981 (R 1306-1347).

21. Deposition of Donald Brant, City's Inspection Engineering Department, obtained April 8, 1981 (R 1033-1074).

22. Deposition of plaintiff, Postell, obtained April 8, 1981 (R 2329-2426).

23. Deposition of Dale Bryam of County's Water Management Department, obtained April 18, 1981 (R 2427-2521).

24. Deposition of J.C. Holley of City's Water Department, obtained April 28, 1981 (R 1143-1193).

25. Deposition of Howard W. Jewett of City's Public Works Department, obtained April 28, 1981 (R 478-540).

26. Deposition of Alexzenia Williams, a friend of

plaintiffs' family, obtained April 30, 1981 (R 1075-1117).

27. Deposition of Josephus Postell, father of plaintiff's decedent, obtained April 30, 1981 (R 1474-1533).

28. Deposition of Umbellino Bango, a resident near accident's scene, obtained April 30, 1981 (R 1441-1473).

29. Deposition of Clarence Wright, Sr., father of plaintiff's decedent, obtained April 30, 1981 (R1348-1440).

30. Deposition of Major Richard May, City's Police Department, obtained October 3, 1983 (R 2589-2635).

31.. Deposition of Gary Hunt, County's Land Surveyor, obtained October 7, 1983 (R 1716-1819).

32. Deposition of Tom Hastings, Director of County's Public Works and Development, obtained October 7, 1983 (R 2522-2588).

On the basis of this factual scenario developed through the extensive discovery outlined above, the City compromised the Plaintiffs' wrongful death suits paying each Plaintiff $100,000.. In return Plaintiffs released the City and its insurer and County from all claims, past, present and future. County did not contribute to this settlement.

City in this same action sued County for contribution (R 542-551). Notice of this contribution claim was given to County by way of a cross/claim which adopted the Plaintiffs' Amended Complaint against County (including notice of the claim) to the County and the Department of Insurance, within six months following the settlement. City's attorney, Thomas G. Kane, also gave this notice by letter dated February 2, 1984, to the County pointing out in that notice letter (R 567) the following:

You have previously received statutory notice of

these claims in connection with the underlying lawsuits. I am enclosing copies of those letters for your ready review. While I do not believe it is necessary to put you on notice of our claim, I am doing so out of an abundance of caution, and would ask for your quick response to this claim, pursuant to Florida Statute 768.28.

A copy of that letter was sent to the attorney for the County, Steven Lengauer. Mr. Lengauer had vigorously defended the Plaintiffs' lawsuit against the County.

A jury trial on City's cross/claim for contribution was held and resulted in a verdict and judgment for City from which County appeals. The main thrust of County's contention is that the County believes that the Department of Insurance, State of Florida, was not timely notified a second time pursuant to Florida Statute 768.28(6). When notified that department advised the County (R 594) as follows:

> "Since the Department of Insurance does not have a financial interest in this claim and is involved only because of the reporting requirement of the aforementioned Statute, the Department will not be involved in the investigation and deposition of this matter. This letter is being written for the sole purpose of advising your agency of this claim being filed with the Department and is not a denial of the claim under 768.28." (Emphasis ours.)

SUMMARY OF ARGUMENTS

Notwithstanding County's argument to the contrary the Department of Insurance was given notice of the underlying tort claim of the Plaintiffs by Plaintiffs. This notice satisfied the requirements of Section 768.28(6)(a) (1983). County, as were the City and CIGNA, was a party defendant in the suit instituted by Plaintiffs. County denied liability and defended these actions by Plaintiffs in 1980 until the eve of the trial of Plaintiffs' case set for December, 1983. Under these circumstances, to adopt County's position that the City, having satisfied it and County's joint liability to Plaintiffs' claims, should have to once again notify County that a tort claim for damages existed against County is a strained and unwarranted construction of Section 768.28(6)(a) concerning contribution claims. That statutory provision was certainly intended to apply only to those cases where a claim had not been processed by an injured party against the governmental agency and where accordingly that governmental agency had not been given the opportunity to investigate and settle that claim under the provisions of Section 768.28(6)(a) Florida Statute. To hold otherwise, under the circumstances of a suit against governmental agencies as co-defendants would result in a legal absurdity. Such a result is absurd in that it accomplishes nothing, is a redundancy because the non-settling governmental agency has already investigated the claimed tort and denied liability and would result in a strained construction of the statutory words, "an action may not be instituted...". No cases, contrary to County's contentions, support the position taken by County in this case on this point.

The District Court of Appeal's opinion that Section

768.28(5) Fla. Stat. (1977) requires that County's maximum liability is limited to a cap of $25,000 in this case is not supported by the terms of that Statute. It is not supported because County was found by the jury to be 25% responsible on each of two $100,000 claims. That Statute merely caps County's liability to each plaintiff in the amount of $50,000 and has nothing to do with pro-ration between joint tortfeasors with the County.

ARGUMENT

POINT I

THE FIFTH DISTRICT COURT OF APPEAL IS CORRECT IN HOLDING THAT CITY'S CLAIM FOR CONTRIBUTION WAS NOT BARRED BY SECTION 768.28(6)(A), FLORIDA STATUTES, (1977).

The Fifth District Court of Appeal's opinion is correct that Section 768.28(6)(a) does not bar this claim by City for contribution by holding (1) County had proper and timely notice of the tort claim; (2) that it was not necessary to give written notice to the Department of Insurance of the drownings a second time (this is especially true since that Department had no interest financially or in investigating the accident); and (3) that Plaintiffs had instituted the action against County the City's cross/claim "being simply part and parcel of that same action".

It is clear that the Plaintiffs complied with the provisions of this Statute and that they, not the City, instituted this action against the County. Where joint tortfeasors are sued in the same action cross claims for contribution by one tortfeasor against other tortfeasors are appropriate. Christiani v. Popovich, 363 So.2d 2 (Fla. 1st DCA 1978) cert. denied 389 So.2d 1179.

As pointed out by the Court of Appeal, County's reliance on cases involving third party practice for contribution against governmental agencies is misplaced. In those cases, e.g., Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979) this Court held that compliance with the statutory notice provision of Section 748.28(6), Fla. Stat., was a condition precedent to maintaining a third party complaint for

contribution based on tortious conduct of a governmental agency. Unlike our case, Plaintiffs in this last cited case had not instituted an action against the governmental agency brought into the suit by way of a third party complaint nor had that agency been given notice as required by Section 768.28.

County's reliance on Orange County V. Piper, 523 So.2d 196 (Fla. 5th DCA 1988) is also misplaced and not analogous to our case. As pointed out by the Court in Piper, a wife's claim for loss of consortium is not a derivative claim, "It is a direct injury to the spouse who has lost the consortium.'' It was also noted by the Court that the husband's notice of claim did not even give notice of his marital status. And, in the case at bar the issues defended vigorously by County from 1981 through this appeal were was the County negligent and, if so, what damages were sustained by Plaintiffs as a result of that negligence.

Nor does Levine V. Dade County School Board, 442 So.2d 210 (Fla. 1983) support County's contentions under the facts of our case. In Levine the Court held that Section 768.28(6) requires compliance before suit may be instituted against any state agency.

More closely analogous is Franklin V. Department of Health and Rehabilitative Services, 493 So.2d 17 (Fla. 5th DCA 1986) which holds that compliance with the notice requirement of Section 768.28 was satisfied even though the notice of claim to the Department of Insurance was not given by the accident victim, but by the defendant agency. This latter case is in accord with the common sense holding of this Court through Justice Terrell in Thompson V. Thompson, 142 Fla. 643, 195 So. 571 (1940) wherein the Court states, page 572:

> "When a litigant is shown to have a legal and meritorious claim, the law should be construed to aid its collection rather than as a shield to help defeat it."

Likewise, the holding of The District Court in our case and in Franklin, supra, comports with this Court's observation in City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950) concerning statutory interpretation and construction. At page 294 this Court states:

> "The courts will not ascribe to the Legislature an intent to create absurd or harsh consequences, and so an interpretation avoiding absurdity is always preferred, See Sutherland on Statutory Construction, Vol. 1 (3rd Ed.) 454-5, par. 2007."

In the final analysis, what possible use would be served to notify a co-defendant about a claim about which it had already been notified, and which it had vigorously defended for almost four years? The questions from July, 1981, through this appeal have been and are; (1) was the County negligent, and (2) if so, how much money was owed to the Plaintiffs. City and Cigna's settlement with Plaintiffs limited this latter question to whether or not $100,000 per claim was reasonable! And, as stated, supra, the Department of Insurance had absolutely no interest in these issues.

POINT II

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT COUNTY WAS LIABLE FOR ONLY 25% OF $100,000.

Since this Court has accepted the Fifth District Court of Appeal's certified question, City and CIGNA request this Court to review the holding of that Court set forth in the above issue. Lawrence v. Florida East Coast Railway Co., 346 So.2d 1012 (Fla. 1977); Confederation of Canada Life Insurance Co. v. Vega Y

Armina, 144 So.2d 805 (Fla. 1962).

City believes that the Court of Appeal erred in holding County responsible for only $12,500, each, on the wrongful death claims of the Plaintiffs, The jury was asked to determine (1) the percentage of liability of both City and County, if any, in causing the deaths of Plaintiffs' decedents and (2) whether or not the City's payment of $100,000 for each of these claims was reasonable.

The jury found that City should bear 75% of the negligence and County 25%. It also found that these settlements were reasonable.

Prior to the trial, a third party defendant, Orange County School Board, paid City $8,000 in settlement of the contribution claim brought by the City by way of a third party complaint for contribution. (Plaintiffs had not sued the Orange County School Board). The trial court gave County the full credit for that $8,000 and reduced the judgment against County on the verdict from $25,000 per claim to $21,000 per claim, (This setoff was corrected by the Court of Appeal's holding giving County 75% of that $8,000 by reducing that setoff to $6,000, or $3,000 per claim.)

Section 768.28(5), Fla. Stat., does not mandate this construction and conclusion because County's liability to each Plaintiff was joint and several.

Section 768.28(5), Fla. Stat., (1977) provides:

> The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extend as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a

> claim or a judgment by any one person which exceeds the sum of $50,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivision arising out of the same incident or occurrence, exceeds the sum of $100,000.". .. (Emphasis ours)

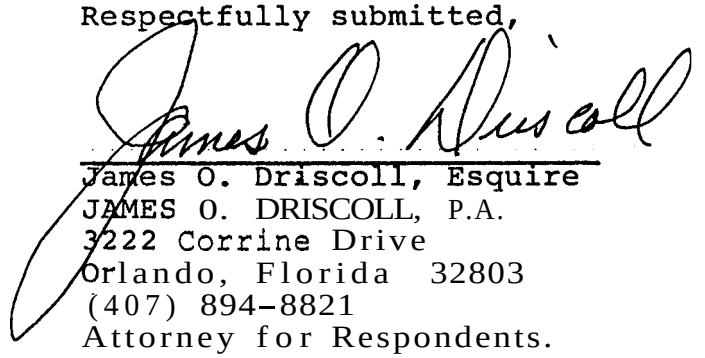
City and not County discharged County's obligation to Plaintiffs and limited those claims to $100,000, each, by so doing.

County's liability to Plaintiffs was a joint and several liability. That several liability cap created by the Statute was $50,000 to each Plaintiff and not $25,000. Accordingly that liability cap created by the Statute has nothing to do with proration between joint tortfeasors with the County. The provisions of that Statute come into play, if, but only if, County's pro-rata share to a claimant is in excess of $50,000. At such time County's liability would, of course, be limited to $50,000 for each claim.

CONCLUSION

City and CIGNA respectfully request that this Court (1) answer the certified question of the District Court of Appeal in the negative, and (2) direct that County is responsible to City in the amount of $44,000, i.e., $25,000 to each Plaintiff's settlement less $3,000 for each claim.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail delivery to Steven F. Lengauer, Esquire, P. O. Box 20154, Orlando, Florida, 32814-0154, this 17th day of May, 1989.

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