IN THE SUPREME COURT OF FLORIDA

CASE NO. **73,975**
FIFTH DISTRICT COURT OF APPEAL NO. **88-1112**

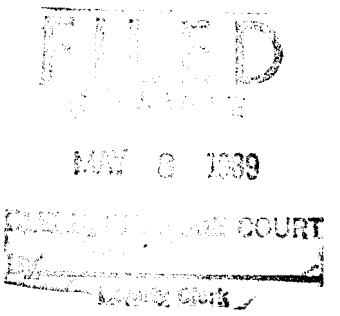
ORANGE COUNTY, FLORIDA,

Petitioner,

v.

CITY OF ORLANDO and CIGNA,

Respondents.



PETITIONER'S INITIAL BRIEF ON THE MERITS

STEVEN F. LENGAUER
Eubanks, Hilyard, Rumbley, Meier and Lengauer, P.A.
P.O. **Box 20154**
Orlando, FL **32814-0154**
(407)425-4251
Attorneys for Appellant, ORANGE COUNTY

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The opinions and rulings of the Honorable Emerson Thompson and B.C. Muszynski, Circuit Judges, are unreported but are contained in the record. References to the proceedings below will be designated with the symbol (R-) followed by the numeral corresponding to the appropriate page of the record to which the reference is being made. The original plaintiffs, Johnnie Gipson and Helen Postell will be referred to as initial plaintiffs. The City of Orlando will be referred to as the City. Aetna Insurance Company and CIGNA will be referred to as CIGNA, inasmuch as CIGNA is the successor corporation to Aetna. Orange County School Board will be referred to as the School Board and Orange County will be referred to as the County.

STATEMENT OF THE CASE

This is an appeal from the Fifth District Court of Appeals decision filed on March 2, 1989 wherein a question was certified to the Supreme Court as having question of great public importance pursuant to Rule of Appellate Procedure 9.30(a)(2)(a)(V). The question certified to the Supreme Court of Florida is as .follows:

> "Is a crossclaimant for contribution against a governmental entity required by §768.28(6)(a), Fla. Stat. to provide notice of its crossclaim to the State Department of Insurance where the underlying tort claimants have provided timely and proper notice of the tort claims to the Department and both the governmental entity and the crossclaimant were defendants in the litigation at the time such notice was provided?"

The City of Orlando and CIGNA filed a crossclaim against Orange County an the Orange County School Board for contribution after settlement with the initial plaintiffs on December 6, 1983 (R-556-567)(R-575-591). After various amendments to the crossclaim, the County filed a Motion to Dismiss the Second Amended Crossclaim on February 26, 1985 (R-593-601) which was denied by the trial court on March 18, 1985 (R-607). One of the grounds the County raised in its Motion to Dismiss was the failure of the City and CIGNA to comply with ~~Fla. Stat.~~ S768.28 (1983), in that they had failed to present their claim for contribution, in writing, to the Department of Insurance within six months after settlement

with the plaintiffs **(R-593-601)** as required by Fla. Stat. **768.28(6)** (a). Other Motions to Dismiss had been filed on the earlier Initial Complaints filed by the crossclaimants **(R-553-554, 568-569).** After the statutory time for such notice expired, on February **12, 1985,** over a year after the settlement with the plaintiffs, the City and CIGNA finally sent a written letter to the Department of Insurance **(R-711-715).** The County filed a Motion for Summary Judgment based upon the lack of notice to the Department of Insurance and on February **27, 1987,** the motion was denied **(R-648** through **651, R-672).** The County then raised the same issue as an affirmative defense **(R-571-574, 608-614, 621)** and in its Pre-trial Statement **(R-665-671). A** subsequent Motion for Summary Judgment on the notice issue was again filed by the County on February **18, 1988** and denied on March 15, **1988 (R-711-715, 744).**

The case then proceeded to trial on the contribution claim and at the close of the City's case, the County moved for a directed verdict on the basis of the failure to comply with the notice provisions **(R-244).** Motion for Directed Verdict was denied by the court **(R-258)** and the Motion was again renewed at the close of all the evidence but denied by the court **(R-324-325).**

The jury returned a verdict finding negligence on the part of the County and assessed them **25%** responsible **(R-738-741).** The jury also found that the payment by the City of Orlando of **$200,000.00** did not exceed a reasonable settlement under all

circumstances **(R-738-741).** A Motion for Judgment Notwithstanding the Verdict was filed by the County and was denied on April **5, 1988 (R-807-810).** The County in its Motion for Judgment Notwithstanding the Verdict raised again the failure of the City to provide written notice to the Department of Insurance as required by ~~Fla~~. ~~Stat~~. **768.28(6)** (a)**(1983).** The County's post-trial motions were denied on April 5, **1988 (R-809-810)** and Orange County subsequently filed its Notice of Appeal from the final judgment entered in favor of the City of Orlando **(R-848).**

The judgment was then appealed to the Fifth District Court of Appeals by the County on three issues. Those issues involved failure of the City and CIGNA to provide notice to the Department of Insurance as required by **§768.28(6);** the failure of the City and CIGNA to establish a cause of action under the attractive nuisance theory and the failure of the trial court to limit the liability of the County to **25%** of the statutory maximum of **$50,000.00** per claim and $100,000.00 per incident pursuant to ~~Fla~~. ~~Stat~~. **§768.28(5) (1977).** The Fifth District Court of Appeals thereafter issued its opinion on March **2, 1989** wherein it denied Orange County relief on the issue of the plaintiff's failure to provide notice under Fla. Stat. **§768.28(6)** to the Department of Insurance and on the grounds that the plaintiff had failed to establish at trial sufficient facts to support a cause of action for an attractive nuisance theory. The court did find in favor of the

County on the issue of whether the trial court had improperly applied the statutory limits of liability under §768.28(5). The Fifth District Court of Appeals, however, did certify the question concerning the notice issue to this Court and notice is the issue presented for purposes of this appeal.

The County thereafter gave timely notice to invoke jurisdiction of the Supreme Court of Florida pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(v) on March 30, 1989.

STATEMENT OF THE FACTS

Helen Postell as personal representative of the Estate of Alphonso Postell and Johnnie Gipson, as personal representative of the estate of Clarence E. Wright, Jr. brought suit against the City of Orlando, Aetna Insurance Company and Orange County, Florida alleging negligence of the City and the County in causing the deaths of their children (R-556-567). The plaintiff's Amended Complaint alleged that the drowning deaths of the two children occurred after they began crossing a City of Orlando pipeline which spanned across a drainage canal owned by Orange County (R-556-567). On or about December 6, 1983, prior to the trial, the City and its insurance carrier, CIGNA, entered into a settlement with each of the plaintiff's estates, whereby each personal representative received $100,000.00 (R-559).

Prior to the filing of the Complaints by the initial plaintiffs, notice had been given on September 5, 1978 to the Orange County Board of County Commissioners and on July 26, 1979 to the Department of Insurance of a claim against the City of Orlando and Orange County by only the original plaintiffs (R-711-715). No potential crossclaims were mentioned in this notice. On January 25, 1984, the City and CIGNA filed crossclaims for contribution against the County (R-542-551). The City and CIGNA filed an Amended Crossclaim on April 11, 1984 (R-556-567), and finally a Second Amended Crossclaim for contribution on November 13, 1984, wherein Orange County School

Board was also named as a defendant **(R-575-591).** The City and CIGNA failed to allege or prove that they had timely provided written notice to the Department of Insurance for their claim for contribution pursuant to ~~Fla~~. ~~Stat~~. **§768.28(6) (R-575-591).** The City and CIGNA failed to give notice to the Department of Insurance within six months of settlement with the Plaintiffs. The City attempted to correct its notice defects by providing notice to the Department of Insurance on February 12**, 1985 (R-711-715)** which was beyond the time allowed by Fla. Stat. **§768.28(6).**

SUMMARY OF ARGUMENT

The Fifth District Court of Appeals has erred in failing to reverse the trial court's refusal to grant the County's Motions to Dismiss, Motion for Summary Judgment, Motion for Directed Verdict, Renewed Motion for Directed Verdict and Judgment in Accordance With the Motion for Directed Verdict on the grounds that the City of Orlando and CIGNA have clearly failed to comply with the notice provisions of Fla. Stat. §768.28(6)(a)(1983). The provisions of Fla. Stat. §768.28(6)(a)(1983) are to be strictly construed and the waiver must be clear and unequivocal. The statutory provisions unquestionably require a claim for contribution to be presented in writing to the governmental agency and the Department of Insurance, within six months after the party seeking contribution has discharged the common liability.

The undisputed record shows that the City and CIGNA settled with the initial plaintiffs on December 6, 1983. The City and CIGNA first provided notice to the Department of Insurance by their letter dated February 12, 1985. Clearly, this letter was well beyond the six months notification period prescribed by law. This defect in the City's and CIGNA's claim was raised by the County at every essential stage of the pleadings and the trial of this case. Despite the abundance of case law which holds that strict compliance with the notice provisions is necessary, the Fifth District Court of Appeals

refused to require the City to give notice to the Department of Insurance.

The Fifth District distinguished the present case on the basis that plaintiffs had previously given notice of the claim to the Department of Insurance at the time they brought their cause of action against the City and the County for negligence. The Fifth DCA analogized that a contribution claim was part and parcel of the negligence cause of action initially brought by the plaintiffs. This analogy fails to recognize that a contribution claim by the City and CIGNA is entirely separate from the negligence claim that was brought by the plaintiffs. The claim for contribution involves separate parties and addresses separate issues. A claim for contribution does not even ripen until settlement of the original plaintiff's claims has been accomplished. The analogy used by the Fifth District Court of Appeals in its opinion flies in the face of its own prior decisions, the langugage of ~~Fla~~. ~~Stat~~. §768.28 and the abundance of case law which have previously addressed the notice issue.

The record is undisputed that the City and CIGNA failed to provide timely notice to the Department of Insurance of their contribution claim. The failure of the City and CIGNA to provide notice to the Department of Insurance is fatal to their cause of action for contribution and the Fifth

District Court of Appeals should have reversed and remanded with instructions to grant judgment in favor of Orange County. This notice issue is a matter of great public importance which will recur in the future and should be resolved by the Florida Supreme Court to ensure strict compliance with the notice provisions of ~~Fla~~. ~~Stat~~. §768.28(6).

ARGUMENT

ISSUE I

WHETHER THE FIFTH DISTRICT COURT OF APPEALS IMPROPERLY AFFIRMED THE TRIAL COURT'S RULING THAT FLA. STAT. §768.28(6)(a) DOES NOT REQUIRE TEE CITY TO PROVIDE NOTICE OF ITS CLAIM FOR CONTRIBUTION AGAINST TEE COUNTY TO THE DEPARTMENT OF INSURANCE

The provisions of ~~Fla. Stat.~~ §768.28(6)(a) provide that notice must be presented in writing to the appropriate agency and the Department of Insurance six months before the action may be instituted. In the case of contribution claims, the statute requires that the notice be given within six months after final judgment or discharge of common liability by payment. The undisputed record shows that the City and CIGNA discharged the alleged common liability by payment in December of **1983 (R-556-567).** The City and CIGNA first provided notice to the Department of Insurance of their claim on February 12, **1985** which was over 14 months after the settlement and beyond the requirement set forth under ~~Fla. Stat.~~ **5768.28.**

Despite being notified of the defects in the notice when the County first filed its Motion to Dismiss the original crossclaim, the City and CIGNA failed to correct the defects within the six months time frame. The attorneys for CIGNA and the City finally saw the light in February of **1985** but at that time it was too late to comply with the statute. The City's letter to the Department of Insurance in February of **1985** was

untimely and not brought within the six months of the time frame in which the discharge of common liability occurred.

The requirements of Fla. Stat. S768.28 for the waiver of Florida's sovereign immunity must be strictly construed and the waiver must be clear and unequivocal. Levine v. Dade County School Board, 442 So.2d 210, at 212, (Fla. 1983); Carlisle v. Game and Freshwater Fish Commission, 354 So.2d 362, at 364-365, (Fla. 1977); Berek v. Metropolitan Dade County, 396 So.2d 756, at 758, (Fla. 3rd DCA 1981), approved 442 So.2d 838, at 840, (Fla. 1982); State Division of Administration v. Oliff, 350 So.2d 484, at 486, (Fla. 1st DCA 1977). Furthermore, the requirement of notice to the Department of Insurance is a condition precedent which has been consistently construed by the courts as an essential element to maintaining a cause of action. The failure to provide notice to the Department of Insurance in accordance with the time limits under S768.28 is fatal to a claim against a sovereign and completely bars the action from being brought. Despite such a harsh result, the case law consistently has supported this proposition.

In Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983), a plaintiff provided written notice of his claim to the school board prior to filing suit. However, he did not notify the Department of Insurance within the six months time frame. The trial court dismissed the Complaint based upon this defect because the plaintiff was unable to amend the Complaint and allege or prove timely compliance with the requirements

of the statute. Ultimately, the Florida Supreme Court upheld the trial court's dismissal by ruling that where the time has lapsed for complying with the notice to the Department of Insurance, and the plaintiff cannot meet the requirement, the trial court has no alternative but to dismiss the Complaint with prejudice.

The facts in Levine are similar to the facts of the instant case in that the City and CIGNA did timely notify the County but neglected to file their notice with the Department of Insurance. As in Levine, the City and CIGNA's Complaint should have been appropriately dismissed. In was clear error to refuse a directed verdict in favor of Orange County.

In the case of Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979) a claim for contribution was dismissed for the failure to provide notice to the Department of Insurance. Again, the Florida Supreme Court ruled that compliance with the required notice to Department of Insurance was a condition precedent that must be alleged in the Complaint. In Commercial Carrier, the time for providing the notice to the Department of Insurance had expired, and an allegation regarding compliance could not have been made. Consequently, the trial court's decision to dismiss the Complaint was affirmed. Based upon Commercial Carrier, the

County's Motions to Dismiss and Motions for Summary Judgment should have been granted since the time for compliance had expired.

Despite the abundance of case law which holds that strict compliance with **S768.28** is necessary, the Fifth District Court of Appeals in its opinion refused to require the City and CIGNA to give notice to the Department of Insurance. The Fifth District Court of Appeals distinguished the present case from the Commerical Carrier decision, contending that adequate notice was given the Department of Insurance by the plaintiff's estates in the underlying case (long before the contribution claim either ripened or was filed by the City and CIGNA). The Fifth District Court of Appeals erroneously concluded that it was not necessary to give notice of a contribution claim which it believed was derivative.

This analogy fails to recognize that the claim of the original plaintiffs and the claims by CIGNA and the City are two entirely separate causes of action. The notice letters by the plaintiffs certainly do not mention a contribution claim by the City or CIGNA against the County. **(R-711-715)** The parties are entirely separate and distinct and the issues in the contribution claim are also different from those raised in the original plaintiff's claim against the County. For example, unlike the original plaintiffs, the City and CIGNA must prove its settlement was not in excess of what is reasonable. The City and CIGNA must also prove the settlement was in good faith.

If the intent of ~~Fla~~. ~~Stat~~. §768.28(6)(a)(1983) was not to require independent notice to the Department of Insurance in every contribution claim, why does the language specifically make provisions for contribution causes of action? ~~Fla~~. ~~Stat~~. 768.28(6)(a)(1983) states as follows:

> "(a) An action may not be instituted on a claim against the state or one of its agencies or subdivisions 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; except that, if such claim is for contribution pursuant to S768.31, it shall be so presented within six months after the judgment against the tort-feasor seeking contribution has become final by lapse of time for appeal or after appellate review, or, if there is no such judgment, within six months after the tort-feasor seeking contribution has either discharged the common liability by payment or agreed, while the action is pending against him, to discharge the common liability..."

The legislative intent is very clear from the wording of the statute. The language was drafted to specifically address contribution claims. The erroneous decisions of the Fifth District Court of Appeals and the trial court fly directly in the face of the requirements of ~~Fla~~. ~~Stat~~. §768.28(6)(a) and are plainly contrary to the intent of the statute.

The analogy used by the Fifth District Court of Appeals in its opinion is totally inconsistent with its own prior decision in the case of Piper v. Orange County, 523 So.2d 196 (Fla. 5th

DCA 1988) rev. den 531 So.2d 1354. There the court held that the failure of a wife to give notice of her consortium claim under §768.28 mandated dismissal of that claim, even though proper notice of the husband's independent claim had been provided. Although Mrs. Piper's claim was based upon the facts underlying her husband's injury, this same court reasoned that she was still an independent claimant and must provide separate statutory notice. Likewise, the City and CIGNA's independent claim for contribution is clearly separate and distinct from the original plaintiff's claims. In each case, the claims involve different claimants, different issues and different rights. A contribution action is a creature of Fla. Stat. 768.31. On the contrary, the original plaintiffs action is based upon common law. Even if tried with main claims, contribution claims require separate jury instructions. See Florida Standard Jury Instructions MI 1.1-1.5. Separate jury findings may also be necessary. See the suggested verdict from following Florida Standard Jury Instructions Model Charge #4.

Piper and the instant opinion are irreconcilable. A contribution claim by different parties is certainly as distinct and separate from a plaintiffs original negligence claim as the consortium claim of a spouse. The husband in Piper had no standing to make a claim for his wife's loss of consortium. Likewise, the original plaintiff's (Gipson and Postell) have no standing to make a claim for recovery of settlement money paid by the City and CIGNA. With all due respect it is patently illogical to conclude that a different

third party's notice which does not mention a contribution claim can satisfy an independent condition precedent 4 years before the City and CIGNA suffered any actual loss. The City and CIGNA suffered no loss until they paid the settlement in 1983. It is elementary that no claim for recovery ripens until injury or damage is suffered. At the time payment was made in 1983, the City and CIGNA first acquired their independent claims. Until then their claims were a mere contingent expectancy. The legal rights and legal obligations of the City and CIGNA were acquired as a result of the 1983 settlement. Failure to require independent notice in such circumstances relegates Fla. Stat. 768.28(6)(a)(1983) to the ash can and makes its clear terms a nullity.

The instant opinion unquestionably presents an issue of great public importance which will continue to present itself in future litigation. Strict compliance with these statutory notice provisions is mandatory. The statutory language makes provisions for a contribution action separate and apart from a tort claim directly against a governmental entity. The intent of the statute obviously was to require that notice be given to the Department of Insurance on any contribution claim.

Numerous other decisions have recognized that a party seeking to recover from governmental entities must allege and prove compliance with the statutory requirements of notice before proceeding with the suit. In the case of Ryan v.

Heinrich, 501 So.2d 185 (Fla. 2d DCA 1987), the court held that the failure of the plaintiff to notify the Department of Insurance required the dismissal of his Complaint, even though proper notice to the Department of Insurance had been provided with respect to the county sheriff and that the Initial Complaint had been served on the board. In the decision of Halpin v. Short, 490 So.2d 1271 (Fla. 2d DCA 1986), rev. dismissed 494 So.2d 1150 (Fla. 1986), the appellate court upheld the dismissal of the plaintiff's complaint with prejudice where he failed to allege compliance with the notice provisions of S768.28 and the time for providing the notice had expired. The principle of strict compliance with the notice provisions of §768.28(6) has been applied consistently in other cases. See Hansen v. State, 502 So.2d 1324 (Fla. 1st DCA 1987); Dukanauskas v. Metropolitan Dade County, 378 So.2d 74 (Fla. 3rd DCA 1979); Lloyd v. Ellis, 520 So.2d 59 (Fla. 1st DCA 1988); O'Donnell v. Broward County, 417 So.2d 1043 (Fla. 4th DCA 1982).

There is no question that the City and CIGNA have failed to provide timely notice to the Department of Insurance of the contribution claim. The case law clearly requires compliance with the notice provision and deems the failure to give notice to be fatal. The County has raised as an affirmative defense the failure of City and CIGNA to provide notice under §768.28(6) to the Department of Insurance, at every stage of

the proceedings below. The authority cited within this Brief and the authority cited to the Fifth District Court of Appeals clearly supports the proposition that this cause of action was barred by the failure of the City and CIGNA to give timely notice to the Department of Insurance. The District Court of Appeals' opinion should be reversed and remanded with instructions to enter final judgment in favor of Orange County.

CONCLUSION

The District Court of Appeal improperly affirmed the trial court's ruling that ~~Fla. Stat.~~ §768.28(6)(a) does not require the City to provide notice of its claim for contribution against the County to the Department of Insurance. Orange County is entitled to a complete judgment in its favor due to the fact the City and CIGNA failed to timely comply with these statutory notice requirements. This court should reverse and remand with instructions to enter judgment for Orange County.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail this 5th day of MAY, 1989 to JOE B. WEEKS, ESQ., 3222 Corrine Drive, Orlando, FL 32803, and JAMES O. DRISCOLL, ESQ., 3222 Corrine Drive, Orlando, FL 32803.

STEVEN F. LENGAUER
Eubanks, Hilyard, Rumbley,
Meier and Lengauer, P.A.
P.O. Box 0154
Orlando, FL 32814
(407) 4 -4251
Attorneys for Appellant,
ORANGE COUNTY