IN THE SUPREME COURT OF FLORIDA

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

ORANGE COUNTY,

Petitioner,

v.

CITY OF ORLANDO and CIGNA,

Respondents.
_____/

PETITIONER'S REPLY BRIEF

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 or Gipson and Postell. The City of Orlando will be referred to as the City. Aetna Insurance Company and CIGNA will be refered 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.

SUMMARY OF ARGUMENT

The evidence is clear and unequivocal that the City and CIGNA have failed to comply with the notice 'provisions of Fla. Stat. §768.28(6)(a) **(1983)** in that they failed to provide timely notice to the Department of Insurance. The fact that the original plaintiffs in the underlying case gave notice of their entirely separate personal injury tort claims does not satisfy the notice requirements of the City and CIGNA. The original plaintiffs' notice letters do not mention a claim for contribution by the City and CIGNA. A claim for contribution is separate and distinct and is in no way part of the original plaintiffs independent tort claims. Fla. Stat. §768.28(6) (a) **(1983)** specifically addresses claims for contribution. If the legislative intent was not to require notice to the Department of Insurance regarding a contribution claim, as the City and CIGNA contends, why does it specifically make provision for such claims? The question certified should be answered affirmatively.

One of the City and CIGNA'S primary arguments is that requiring notice would create a harsh result. This argument has been flatly rejected by the Florida Supreme Court. It is respectfully submitted that this Honorable Court is without authority to overlook the clear requirements of ~~Fla~~. ~~Stat~~. §768.28(6)(a)**(1983).** The City and CIGNA have not cited any authority in the answer brief to support the contention that notice to the Department of Insurance is not required in a contribution claim. Nothing in the provisions of Fla. Stat.

§768.28(6)(a)(1983) provides for such an exception to proper and complete notification in contribution claims. Prior cases construing this statutory provision have universally mandated strict compliance. The wisdom or propriety of these notice requirements is not a proper subject of judicial inquiry.

The County objects to the City. and CIGNA's attempt to exceed the scope of the certified question by adding a new point on appeal and contends that the entire judgment should be reversed. However, without waiver of these contentions, if the Court allows the plaintiff to interject a second point on appeal without filing a proper cross notice, the County's arguments on that issue would be as follows: The provisions of ~~Fla~~. ~~Stat~~. §768.28(5)(1977) specifically limited the claims of any one person to the sum of $50,000.00 and further limited all claims arising out of the same incident or occurrence to the amount of $100,000.00 regardless of the number of governmental defendants. The 1977 Statute controls that issue since the original accident occurred in 1978. $100,000.00 was the absolute maximum total monetary exposure for all three governmental entities involved in this occurrence. Those entities would be Orange County, Orange County School Board and the City of Orlando. The Fifth District Court of Appeal correctly limited Orange County's liability to a maximum of $25,000.00 since the County was only found 25% negligent by the jury. The City of Orlando and CIGNA voluntarily made payments of $100,000.00 to each of the personal representatives in the

underlying cause of action despite only being obligated by Florida Statutes to an absolute maximum of $100,000.00. These voluntary payments by third parties cannot unilaterally raise the exposure of the County beyond the statutory maximum. Although the Fifth District Court of Appeal ruled that the County was only liable for its pro rata share of the common liability, it should have reduced the pro rata share by the full $8,000 settlement with the Orange County School Board leaving a net judgment of $17,000.00.

Accordingly, this Court should answer the certified question in the affirmative and reverse the Fifth District Court of Appeal's decision that the provisions of ~~Fla~~. ~~Stat~~. §768.28(6)(a)(1983) do not require the City and CIGNA to provide notice of their contribution claim to the Department of Insurance. Without waiver of this position, if this Court allows the City and CIGNA to cross-appeal the issue regarding monetary limitations of ~~Fla~~. ~~Stat~~. §768.28(5), then the Fifth District Court of Appeal's decision on that issue should be affirmed in part and modified to give the County full credit for the $8,000 setoff.

ARGUMENT

ISSUE I (as originally stated)

WHETHER THE FIFTH 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.

It is undisputed by the City and CIGNA in their Answer Brief that notice to the Department of Insurance of their contribution claim was not timely given in accordance with Fla. Stat. §768.28(6)(a)(1983). Notice to the Department of Insurance is a condition precedent to maintaining an action and has been consistently construed by case decisions as a requirement even when it creates a harsh result. See, e.g., Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983). The City and CIGNA in their Answer Brief request this Court not to require statutory notice of their contribution claim because it would create a harsh result and that the Department of Insurance had no financial interest in the outcome of the case. These arguments have been flatly rejected by this Court in Levine v. Dade County School Board, supra. In Levine, this Court held that a plaintiff may not maintain an action to recover damages from the state or its subdivisions if he notified the appropriate agency but failed to present written notice of claim to the Department of Insurance, notwithstanding that the Department of Insurance had no interest or role in the proceedings other than to report the claim to the legislature

and no prejudice resulted. Justice Boyd, on page 212 of the Opinion, pointed out. the following:

> "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 ... Consideration of the efficacy of or need for the notice requirement is a matter wholly within the legislative domain."

The arguments of the City and CIGNA are in fact addressed to issues relating to "the efficacy of or the need for" this statutory notice provision. Such questions are not proper subjects of judicial inquiry and are unquestionably matters wholly within the legislative domain. Notice of a contribution claim to the Department of Insurance is clearly required by statute and has been held to be appropriate in Commercial Carrier Corp. v. Indian River Co., 371 So.2d 1010 (Fla. 1979). Commercial Carrier Corp. involved a contribution claim and held that compliance with the statutory notice to the Department of Insurance was a condition precedent that must be alleged in the Complaint. Id. at 1022-1023. The City and CIGNA never even alleged that proper notice had been given by them to the Department of Insurance in the instant case (R-556-567, 575-591). Inasmuch as the time for providing notice to the Department of Insurance had expired, the allegation could never have been made and proven. Therefore, the trial court and the 5th DCA erred in failing to dismiss the City and CIGNA's

complaint with prejudice. Contrary to the contentions of the City and CIGNA, the reliance on the Levine and the Commercial Carrier decisions is certainly appropriate. Failure to prove compliance with Fla. Stat. §768.28 (6)(a)(1983) is fatal to the City and CIGNA'S independent action. See Hardcastle v. Mohr, 483 So.2d 874 (Fla. 2d DCA 1986).

The City and CIGNA in their Answer Brief do not cite cases which refute the County's position that the contribution action involves issues which are fundamentally different from the original personal injury claims of Gipson and Postell. The real parties in interest are entirely separate and distinct. New issues regarding good faith and the reasonableness of the settlement are involved. The City and CIGNA obviously did not accrue their legal rights and obligations until such time as the settlement occurred in 1983 with the estates of Gipson and Postell (R-831-832). The provisions of Fla. Stat. 5768.28 (6) (a) (1983) clearly apply to those situations where, as here, contribution rights are acquired at the time of settlement or satisfaction of the judgment. The undisputed record shows that the City and CIGNA never attempted to enforce contribution prior to the 1983 settlement. The notice which the original plaintiffs provided in the initial independent tort claim did not even mention any potential contribution claim. It is inappropriate to contend that a letter (R-711-715), silent as to the proper claimants, silent as to the proper claim, silent as to the amount of settlement, silent as to facts supporting the reasonableness of the unknown settlement concluded five

years later and silent as to the good faith of the unknown settlement which was to occur five years in the future is somehow proper statutory notice. This argument is even more far fetched when, as here, liability to the persons providing such a letter has been completely released (R-831-832) before the subsequent action is begun by completely different entities (R-831-832).

The City and CIGNA place considerable reliance on Franklin v. Department of Health and Rehabilitative Services, 493 So. 2d 17 (Fla. 5th DCA 1986). There, notice of the claim at issue by the proper claimant was given by the defendant but not the plaintiff. Franklin is obviously distinguishable since the undisputed record shows that no one in the instant case gave timely notice to the Department of Insurance of the independent contribution claim by the City and CIGNA. Furthermore, Lecuyer v. Department of Transportation, 535 So.2d 720 (Fla. 4th DCA 1989) is much more closely on point and completely undercuts respondents position regarding Franklin. Lecuyer affirmed a dismissal with prejudice and involved the same kind of arguments that the City and CIGNA make here. In Lecuyer, Nationwide gave notice to DOT under ~~Fla. Stat.~~ §768.28(6) of a property damage subrogation claim stating it was subrogated to the rights of Lecuyer. Lecuyer later brought suit (apparently for personal injuries) and did not provide proper statutory notice. The court held that Nationwide's notice did not satisfy the requirement that Lecuyer give independent notice of her additional claims. Nationwide sent an accident report to

DOT which showed that Lecuyer was injured in the one car accident. Direct and express conflict now exists between the instant opinion and the decision in Lecuyer which should be addressed in addition to the certified question.

The City and CIGNA are attempting to raise the same contentions as the personal injury claimant in Lecuyer. Here reliance on the notice provided by Gipson and Postell is no better than the improper reliance on Nationwide's notice in Lecuyer. Lecuyer explodes the City and CIGNA'S arguments regarding similarity of liability issues. In Lecuyer, the issues on ultimate liability are identical for the personal injury and subrogation claims. Lecuyer had an even stronger position than the City and CIGNA in the instant case because Nationwide's letter at least referred to the rights of Lecuyer. No such reference is made in the letter the City and CIGNA attempt to rely upon. As in Lecuyer, the trial court should have dismissed the instant case with prejudice.

In its answer brief the City and CIGNA also contend that conduct of the County in defending the original plaintiffs action somehow eliminates the notice requirement. Menendez v. North Broward Hospital District, 537 So.2d 89 (Fla. 1989) flatly rejects such a proposition. In Menendez the Florida Supreme Court held that the statutory notice to the Department of Insurance as required by Fla. Stat. §768.28 (6)(a) is not waived by conduct of the defending party during court proceedings, mediation or settlement negotiations. Respondents contentions in this regard are simply without merit.

Menendez at page 91 interpreted the notice provisions of Fla. Stat. §768.28(6)(a) to require several things:

> "First, the claimant must present the 'claim to the agency in writing. Second, the claimant must present the claim to the Department of Insurance in writing ..." (emphasis supplied)

In Menendez, as in the instant case, the record showed that the notice to the Department of Insurance'was not timely given and the time for filing a proper claim had expired. Menendez consequently affirmed the dismissal of the claim with prejudice. In the instant case it cannot be legitimately disputed that the contribution claimants are the City and CIGNA. It also cannot be disputed that the claim is one for contribution and such a claim was not properly presented as required by Fla. Stat. §768.28(6)(a)(1983). This Court should reverse with instructions to render judgment in favor of Orange County and should answer the certified question in the affirmative.

ISSUE II (RESTATED)

THE FIFTH DISTRICT COURT OF APPEAL PROPERLY REVERSED THE TRIAL COURT'S ERROR IN FAILING TO LIMIT THE LIABILITY OF ORANGE COUNTY TO 25% OF THE STATUTORY MAXIMUM OF $50,000.00 PER CLAIM AND $100,000.00 PER INCIDENT OR OCCURRENCE PURSUANT TO FLA. STAT. §768.28(5) (1977).

As a preliminary to this argument, the County objects to inclusion of this issue since it is beyond the scope of the certified question and the City and CIGNA have failed to file a cross notice of appeal. The only issue which was raised on appeal was the question which was certified by the Supreme Court of Florida concerning the notice provisions as set forth in Issue I. Under Rule 9.110(g) of the Florida Rules of Appellate Procedure, an appellee may cross appeal by serving a notice within ten (10) days of service of the appellant's notice. A review of the record clearly shows that the City and CIGNA have not filed any notice of a cross appeal and Issue II of the City and CIGNA'S appeal brief should be stricken. In the event this Court elects to allow the City and CIGNA to raise this issue, the County responds as follows without waiver of this objection or any of the arguments in Issue I.

The Fifth District Court of Appeal in its opinion correctly pointed out that ~~Fla~~. ~~Stat~~. §768.28(5)(1977) imposes a cumulative per incident limitation on total recovery regardless of whether the source of payment is a single governmental entity or multiple governmental entities. Therefore, the County and the City's liability is subject to the monetary provisions as evidenced in the statute applicable

at the time of the original accident. Fla. Stat. §768.28(5)(1977) specifically limited the claims of any one person to a sum of $50,000.00 and further limited all claims arising out of the same incident or occurrence to an amount of $100,000.00. The 1977 statute controls the issue since the original accident occurred in 1978 (R-60-61).

In the case of Gerard v. Department of Transportation, 455 So.2d 500 (Fla. 1st DCA 1984), affirmed in part 472 So.2d 1170 (Fla. 1985), the court held that the plaintiff could not recover additional funds from the Department of Transportation because the statutory maximum liability had already been paid by the co-defendant, the City of Lake Wales. This Court upheld the ruling of the District Court that the statutory limitation on liability applied to the total recovery, irrespective of the number of governmental entities being sued. Therefore, it is clear that the Fifth District Court of Appeal's correctly limited the maximum liability of all governmental entities in this case to a total of $100,000.00.

Accordingly, as the jury returned a verdict finding Orange County 25% negligent, the maximum possible exposure of the County would have been $25,000.00 less the appropriate credit for the $8,000.00 settlement paid by the Orange County School. Voluntary payments by the City and CIGNA above the statutory maximum cannot increase the statutory cap enacted by the legislature. Just as an insurance carrier cannot change statutory coverages by the simple expedient of omitting them in a contract, an insurance carrier cannot unilateraly expose the

County to sums in excess of statutory limitations by the simple expedient of a settlement agreement.

If the Court considers Respondents Issue 11, the Court should modify the judgment to reflect full credit for the $8,000 setoff for the settlement proceeds paid by the Orange County School Board. The Fifth District Court of Appeals erred when it gave credit for only **75%** of the settlement proceeds contrary to Fla. Stat. **§768.31(5)** (a) and contrary to the analysis of Department of Transportation v. Webb, **409 So.2d 1061** (Fla. 1st DCA **1982)** modified on other grounds **438** So.2d **780** (Fla. **1983).** In Webb, which also involved comparative fault, the court correctly reduced a judgment on account of a pretrial settlement in the full amount of the settlement, not a portion of that amount. The proper reduced judgment is $17,000.00, not **$19,000.00** if the Court reaches Issue 11.

CONCLUSION

This Honorable Court should answer the question certified in the affirmative. This Court should also reverse and remand for entry of judgment in favor of the County because the City and CIGNA unquestionably failed to comply with the notice provisions of ~~Fla~~. ~~Stat~~. §768.28(6)(a)(1983). Without waiver of this position, this Court should either strike Issue II from the City's Answer Brief or in the alternative modify the decision of the Fifth District Court of Appeal to allow a full credit for the $8,000.00 settlement leaving a total judgment in the amount of $17,000.00.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail this 5th day of June, 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 20154
Orlando, FL 32814-0154
(407)425-4251
Attorneys for Appellant,
ORANGE COUNTY
Florida Bar No. 224448