IN THE
SUPREME COURT OF FLORIDA

CASE NO. 76,698

4TH DISTRICT NO. 88-2424

MIGUEL PIREZ, JR.,

Petitioner,

vs.

GEORGE BRESCHER, SHERIFF, etc.,

Respondent.
_____/

Discretionary Review of Decision
of the District Court of Appeal,
Fourth District

BRIEF OF ATTORNEY GENERAL, STATE OF FLORIDA, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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STATUTORY AUTHORITY

768.28 Waiver of sovereign immunity in tort actions

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

(2) As used in this act, "state agencies or subdivisions" include the executive or subdivisions" include the executive departments, the legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.

* * *

(6) An action shall 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, presents such claim in writing to the Department of Insurance, within 3 years after such claim accrues and the

Department of Insurance or the appropriate agency denies the claim in writing. The failure of the Department of Insurance or the appropriate agency to make final disposition of a claim within 6 months after it is filed shall be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted by counterclaim pursuant to s. 768.14.

(7) 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 or the agency concerned shall have 30 days within which to plead thereto.

INTEREST OF AMICUS CURIAE

The Attorney General, as chief legal officer of the State of Florida, has a vital interest in this appeal. A substantial amount of litigation handled by the Department of Legal Affairs, at the request of state agencies, is predicated upon the same notice requirement as is before the Court.

A consequence of this Court's decision is whether notice to the Attorney General's Office would be sufficient notice to a state agency in compliance with Section 768.28(6)(a), Florida Statutes (1987).

The Attorney General believes the decision of the District Court of Appeal, Fourth District is correct and files this Brief as Amicus Curiae in support of the Respondent, urging affirmance.

STATEMENT OF THE CASE AND OF THE FACTS

This case has had a history dating back to 1984, involving several complaints, amended complaints, and crossclaims.

The facts are not significant other than to comment that this litigation involved claims of negligence and civil rights violations against George Brescher, Sheriff of Broward County and others.

Motions presented to the trial court raised the defense of Petitioner's failure to comply with the notice provisions of Section 768.28, Florida Statutes, particularly Section (6)(a).

Affidavits and facts considered by the trial court showed that Petitioner sent notice to the Broward County Attorney's Office, styled "Re: Claim of Miguel Pirez v. Broward County." (R-245-247). The Chief Trial Counsel for the Office of General Counsel for Broward County, Florida established that the County Attorney is in a different location from the Sheriff, does not advise or represent the Sheriff unless requested to do so and that since 1975 no Broward Sheriff has requested or received legal advice from the Office of General Counsel. (R-260-261)

The trial court granted Respondent's Motion to Dismiss which was appealed to the District Court of Appeal, Fourth District which affirmed and certified the question presented to this Court.

SUMMARY OF ARGUMENT

Section 768.28(6)(a), Florida Statutes (1987) specifically requires notice by a prospective claimant to the "appropriate agency." Clearly the "appropriate agency" is the agency to be sued.

To permit notice to an entity that has no legal or contractual obligation to represent the soon-to-be Defendant would severely jeopardize the administration of justice in tort cases involving governmental entities.

ARGUMENT

NOTICE GIVEN ONLY TO THE BROWARD COUNTY ATTORNEY'S OFFICE PURSUANT TO SECTION 768.28(6)(a), FLORIDA STATUTES, IS INSUFFICIENT TO SUPPORT AN ACTION ON A CLAIM AGAINST THE SHERIFF'S OFFICE OF BROWARD COUNTY

The Florida Supreme Court is vested with discretionary jurisdiction to review District Court of Appeal decisions certified by a District Court to be of great public interest. Art. V, §3(b)(4), Fla. Const.; Fla.R.App. P. 9.030(a)(2)(a)(v). The decision to certify a question is exclusively within the province of the Supreme Court to decide the merits of the question. Stein v. Darby, 134 So.2d 232 (Fla. 1961).

Since Section 768.28, Florida Statutes, has waived sovereign immunity for the State, it must be strictly construed. Spangler v. Fla Turnpike Authority, 106 So.2d 461 (Fla. 1958); Carlisle v. Game & Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1977); Department of Natural Resources v. Circuit Court, 317 So.2d 772 (Fla. App.2d 1975); Aff'd, 339 So.2d 1113 (Fla. 1976); State v. Gordon Bros. Concrete, 339 So.2d 1156 (Fla. App.2d 1976).

The language of the particular statutory section at issue could not be more plain. In subs. (6), the legislature has chosen to use the mandatory "shall" in delineating for a claimant the conditions for bringing suit against a sovereign. The legislature is equally clear in describing the presentation of a claim to "the appropriate agency".

As pointed out by the District Court of Appeal; it is uncontroverted that the Broward County Attorney's Office does not represent the Sheriff. Why then should any notice upon the County Attorney's Office be sufficient notice to the Sheriff who has independent counsel? It should not and is not.

By analogy, the District Court said that no one could expect that notice upon a County Attorney's Office would as suffice a predicate for action against the tax collector, property appraiser, supervisor of elections or Clerk of the Circuit Court.

The above is the same concern held by the Attorney General's Office. While designated as chief legal officer by Article IV, 4(c), Florida Constitution, the Attorney is not and never has been the "appropriate agency" to receive notice pursuant to Section 768.28(6)(a).

Utilizing Petitioner's reasoning, claims against the Department of State, Department of Insurance. Department of Education, Department of Insurance, Comptroller, Office of the

Governor, and dozen of others state agencies could be precipitated by notice to the Attorney General's Office. Such a proposition is ludicrous.

Each of the agencies named above has their own general counsel. The Attorney General's Office only represents the agencies named when requested and agreed to between the parties. The record keeping required if the Attorney General's Office was the "appropriate agency" for receipt of claims notices would be mind-boggling and totally unworkable.

Who would be more appropriate for investigation, compiling records and reports, and discussing possible settlement with claimant's attorney than the agency allegedly negligent and about to be sued.

This Court in Menendez v. North Broward Hospital District, 537 So.2d 89, 91 (Fla. 1988) set forth the three conditions precedent for suit against a governmental agency. The first condition listed was:

> . . . the claimant must present the claim to the agency in writing. (Emphasis added)

In Ryan v. Heinrich, 501 So.2d 185 (Fla. App.2d 1987) there was notice to the Sheriff and the Department of Insurance. The claim was against the Sheriff and the Hillsborough County Board of Criminal Justice, a county

department of whom the Sheriff was director. The court held notice was insufficient under Section 768.28(6), Florida Statutes. Notice to the Sheriff was not the "appropriate agency" for suit against the county. By analogy to the case before this Court, the County would not be the "appropriate agency" for notice preceding a suit against the Sheriff.

In Mrowczynski v. Vizenthal, 445 So.2d 1099 (Fla. App. 4th 1984), it was once again recognized that a claim under Section 768.28(6) must be submitted in writing to the potential defendant.

To adopt petitioner's position would render meaningless the requirements formulated by the legislature in Section 768.28(6), Florida Statutes, and the numerous appellate decisions.

CONCLUSION

For all of the foregoing reasons, the Attorney General as Amicus Curiae respectfully requests that this Court answer in the negative the certified question and affirm the decision of the Fourth District Court of Appeal affirming the trial court's dismissal of Petitioner's Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing **BRIEF OF ATTORNEY GENERAL,** has been furnished by U. S. Mail to **DAVID FINGER**, Attorney at Law, 3991 Coral Way, Suite 1010, Miami, FL 33145 and **FRED PARKER**, Attorney at Law, P.O. Box 669, Tallahassee, FL 32302, this 14 day of November, 1990.

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