IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 76,698

MIGUEL PIREZ, JR.,

Petitioner,

vs.

GEORGE BRESCHER,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, FOURTH DISTRICT
DCA-4 CASE NO. 88-2424

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, MIGUEL PIREZ, JR., was the Appellant in the District Court of Appeal and the Defendant/Cross-Plaintiff in the Circuit Court.

Respondent, GEORGE BRESCHER, as Sheriff of Broward County, Florida, was the Appellee in the District Court of Appeal and the Defendant/Cross-Defendant in the Circuit Court.

Since this appeal dealt solely with the dismissal of Petitioner's Cross Complaint, the Petitioner will be referred to in this brief as the "Plaintiff" or as "Petitioner". Respondent will be referred to as "Defendant" or as "Respondent".

The symbol "R" refers to the record on appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as set forth on pages 2 through 5 of the Brief of Petitioner on the Merits.

SUMMARY OF ARGUMENT

This Court, in Beard v. Hambrick, 398 So.2d 708 (Fla. 1981) held that the notice provisions of Florida Statutes §768.28(6) are applicable to sheriffs as a separate political subdivision. This Court likewise held in Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983) that the provisions of the waiver of sovereign immunity found in Section 768.28 must be strictly construed.

The Second District Court of Appeal, in Hardcastle v. Mohr, 483 So.2d 874 (Fla. 2d DCA 1986), held that the notice must be given to the sheriff. The Second District in Ryan v. Heinrich, 501 So.2d 185 (Fla. 2d DCA 1987) strictly applied the provisions of Section 768.28(6) and held that notice to the sheriff was insufficient as notice to the Hillsborough County Board of Criminal Justice, even though the sheriff was the chairman of that Board and received actual notice of the claim but addressed to him in his capacity as Sheriff.

Notice to the County Attorney is clearly not in compliance with the provisions of Section 768.28(6) and the opinion of the Fourth District Court of Appeal on rehearing in the case at bar is correct and should be affirmed.

ARGUMENT

NOTICE GIVEN TO BROWARD COUNTY BY SERVICE ON THE BROWARD COUNTY ATTORNEY'S OFFICE DOES NOT COMPLY WITH THE NOTICE PROVISIONS OF FLORIDA STATUTES §768.28(6)(a) TO SUPPORT AN ACTION ON A CLAIM AGAINST THE SHERIFF OF BREVARD COUNTY

The District Court of Appeal, Fourth District, has certified the following question to this Court:

> Does notice given only to the Broward County Attorney's Office pursuant to Section 768.28(6)(a) suffice to support an action on a claim against the Sheriff's Office of Broward County?

Notably absent from Petitioner's Brief is any mention of the seminal case with regard to the notice requirements of Section 768.28(6). That case is Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983).

In Levine this Court ruled on a certified question from the Third District Court of Appeal which is set

forth in the opinion as follows:

> ...The district court certified the following question:
>
> > May a plaintiff maintain an action to recover damages from a state agency or subdivision, pursuant to section 768.28(6), Florida Statutes (1977), if he notified the appropriate agency but failed to present a written notice of claim to the Department of Insurance, which has no interest or role in the proceedings other than to report claims to the legislature, and no prejudice resulted?
>
> 419 So.2d at 809. We are compelled to answer the question in the negative and approve the decision of the district court of appeal.

442 So.2d at 212 (Emphasis supplied).

This Court goes on to hold:

> ...The provision in section 768.28(6) excepting suits against municipalities from the requirement of notice to the Department of Insurance, together with the affidavit negating any role or function for the department in suits against school districts, gives rise to further speculation that the failure to also except county school districts from the statutory notice requirement was inadvertent.
>
> Such speculation, however, does not authorize us to ignore the plain language of the statute. Section 768.28(6) clearly requires written notice to the department within three years of the accrual of the claim before suit may be filed against any state agency or subdivision except a municipality. Because this subsection is part of the statutory waiver of sovereign immunity, it must be strictly construed.

442 So.2d at 212 (Emphasis supplied).

Finally, this Court opined that:

> ...Our views about the wisdom or propriety of the notice requirement are irrelevant because the requirement is so clearly set forth in the statute.

442 So.2d at 212.

The case of Beard v. Hambrick, 396 So.2d 708 (Fla. 1981) fully supports Respondent's position and the opinion of the Fourth District. In Beard v. Hambrick this Court held that:

> Concerning the applicability of section 768.28 to sheriffs, we find that a sheriff is a "county official", and, as such, is an integral part of the "county" as a "political subdivision" and that section 768.28 is applicable to sheriffs as a separate entity or agency of a political subdivision.

396 So.2d at 711 (Emphasis supplied).

The District Courts of Appeal have consistently applied the notice provisions of Section 768.28(6) strictly and have required that the notice be given to the sheriff. One example is Hardcastle v. Mohr, 483 So.2d 874 (Fla. 2d DCA 1986) in which the Second District squarely held that:

> ...Under this section Mohr was required to present a claim in writing to both the sheriff and the Department of Insurance six months before bringing action against the sheriff. See Beard v. Hambrick, 396 So.2d 708 (Fla. 1981).

483 So.2d at 874 (Emphasis Supplied).

The Second District interpreted the notice provisions of the statute even more strictly in the case of Ryan v. Heinrich, 501 So.2d 185 (Fla. 2d DCA 1987). In that case the notice was given to Sheriff Heinrich of Hillsborough County in his capacity as Sheriff but no notice was given to the Sheriff in his capacity as Chairman of the Hillsborough County Board of Criminal Justice. The suit was brought against both the Sheriff and the Hillsborough County Board of Criminal Justice. The court dismissed the action against the Board with prejudice on the grounds that the notice provisions of the statute had not been complied with. Attached to this brief as Exhibit A is a copy of the actual notice given. In affirming dismissal by the trial court the Second District held as follows:

> There is no doubt that appellant complied with section 768.28(6) with respect to Heinrich, as sheriff, by mailing a written notice of claim to him and to the Department of Insurance. However, this claim made no reference to Heinrich in his capacity as director of the HBCJ, and there was nothing in the text of the claim to suggest that the board was a potential defendant. The written notice did not suffice to make a claim against the board.

501 So.2d 187 at 187 (Emphasis supplied).

Subsection (9) of Section 768.28 supports Respondent's position. The pertinent part of that

subsection reads as follows:

> ...The exclusive remedy for injury or damages suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivision or constitutional officers shall be by action against the governmental entity, or the head of such entity in his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property.

(Emphasis supplied).

It logically follows that if the exclusive remedy is an action against the "constitutional officer" then the notice required by subsection 6 should be given to the constitutional officer.

Petitioner places great reliance on this Court's decision in Orange County v. Gipson, 548 So.2d 658 (Fla. 1989). That case was considered by the Fourth District as is clear from the following quotation from the Fourth District's opinion:

> ...Clearly, the case of Orange County v. Gipson, 548 So.2d 658 (Fla. 1989) does not support the appellant's position. In Gipson, the supreme court merely held that a cross-claim did not require separate notice under the statute because it was part and parcel of the original action. The present case is a far cry from that scenario. Sheriffs in most counties are elected constitutional officers operating their own bandwagons, even taking out their own insurance out of their own budgets to safeguard them against claims such

> as the one before us now. We do not agree that notice to the county attorney's office, when it does not represent the sheriff and when the county is not even named as a defendant, satisfies the intent of the legislature.

Fifth DCA opinion, p.3; Exhibit "B" 3/4, Petitioner's Brief

CONCLUSION

The notice provisions of Section 768.28(6) are clear and unequivocable as are the appellate decisions interpreting that notice requirement. It is clearly established law that a sheriff as an independent constitutional officer must be given written notice pursuant to statute prior to filing a tort action against him. Notice to the county attorney clearly is not either actual or constructive notice to the sheriff. The Fourth District's opinion is legally and factual correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by way of regular United States Mail to David J. Finger, Esquire, Levine & Finger, 3191 Coral Way, Suite 1010, Miami, Florida 33145 and to Louis F. Hubener, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 this 8th day of November, 1990.

Respectfully submitted,

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