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IN THE SUPREME COURT 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

REPLY BRIEF OF PETITIONER

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ARGUMENT

Both the brief of the Respondent and the Amicus brief of the Attorney General stress the same point i.e. Florida Statute 768.28 must be strictly construed. Petitioner does not disagree with this proposition.

The problem presented to the Respondent, however, is that the strict construction urged by the Respondent leads to the inescapable conclusion that the Sheriff of Broward County has no statutory entitlement to notice whatsoever [a position already rejected by this Court in Beard v. Hambrick, 396 So.2d 708 (1981)].

Florida Statute 768.28(6)(a) provides:

> 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...

The instant case involves a suit against a County official i.e. an official of the subdivision. There is no suit brought herein against the state, its (the state's) agencies, or a subdivision of the state. The Petitioner would submit, therefore, that under the "strict construction" urged by the Respondent and Amicus no notice need be given to the Sheriff.

This "strict construction" rationale was, however, tacitly rejected by this Court in both Beard v. Hambrick, supra, and Orange County v. Gipson, 548 So.2d 658 (Fla. 1989).

Turning first to Beard, supra, this Court held that 768.28 is indeed applicable to Sheriffs by virtue of the Sheriffs' position as a "county official" and, as such, as an "integral part of the county" as

a "political subdivision" (at 711). In essence, this Court refused to so strictly construe 768.28 so as to exclude Sheriffs from the reference to "subdivisions" in 768.28(6)(a). Thus, because the subdivision was entitled to notice the Sheriff of the subdivision was entitled to notice.

What is pivotal to the Beard decision and to the resolution of the instant appeal is the rationale of Beard by which this Court determined that the reference to "subdivision" in 768.28 included Sheriffs.

The Court in Beard specifically disapproved of the holding in Johnson v. Wilson, 336 So.2d 651, 652 (Fla. 1st DCA 1976) which found that a "sheriff is not a political subdivision of the State." (at 711).

The First District Court of Appeal in Johnson, supra, grappled with the same issue raised herein, in the context of an analogous statute, 112.531-112.534. In these statutes (referred to as the Police Officers Bill of Rights) the question became one of whether a sheriff fell within the definition of "employing agency."

"Employing agency" as defined by Florida Statute 112.531(2), Florida Statutes (1975) means "any municipality or the state or any political subdivision thereof which employs law enforcement officers."

The First District Court of Appeals "strictly construed" this definition of 112.531(2) and determined that the Sheriff, who is a constitutional officer, "is not a municipality, is not the State of Florida, and is not a political subdivision of the state. (emphasis added) (at 652). The First District did nothing more than

strictly construe the statute whose language (according to the Court) was "so plain and unambiguous that it leaves no room for doubt as to the intent of the legislature in enacting it." (at 652).

Petitioner would submit that in specifically disapproving of the First District's finding in Johnson, supra, that a sheriff is not a political subdivision of the State, this Court in Beard, supra, refused to strictly construe the statute so as to exclude the sheriff from the "subdivision" (county).

This Court in Beard, supra, rejected the strict construction of the First District Court of Appeals in Johnson, supra, precisely because the sheriff is a "county official," and, as such, is an integral part of the "county." This Court in Beard, supra, went on to determine that:

> "there is no reasonable way to construe article viii, section 1, other than to include sheriffs as well as other named county officers as part of a county and, as such, within the definition of a political subdivision... To hold otherwise creates an artificial governmental entity for sheriffs and other named county officials that was not intended by either the legislature or the framers of our constitution. (at 711) (emphasis added.)

Thus, it is clear from Beard, supra, that this Court will not strictly construe the statute when such construction flies in the face of legislature intent or the framers of the Constitution. Indeed, this Court disapproved of the First District's holding in Johnson, supra, which did nothing more than "strictly construe" the statute in question.

Orange County v. Gipson, supra, provides yet another example of this Court's refusal to strictly construe Florida Statute 768.28(6)

where such a construction of the statute would "yield an absurd result" and would be a "totally unwarranted elevation of form over substance." Gipson, at 660.

Petitioner would submit that a "strict construction" of 768.28 in Gipson, supra, would mandate that a second notice of the cross-claim for contribution be given to the Department of Insurance. Nowhere in Florida Statute 768.28(6)(a) is there any provision that notice to the Department of Insurance applies only in cases where the claim for contribution is an independent action of a third party claim against a government agency not a party to the original tort action. Yet, this is precisely the rationale for this Court's refusal to require a second notice to the Department of Insurance.

The strict construction of 768.28(6)(a) urged by the Petitioner in Gipson, supra, was rejected by this Court despite the clear and unambiguous language of the statute unequivocally requiring notice to the Insurance Department of a claim for contribution because this Court refused to interpret the statute so as to "yield an absurd result" and produce a "totally unwarranted elevation of form over substance." (at 660).

The Respondent in the case at bar "hangs his hat" on this Court's pronouncements that Florida Statute 768.28 must be strictly construed. As stated by Petitioner at the outset of this brief, Petitioner does not quibble with this basic premise. Respondent's "strict construction" approach, however, falls short of the mark in two respects.

First, the very protection of the Sheriff afforded by the notice requirement of 768.28(6)(a) was based upon this Court's refusal to

strictly construe the statute so as to exclude sheriffs from the definition of political subdivision. See Beard, supra. This refusal to strictly construe 768.28 was because the Court determined the sheriff to be one and the same as the subdivision itself by virtue of the sheriff's position as a "county official."

Secondly, there is precedent in Orange County v. Gipson, supra, that this Court will refuse to strictly construe the statute where such construction would elevate form over substance or yield an absurd result.

The Petitioner herein suggests that whether the statute is construed strictly or loosely the result is the same - a reversal of the Court below.

A "strict" construction would suggest that no notice to the Sheriff is required. (A position already rejected by this Court in Beard, supra, in disapproving of the First District's "strict" construction in Johnson, supra.)

A more realistic and practical construction of the statute (adopted by this Court in Orange County v. Gipson, supra) suggests that the timely notice to the County of Petitioner's intention to file suit against the Sheriff of the County (whose only entitlement to notice is by virtue of his status as a county official) is sufficient because to hold otherwise would result in a "totally unwarranted elevation of form over substance." Petitioner would submit that to interpret 768.28(6)(a) so as to arrive at the conclusion that notice to the subdivision is not sufficient for notice to the subdivision officials is absurd simply because the subdivision's official (i.e. the sheriff) is entitled to no notice whatsoever but for his status as

a <u>county</u> official.

Petitioner would submit that there is but one conclusion this Court may arrive at so as to avoid 1) interpreting 768.28(6)(a) to yield an absurd result, 2) elevating form over substance, and 3) flying in the face of this Court's rationale and holdings in <u>Beard</u>, supra, and <u>Gipson</u>, supra, - Petitioner's timely notice to the subdivision was sufficient to satisfy the notice requirement of 768.28(6)(a) and enable him to proceed against the subdivision's official (sheriff).

CONCLUSION

Based on the foregoing facts, authorities and arguments, Petitioner respectfully submits that the Respondent was entitled to no notice of Petitioner's crossclaim and that the decision of the District Court be reversed on this basis alone. In the alternative, Petitioner submits that the question certified by the District Court be answered in the affirmative, and that the decision of the District Court be reversed.

Respectfully submitted,

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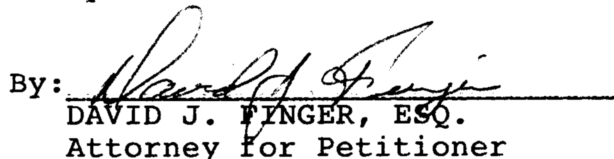
By: 
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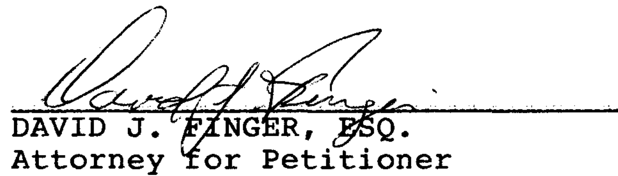
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this 30th day of November, 1990 to: Fred Parker, Esq., Parker, Skelding, Labasky & Corry, P.O. Box 669, Tallahassee, Florida, 32302; and to Denis Dean, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida, 32399-1050.



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