IN THE SUPREME COURT OF FLORIDA
DISTRICT COURT

CASE NO. 94-1737

METROPOLITAN DADE COUNTY,

Petitioner,

vs.

ORLANDO REYES AND BEATRIZ REYES,

Respondents.
_____/

FILED
SID J. WHITE
DEC 4 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITIONER'S JURISDICTIONAL BRIEF

ROBERT A. GINSBURG
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Stephen P. Clark Center
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By

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Assistant County Attorney
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TABLE OF CITAITONS

DESIGNATION OF PARTIES

The parties herein will be referred to as follows: The Petitioner, Metropolitan Dade County, will be referred to as "Dade County" or "County." The Respondent, Orlando and Beatriz Reyes, will be referred to as "Respondent" or "Reyes."

STATEMENT OF THE CASE AND FACTS

The statement of this case, as found by the Third District (Opinion at 1 and 2):

> This is an appeal questioning the propriety of a final judgment in favor of the defendant based on a directed verdict in a "slip and fall" case. The accident occurred at a Dade County jail facility. The plaintiff was a delivery man for a purveyor. In addition, error is urged in a motion for limine ruling finding hearsay in a written statement by an inmate of the facility and the denial of a loss of consortium claim by the wife for her failure to give a notice pursuant to section 768.28(6)(a), Florida Statutes (1989), even though the husband had, in fact, given such a notice.
>
> * * *
>
> But we do find error in the denial of loss of consortium claim. Chandler v. Novak, 596 So. 2d 749 (Fla. 3d DCA 1992). Therefore, the final judgment on the directed verdict is reversed and the matter is returned to the trial court for further proceedings consistent with this opinion.

1. Jurisdictional Statement

This Court has jurisdiction, pursuant to Article V, §(b)(3), based upon the express and direct conflict of the decision below with Orange County v. Piper, 523 So. 2d 196 (Fla. 5th DCA 1988).

2. Summary of Argument

The Third District's decision claiming that it was error to grant a directed verdict where there was no presuit notice as to a loss of consortium claim by the wife pursuant to Section 768.28(6)(a), Fla. Stat. (1989), when the husband had in fact given such notice is in direct and express conflict with the Fifth District Court of Appeal. The Fifth District has held that the presuit notice letter by a husband does not serve as the required notice for the spouse, nor did it excuse the necessity of the spouse filing a notice of her loss of consortium claim.

ARGUMENT

THERE IS DIRECT AND EXPRESS CONFLICT BETWEEN THE THIRD DISTRICT COURT OF APPEAL AND FIFTH DISTRICT COURT OF APPEAL CONCERNING WHETHER PRESUIT NOTICE REQUIREMENTS ARE NECESSARY BY A SPOUSE CONCERNING A LOSS OF CONSORTIUM CLAIM.

The Third District held that it was error to grant a directed verdict where the wife of the Respondent failed to give notice presuit of her consortium claim where the husband had, in fact given notice of only his claim.[1] The court found error in the denial of the loss of consortium claim, citing to Chandler v. Novak, 596 So. 2d 749 (Fla. 3d DCA 1992). The court in Chandler held a "derivative action is not a separate and distinct action.

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[1] Section 768.28(6) provides in pertinent part:

> An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents a claim in writing to the appropriate agency, and . . . presents such claim in writing to the Department of Insurance, within three (3) years after such claim accrues in the Department of Insurance or the appropriate agency denies the claim in writing.

Something that is derivative has no origin in itself but owes its existence to something foregoing." Id. at 751. The Third District recognized that its holding may conflict with Orange County v. Piper, 523 So. 2d 196 (Fla. 5th DCA 1986). Id. at 751, Footnote 2.

In Orange County v. Piper, the court held that a "loss of consortium claim is a separate cause of action belonging to the spouse of the injured married partners, and though derivative in the sense of being occasioned by injury to the spouse, it is a direct injury to the spouse who has a loss consortium. . . . Therefore the filing of the required notice by William Piper did not serve as a required notice for Katherine, nor did it excuse the necessity of her filing a notice of her loss of consortium claim." Id. at 198.

It is clear that the Fifth District and Third District are in direct and express conflict as to the necessity of given presuit notice on a consortium claim. This Court should accept jurisdiction.

CONCLUSION

The Third District's decision expressly and directly conflicts with decisions from the Fifth District Court of Appeal on the issue of whether presuit notice is required on a

consortium claim. This Court should accept jurisdiction to make uniform the law in this state on this issue.

Respectfully submitted,

ROBERT A. GINSBURG
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By: Evan Grob
Evan Grob
Assistant County Attorney
Florida Bar No. 699373

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 29th day of November, 1995, mailed to: Todd R. Schwartz, Esq., Arnold R. Ginsburg, P.A. & Richard B. Burke, Esq., 410 Concord Building, Miami, FL 33130

Evan Grob
Assistant County Attorney

APPENDIX

Appendix Part 1

RECEIVED
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Dade County Attorney

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1995
WEDNESDAY, OCTOBER 25, 1995

ORLANDO REYES, et al., **
Appellants, **
vs. ** CASE NO. 94-1737
METROPOLITAN DADE COUNTY, etc., **
Appellee. **

Upon consideration, appellee's motion for rehearing and clarification is hereby denied. BARKDULL, BASKIN and LEVY, JJ., concur. Appellee's motion for rehearing en banc is denied.

A True Copy

ATTEST:

LOUIS J. SPAMPINATO
Clerk, District Court of
Appeal, Third District

By _____
Deputy Clerk

cc: Todd R. Schwartz
Eliot Grob

/NB

Appendix Part 2

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

RECEIVED
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Dade County

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1995

ORLANDO REYES and BEATRIZ REYES, ** Appellants, **

vs. ** CASE NO. 94-1737

METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida, ** Appellee. **

Opinion filed September 6, 1995.

An Appeal from the Circuit Court for Dade County, Jon I. Gordon, Judge.

Arnold R. Ginsberg and Richard B. Burke and Todd R. Schwartz, for appellants.

Robert A. Ginsburg, County Attorney, and Evan Grob, Assistant County Attorney, for appellee.

Before BARKDULL, BASKIN and LEVY, JJ.

PER CURIAM.

This is an appeal questioning the propriety of a final judgment in favor of a defendant based on a directed verdict in a

"slip and fall" case. The accident occurred at a Dade County jail facility. The plaintiff was a delivery man for a purveyor. In addition, error is urged in a motion in limine ruling finding hearsay in a written statement by an inmate of the facility and the denial of a loss of consortium claim by the wife for her failure to give a notice pursuant to section 768.28(6)(a), Florida Statutes (1989), even though the husband had, in fact, given such a notice.

We reverse, finding that the plaintiff's case should have gone before a trier of fact. Mahoney v. Burger King Corp., 600 So. 2d 1252 (Fla. 3d DCA 1992); Brooks v. Phillip Watts Enterprises, Inc., 560 So. 2d 339 (Fla. 1st DCA 1990); Lee v. The Southland Corp., 253 So. 2d 268 (Fla. 2d DCA 1971). We find no error in the motion in limine ruling as the inmate was not an agent or employee of the defendant, and therefore the statement was inadmissible under section 90.803(18)(d), Fla. Stat. (1993) amended by 1995 Fla. Laws ch. 95-147. But we do find error in the denial of loss of consortium claim. Chandler v. Novak, 596 So. 2d 749 (Fla. 3d DCA 1992). Therefore, the final judgment on the directed verdict is reversed and the matter is returned to the trial court for further proceedings consistent with this opinion.

Reversed and remanded with directions.

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breached, there can be no cause of action for negligence. *Seitz*, 517 So.2d at 50; *Rice v. Florida Power & Light Co.*, 363 So.2d 834, 839 (Fla. 3d DCA 1978), *cert. denied*, 373 So.2d 460 (Fla.1979).

[2, 3] Redress for injuries caused by the allegedly negligent performance of a contractual duty may be properly sought through a tort action. *Gallichio v. Corporate Group Serv., Inc.*, 227 So.2d 519, 520 (Fla. 3d DCA 1969). The rule is well settled that privity of contract is not an element of a cause of action in tort. *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973); *Navajo Circle, Inc. v. Development Concepts, Corp.*, 373 So.2d 689, 691 (Fla. 2d DCA 1979). Further, a defendant's liability extends to persons foreseeably injured by the defendant's failure to use reasonable care in the performance of a contractual promise. *Maryland Maint. Serv., Inc. v. Palmieri*, 559 So.2d 74, 76 (Fla. 3d DCA), *review denied*, 574 So.2d 142 (Fla. 1990). Rouzie argues that Municipal and Alterman were under a duty to load the cargo so as to enable Rouzie to unload it mechanically. Further, Municipal loaded the sign posts in an enclosed trailer pursuant to the explicit directions of the Navy, and Alterman merely carried the sign posts to the Navy loading dock. It was Rouzie's supervisor who accepted the shipment and instructed Rouzie to unload the cargo. Nowhere was a contractual duty created between the Navy and the defendants whereby the defendants were required to load the cargo so that it could be unloaded by mechanical means. Thus, finding defendants owed no duty to Rouzie upon which to base a claim of negligence, the trial court properly directed the verdict in defendants' favor. *Whitten v. State Farm Fire and Casualty Co.*, 430 So.2d 528, 529 (Fla. 4th DCA 1983); *Daniels v. Weiss*, 385 So.2d 661, 664 (Fla. 3d DCA 1980).

Accordingly, we affirm.

Gayle CHANDLER, Appellant,

v.

Fred J. NOVAK, D.D.S., Mark Greenberg, D.D.S., and Isaac Garazi, D.M.D., Appellees.

Nos. 90–548, 90–976.

District Court of Appeal of Florida, Third District.

March 31, 1992.

Appeal was taken from judgment of the Circuit Court, Dade County, S. Peter Capua, J., dismissing wife's derivative loss of consortium claim in husband's dental malpractice action. The District Court of Appeal, Ferguson, J., held that wife of alleged dental malpractice victim was not required to give separate statutory notice of her loss of consortium claim in order to join as coplaintiff in her husband's lawsuit.

Reversed and remanded.

1. Husband and Wife ⇐209(4)

Wife of alleged dental malpractice victim was not required to give separate statutory notice of her loss of consortium claim within limitations period in order to join as coplaintiff in her husband's lawsuit, where husband's notice described occurrence with sufficient detail to enable defendant dentist to investigate; overruling *Scarlett v. Public Health Trust of Dade County*, 584 So.2d 75. West's F.S.A. § 766.106(2), (3)(a); F.S.1987, § 768.57.

2. Husband and Wife ⇐209(4)

Wife's derivative loss of consortium claim was not separate and distinct from husband's dental malpractice claim, so as to require wife to file separate notice of claim. West's F.S.A. § 768.28(6); F.S.1987, § 768.57.

Perse & Ginsberg and Arnold R. Ginsberg, Miami, and Samuel M. Spatzer, Coral Gables, for appellant.

Womack & Bass and David C. Appleby, Miami, for appellee Novak.

Vernis & Bowling and Peter Wildman, Wolpe, Leibowitz, Berger & Brotman and Steven R. Berger, Miami, for appellee Greenberg.

Kubicki, Draper, Gallagher & McGrane and Dennis J. Murphy, Miami, for appellee Garazi.

Before SCHWARTZ, C.J., and BARKDULL, HUBBART, NESBITT, BASKIN, FERGUSON, JORGENSON, LEVY, GERSTEN and GODERICH, JJ.

ON MOTION FOR REHEARING EN BANC

PER CURIAM.

The November 19, 1991, opinion of the panel, as corrected, is adopted as the opinion of the en banc court. *Scarlett v. Public Health Trust of Dade County*, 584 So.2d 75 (Fla. 3d DCA 1991), is overruled.

Before HUBBART, FERGUSON and GODERICH, JJ.

CORRECTED OPINION

FERGUSON, Judge.

[1] The issue presented by this appeal is whether a wife, whose medical malpractice claim is wholly derivative of her husband's claim which has been prenoticed pursuant to section 768.57, Florida Statutes (1987), must give a separate statutory prenotice within the statutory limitations period in order to join as a co-plaintiff for loss of consortium in the husband's lawsuit.

Plaintiff, Gayle Chandler, appeals from an adverse summary judgment in favor of the defendants based upon a finding that she failed to file notice of her intent to initiate litigation within the applicable two-year statute of limitations period. We reverse for the reasons set forth below.

In 1985, Clifford Chandler, appellant's husband, suffered injuries as a result of an alleged dental malpractice. Pursuant to section 768.57, Florida Statutes (1987),[1] Clifford Chandler sent to the alleged medical tortfeasors the required notice of intent to sue. No mention was made in the notice of appellant's claim for loss of consortium. Agents for the appellees subsequently denied that any medical malpractice was involved. Mr. Chandler sued the three appellees; Mrs. Chandler joined in the complaint as a derivative claimant seeking damages for loss of services and loss of consortium. After responsive pleadings were filed, the appellees moved for summary judgment as to Mrs. Chandler because the notice of intent to sue filed by the husband did not reflect any claim being made on behalf of his wife. The trial court granted the appellees' motions for summary judgment.

Section 768.57(2) states that "prior to filing an action for medical malpractice, a claimant shall notify each prospective defendant ... of intent to initiate litigation for medical malpractice." Further, section 768.57(3)(a) provides that no suit may be filed for a ninety-day period after notice is mailed to any prospective defendant, during which time the prospective defendant's insurer is to conduct a review to determine the liability of the defendant.

The clear legislative intent behind section 768.57 is to reduce the number of lawsuits by providing prospective defendants the opportunity to investigate a claim and make a settlement offer where appropriate. *Solimando v. International Medical Centers*, 544 So.2d 1031, 1033–34 (Fla. 2d DCA 1989) (cited with approval in *Hospital Corp. of Am. v. Lindberg*, 571 So.2d 446 (Fla.1990)).

Mr. Chandler filed the required notice of intent to sue within the applicable time limitations. That notice to the alleged medical tortfeasors was sufficient to make them aware of all the facts concerning the dental malpractice claim upon which Mrs. Chandler's cause of action depended. Pursuant to the notice, the three appellees conducted an investigation and determined that there was "absolutely no medical malpractice involved in the care and treatment of" Mr. Chandler. Because the notice sent

1. Section 768.57, Florida Statutes (1987) has subsequently been renumbered as sections 766.106(2) and 766.106(3)(a), Florida Statutes (1988 Supp.).

by appellant's husband to the appellees described the occurrence with sufficient detail to enable the appellees to investigate, it fulfilled the statutory requirements. *Metropolitan Dade County v. Coats*, 559 So.2d 71 (Fla. 3d DCA), *rev. denied*, 569 So.2d 1279 (Fla.1990).

[2] Relying extensively on *Orange County v. Piper*, 523 So.2d 196 (Fla. 5th DCA), *review denied*, 531 So.2d 1354 (Fla. 1988), the appellees argue that, because Mrs. Chandler's derivative claim for loss of consortium is completely separate and distinct from the action of Mr. Clifford Chandler, she is a "claimant" under section 768.57 and must either file her own notice of intent to sue or specifically join in the notice filed by her husband. We disagree.[2]

A derivative action is not a separate and distinct action. Something that is derivative has not its origin in itself, but owes its existence to something foregoing. Black's Law Dictionary 399 (5th ed. 1979); *see Gates v. Foley*, 247 So.2d 40 (Fla.1971) (wife has a derivative right to recover only if her husband has a cause of action against the same defendant). Once the appellees were put on notice of Mr. Chandler's claim, no further investigation was necessary as to his wife's claim because, as a derivative action, appellant's loss of consortium claim was completely dependent upon the husband establishing a cause of action against the appellees. *Habelow v. Travelers Ins. Co.*, 389 So.2d 218 (Fla. 5th DCA 1980). There's no showing that the appellees were prejudiced by the lack of a separate notice letter regarding a derivative claim.

The summary judgment in favor of the appellees as to the appellant's derivative action is reversed and the cause is remanded for further consistent proceedings.

2. Our holding may conflict within *Orange County v. Piper*, 523 So.2d 196 (Fla. 5th DCA 1988). We agree with the special concurring opinion of Judge Orfinger in *Piper* that *Levine v. Dade County School Bd.*, 442 So.2d 210 (Fla.1983), does not compel dismissal of a derivative claim where the notice given of the main claim is timely and adequate. Rather, *Levine* held that the failure of a plaintiff to give *any* notice to the Department of Insurance within the limitations period as required by section 768.28(6), Florida Statutes (1977), barred the action. In this case, the appropriate notice of the main claim was timely given.

Eddie SMALL, Appellant,

v.

STATE of Florida, Appellee.

No. 91-1807.

District Court of Appeal of Florida, Fourth District.

April 1, 1992.

Appeal from the Circuit Court for Broward County; Richard D. Eade, Judge.

Richard L. Jorandby, Public Defender, and Barbara J. Wolfe, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Douglas J. Glaid, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

DELL and GUNTHER, JJ., concur.

FARMER, J., dissenting with opinion.

FARMER, Judge, dissenting.

Defendant, who was then represented by the public defender, filed his own motion for discharge on the grounds that he had been denied his speedy trial rights. *See* Fla.R.Crim.P. 3.191. It was then 227 days after his arrest. Three days after the pro se filing, his public defender filed a separate motion on the same grounds. Neither motion was set for hearing, but a status conference was held the day after counsel's motion was filed. Eleven days after the status conference, defendant's counsel filed still another motion for discharge which was heard later that day. The court ruled

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Chanen to pay $30,000 of the money it was holding for Gay to Wharfside, instead of ordering Chanen to pay it to Gay first and then ordering it paid to Wharfside. This argument requires we ignore the jury's plain finding that Gay was not liable but Chanen was. Further, the jury award was not the same as the total cost of repairing the water system. Consequently, the basis of the award is uncertain. Because the verdict contains inconsistency which fundamentally undermines its underlying basis,[2] we reverse and remand for a new trial on this ground as well.

REVERSED and REMANDED.

ZEHMER and WIGGINTON, JJ., concur.

ORANGE COUNTY, a political subdivision of the State of Florida, Appellant,

v.

William E. PIPER and Kathryn Fernandez Piper, his wife, Appellees.

William E. PIPER and Kathryn Fernandez Piper, his wife, Appellants,

v.

ORANGE COUNTY, a political subdivision of the State of Florida, Appellee.

Nos. 87-663, 87-1153.

District Court of Appeal of Florida, Fifth District.

April 14, 1988.

Plaintiff brought suit seeking damages for personal injuries sustained when he fell into trash compactor operated by county, and plaintiff's wife sought damages for loss of consortium. The Circuit Court for Orange County, William C. Gridley, J., awarded judgment to plaintiff and granted his wife new trial on issue of damages for loss of consortium. Plaintiff appealed and county cross-appealed. The District Court of Appeal, Sharp, C.J., held that: (1) instruction on county's failure to maintain its premises in reasonably safe condition or to warn or correct known dangerous condition was justified, and (2) wife's failure to file her loss of consortium claim with county or to join in husband's claim warranted its dismissal.

Reversed and remanded.

Orfinger, J., filed specially concurring opinion.

1. Appeal and Error ⇐1067

Failure to give requested jury instruction constitutes reversible error where complaining party establishes that requested instruction accurately states applicable law, facts in the case support giving instruction and instruction was necessary to allow jury to properly resolve all issues in the case.

2. Counties ⇐224

Instruction on county's failure to maintain its premises in reasonably safe condition or to warn or correct known dangerous condition was justified, in action for personal injury sustained when plaintiff fell into trash compactor, by evidence as to procedure for dumping trash in compactor, and necessary proximity of vehicles and persons to the pit, without a guardrail.

3. Appeal and Error ⇐1067
Counties ⇐224

Failure to give instruction as to whether county failed to maintain its premises in reasonably safe condition or to warn or correct known dangerous condition was not harmless, in action for personal injury sustained when plaintiff fell into trash compac-

2. *See North American Catamaran Racing Association, Inc. v. McCollister*, 480 So.2d 669 (Fla. 5th DCA 1985).

tor, especially in light of jury's finding of 90/10% liability in favor of county.

4. **Counties** ⇐212

Wife's failure to file her loss of consortium claim with county or to join in husband's claim warranted its dismissal. West's F.S.A. § 768.28(6).

5. **Husband and Wife** ⇐209(3, 4)

Loss of consortium is separate cause of action belonging to spouse of injured married partner, and though derivative in sense of being occasioned by injury to spouse, it is a direct injury to spouse who has lost consortium.

Steven J. Lengauer, of Pitts, Eubanks, Hilyard, Rumbley & Meier, P.A., Orlando, for Orange County.

William W. Fernandez, Orlando, and Calvin J. Faucett, Lake Mary, for William and Kathryn Piper.

SHARP, Chief Judge.

William Piper appeals from a final judgment awarding him $12,890.70 in damages. He suffered personal injuries when he fell into a trash compactor which was operated by Orange County. He argues the trial court erred in failing to read Florida Standard Jury Instruction 3.5(f) to the jury. Orange County cross-appeals from an order granting Mrs. Piper a new trial on the issue of damages for loss of consortium. We reverse on both grounds.

[1] Failure to give a requested jury instruction constitutes reversible error where the complaining party establishes that:

(1) The requested instruction accurately states the applicable law,

(2) The facts in the case support giving the instruction, and

(3) The instruction was necessary to allow the jury to properly resolve all issues in the case.

Giordano v. Ramirez, M.D., 503 So.2d 947 (Fla. 3rd DCA 1987); *Alderman v. Wysong & Miles Co.*, 486 So.2d 673 (Fla. 1st DCA 1986).

[2] Initially, both parties requested Florida Standard Jury Instruction 3.5(f) be read to the jury. 3.5(f) as submitted by Piper stated:

> Whether Defendant Orange County negligently failed to maintain its premises in a reasonably safe condition; or whether Defendant Orange County negligently failed to correct a dangerous condition of which Defendant Orange County either knew or should have known by the use of reasonable care; or whether Defendant Orange County negligently failed to warn Plaintiff William E. Piper of a dangerous condition concerning which Defendant Orange County had, or should have had, knowledge greater than that of Plaintiff William E. Piper.

We reject the County's argument that Florida Standard Jury Instruction 3.5(f) inaccurately states the law as it applies to governmental entities. *Cf. Pittman v. Volusia County*, 380 So.2d 1192 (Fla. 5th DCA 1980). If facts at trial established a basis to find that Orange County failed to maintain its premises in a reasonably safe condition, or to warn or correct a known dangerous condition, the instruction should have been given.

[3] The failure to give this instruction was not harmless error in this case especially in light of the jury's finding of 90/10% liability in favor of Orange County. Much of Piper's evidence on these issues was excluded by the trial judge. However, the procedure for dumping trash in the compactor, as prescribed by the County, and the necessary proximity of vehicles and persons to the pit, without a guardrail, along justified the giving of the instruction and the jury's finding of some liability on the part of Orange County.

[4] With respect to the loss of consortium claim we find that Mrs. Piper's failure to file her claim with the County or join in Mr. Piper's claim,[1] as required by section 768.28(6), Florida Statutes (1981) warrants its dismissal.[2] *Levine v. Dade County*

1. We note that Mr. Piper's claim did not even give notice of his marital status.

2. Section 768.28(6) provides:

School Board, 442 So.2d 210 (Fla.1983). *See also Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979). Compliance with 768.28(6) is clearly a condition precedent to maintaining a suit.

Mrs. Piper's reliance on this court's opinion in *Whitney v. Marion County Hospital District*, 416 So.2d 500 (Fla. 5th DCA 1982), for the principle that a technical defect in a notice can be waived when the notice is sufficient to provide authorities with an opportunity to investigate shortly after the occurrence, apparently has been impliedly overruled by *Levine*. *Cf. Franklin v. DHRS*, 493 So.2d 17 (Fla. 5th DCA 1986) (compliance with notice requirement satisfied even though notice of claim to Department of Insurance was not given by accident victim but by defendant).

[5] Florida case law recognizes that loss of consortium is a separate cause of action belonging to the spouse of the injured married partner, and though derivative in the sense of being occasioned by injury to the spouse, it is a direct injury to the spouse who has lost the consortium. *Busby v. Winn & Lovett Miami, Inc.*, 80 So.2d 675 (Fla.1955); *see also Ryter v. Brennan*, 291 So.2d 55 (Fla. 1st DCA), *cert. denied*, 297 So.2d 836 (Fla.1974); *Resmondo v. International Builders of Fla., Inc.*, 265 So.2d 72 (Fla. 1st DCA 1972) (both cases holding that husband's release did not abate wife's cause of action for loss of consortium, which was a property right in her own name); *but see Gates v. Foley*, 247 So.2d 40 (Fla.1971) (termination of husband's cause of action because of adverse judgment on the merits should bar wife's cause of action for loss of consortium). Therefore, the filing of the required notice by William Piper did not serve as the required notice for Kathryn, nor did it excuse the necessity for her filing a notice of her loss of consortium claim.

REVERSED AND REMANDED.

COWART, J., concurs.

ORFINGER, J., concurs specially with opinion.

ORFINGER, Judge, concurring specially.

I concur in Judge Sharp's opinion, except that I would not so hastily relegate *Whitney v. Marion County Hospital District*, 416 So.2d 500 (Fla. 5th DCA 1982) to the judicial scrap heap. While I agree that *Whitney* does not support Kathryn Piper's position here, I do not agree that it was impliedly overruled by *Levine v. Dade County School Board*, 442 So.2d 210 (Fla. 1983). *Levine* held that the failure of the plaintiff to give any notice to the Department of Insurance within the three year period required by section 768.28(6), Florida statutes (1977), barred the action. In *Whitney*, proper notice was given to the Department of Insurance, and the issue was whether the written notice of claim submitted to the *agency* was sufficient as to form when it contained all required details, and made a claim for medical mediation under the medical malpractice statute then in effect. We held in *Whitney* that although section 768.28(6) bars an action against the state or its agencies "unless the claimant presents the claim in writing to the appropriate agency" but does not specify the *form* in which the claim be presented, a writing which made a claim and contained all the pertinent details on which the claim was based, satisfied the statute, although couched in the *form* of a request for medical mediation. That issue was not presented in or ruled on in *Levine*.

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, 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.