IN THE SUPREME COURT OF FLORIDA

METROPOLITAN DADE COUNTY,

Petitioner,

vs.

ORLANDO REYES and BEATRIZ REYES,

Respondents.
_____/

CASE NO. 86,911

District Court of Appeal,
3d District - No. 94-1737

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. A LOSS OF CONSORTIUM CLAIMANT MUST PROVIDE WRITTEN NOTICE OF THE CLAIM PURSUANT TO § 768.28(6)(a), FLORIDA STATUTES, TO SATISFY THE REQUIREMENTS FOR WAIVER OF SOVEREIGN IMMUNITY.

The Respondents frankly admit the strength of the County's arguments that the presuit notice provision, § 768.28(6)(a), Florida Statutes, must be strictly construed. They can do little else, considering the force and clarity of this Court's holdings in Levine v. Dade County Sch. Bd., 446 So. 2d 210 (Fla. 1983), and its progeny. The Respondents also admit that a consortium claim may "stand alone" and so independently fall within the statute's requirements. Resp'ts' Br. at 4.

In the same breath, however, the Respondents offer a single, contradictory argument. They contend that "the County has no standing to assert the notice provision as an absolute defense to a derivative claim promised upon the same negligence visited upon the same claimant whose claim the County has already denied." Resp'ts' Br. at 4. In other words, the Respondents contend that while the notice provision may ordinarily apply to a derivative claim like loss of consortium, it effectively does not apply where the government denies liability on the main claim. For this contention, the Respondents offer no authority beyond the obvious principle that legislation should be interpreted to make sense. See Resp'ts' Br. at 4-5 (citing City of Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950). It is the Respondents' construction of the statute, however, which makes no sense, for three reasons.

First, the Respondents' construction does not comport with the literal terms of the statute, which they themselves admit must be construed strictly and cover the loss of consortium claim. The language of § 768.28(6)(a) does not contain any exception for derivative claims, on condition that the main claim is rejected or otherwise.[1]

Second, the Respondents' construction frustrates the central purpose of § 768.28(6)(a), to ease the investigation and settlement of claims. By the Respondents' construction, the government will only learn of a consortium claim after the main claim is denied, often after the case proceeds to litigation. It does not make any sense to assume that the Florida Legislature would want the government to learn only half of the story when determining its exposure and deciding whether the settle. And nothing would stop the claimant on the main claim from filing, and when the government accepts the claim, the spouse could file the consortium claim with liability already essentially admitted. Surely the Florida Legislature did not intend to leave the government subject to ill-informed settlement decisions and exposure to continued, open-ended liability.

Finally, a construction that requires notice for accepted claims but not for rejected ones is simply absurd. At the time the claims are filed, the claimants cannot know whether they will be accepted or rejected. It is senseless to assume the Legislature intended to condition presuit notice on an event that has not yet occurred. In sum, the Respondent's construction of § 768.28(6)(a) must be rejected.

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[1] Notably the Florida Legislature did provide a statutory exception for a contribution claim. The Legislature is thus obviously able to provide an exception if needed. Furthermore, the canons of construction provide that the inclusion of one category implies the exclusion of another ("expressio unius est exclusio alterius"). Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996). The implication is thus that consortium claims should not be excepted from the general requirement of presuit notice.

The Respondent's finally attempt to avoid the presuit notice issue altogether by using a procedural argument. They claim that the County should be precluded from arguing the issue because it was not squarely addressed in its Answer Brief in the district court. The Respondents offer no authority for this, because none exists.

An appellee does not waive or abandon its position by failing to address an appellant's argument. Indeed, the rules do not even require an appellee to file a brief; they merely permit such a filing. See Fla. R. App. P. 9.210; State Bd. of Optometry v. Florida Sec'y of Ophthalmology, 538 So. 2d 887, 889 (Fla. 1st DCA 1988). Moreover, the County was faced with an en banc decision from the Third District which overruled a case squarely on point that required notice for loss of consortium claims. Chandler v. Novak, 596 So. 2d 749, 750 (Fla. 3d DCA 1992) (overruling Scarlett v. Public Health Trust of Dade County, 584 So. 2d 75 (Fla. 3d DCA 1991)). Considering that state of the law, it would have been impossible for the County to succeed in an argument to any panel of the district court. A panel may not expressly overrule or recede from a prior en banc decision on the same point. O'Brien v. State, 478 So. 2d 497, 499 (Fla. 5th DCA 1985); see also In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure, 416 So. 2d 1127, 1128 (Fla. 1982) (mandating intra-district consistency). This Court has never demanded an exercise in futility in order to maintain an issue on appeal. Accordingly, the Court should ignore the Respondent's flawed procedural argument, address the merits, and reverse the district court's decision below. The Court should expressly hold that the requirements of § 768.28(6)(a), Florida Statutes, apply to derivative claims like loss of consortium.

II. THE DISTRICT COURT SHOULD NOT HAVE REVERSED THE DIRECTED VERDICT AGAINST PLAINTIFF ORLANDO REYES BECAUSE HE INVITED THAT ORDER IN THE TRIAL COURT.

In their statement of facts, the Respondents assert that they neither requested nor agreed to the directed verdict, but simply consented to consideration of the motion at an earlier stage of the proceedings. See Resp't.'s Br. at 1-2. To buttress this assertion they misleadingly link two separate quotes from the trial court (which are actually found sixteen pages apart in the transcript) to suggest that the trial court was doing nothing more than ruling on the evidence presented. In so doing, the Respondents completely ignore all of the discussion in between those two quotes, including the trial court's repeated disinclination to grant the directed verdict, see R. at 198, 203, 209, 213, and the following critical exchange:

> The Court: . . . Then I guess we go back to the question do you want me to direct a verdict. How do you feel about that?
>
> What do you want me to do? Do you all lawyers want me to direct a verdict?

R. at 213-14. The Plaintiffs did not respond, "no," but instead said this:

> [Plaintiffs' Counsel]: If you're inclined to do that and he wants to do it, I'd rather have it all up there at one time rather than piecemeal because the strongest part of my case is that statement and if it goes to the jury on what I have it's much weaker than it would be without the statement.

R. at 214.

This was the last word from the Plaintiffs on the issue. Neither side presented any further evidence and the Plaintiffs made no argument opposing the directed verdict. In fact, there was no further discussion of the directed verdict issue at all, except for the court's unadorned ruling granting it. There was no need for further discussion; for despite

the court's reservations about granting the directed verdict, the Plaintiffs had asked for it -- so they could have all the issues "up there at one time." R. at 214. The court capitulated and observed "[s]o now you can take it all up." R. at 222.

When the record is read fully it is apparent that the trial court's final ruling was at the invitation of (or at the very least without the objection of) the Plaintiffs. Unless the Respondents attribute the Court's actions to whim, there is no other explanation for the about-face on granting the directed verdict. As noted in the County's Initial Brief (p. 5, n. 5), after announcing that it would not enter the verdict, the Court then denied a County motion in limine, further supporting the Plaintiff's evidence and case. That the Court then granted the directed verdict against the Plaintiffs, after it had improved the Plaintiffs' case, makes no sense, unless it is understood that the ruling was in fact invited.

The Respondents next suggest that this case is different than those relied on by the County, "wherein the appealing party actually asked the Court to rule against it." Resp't.'s Br. at 6. While blatantly requesting an adverse ruling is one way to encounter the doctrine of invited error, e.g., Rubin v. Gordon, 165 So. 2d 824 (Fla. 3d DCA 1985), it is not the only way. As pointed out in the County's Initial Brief at 12-13, simply contributing to the error, or failing to object, is enough. See, e.g., Behar v. Southeast Banks Trust Co., 374 So. 2d 572, 575 (Fla. 3d DCA 1979); County of Volusia v. Niles, 445 So. 2d 1043, 1048 (Fla. 5th DCA 1985); Florida Antilles Properties v. Rose & Rose, Inc., 324 So. 2d 129, 130 (Fla. 3d DCA 1975). However couched, the Plaintiffs' failure to say "no" when asked if the Court should rule against them plainly runs afoul of the doctrine.

Finally, relying on Ogden Allied Services v. Panesso, 619 So. 2d 1023 (Fla. 1st DCA 1993), the Respondents assert that the County improperly utilized a Notice of Supplemental Authority. In Ogden the appellee filed two notices of supplemental authority. The second was filed the day before oral argument and attached twenty-two cases, totaling 125 pages. Concerned with the improper use of supplemental authorities as what amounted to an additional brief, or as a way to ambush an opponent, the district court felt compelled to publish the "Order Striking Notices of Supplemental Authority" to prevent future abuses.

In the case at bar, and in stark contrast to Ogden, the County's Notice of Supplemental Authority cited only two cases (the first just two pages long, the other a mere paragraph), and was submitted three days before oral argument. See Appendix at Tab A-1. This is hardly the type of "abuse" the First District was concerned about in Ogden. Rather, by alerting the court to case law on the simple, but nonetheless important issue of invited error, the County's Notice of Supplemental Authority served its proper and intended function. Moreover, the Respondents are hard pressed to contend that they were in any way prejudiced by the Notice of Supplemental Authority (indeed they have made no such claim). Nor for that matter can the Respondents claim that the County waived the issue of invited error. They did not make such an argument in the district court; on the contrary, the Respondents themselves have stated that "the parties thoroughly addressed and the [district] Court carefully considered, the issue [of invited error] at oral argument." Appendix at Tab A-3 (Appellants' Reply to Appellee's [County's] Motion for Rehearing)

¶ 3; see also id. ¶ 1 ("all of the asserted points were previously briefed and orally argued to, and considered by the [district court]").

The other two cases cited by the Respondents are likewise not relevant. Denny v. Denny, 334 So. 2d 300 (Fla. 1st DCA 1976), and American Baseball Cap, Inc. v. Duzinski, 308 So. 2d 639 (Fla. 1st DCA 1975), stand merely for the proposition that appellees should respond to the points raised by appellants There is no suggestion that the County failed to do so here. Indeed, Denny also specifically noted that it was appropriate for an appellee "to present additional points for the court's consideration." 334 So. 2d at 302 (emphasis added). By raising the simple, but important (perhaps jurisdictionally imbued) issue of invited error, that is all the County was doing. If invited error can be waived at all,[2] it was certainly not waived in the district court nor in this Court. And because the claimed error was invited it should have been upheld by the district court.

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[2] Given the quasi-jurisdictional character of invited error, and the attempted circumvention of procedure that frequently motivates the practice, it is questionable whether the issue can in fact be waived. Moreover, if waivable, appellate courts risk collaboration among parties desirous of unripe and unauthorized appeals. One party need only volunteer to invite an adverse ruling, provided the other agrees not to raise "invited error" on appeal, defeating the doctrine's purpose while encouraging procedural circumvention and advisory rulings.

CONCLUSION

The district court erred, both in rejecting the statutory presuit notice requirement for loss of consortium claims and in ignoring the Plaintiff's invitation of the error he subsequently appealed. Accordingly, this Court should reverse the district court and direct it to reinstate the trial court's order in its entirety.

Respectfully submitted,

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and

Jason Bloch
Assistant County Attorney
Florida Bar No. 033588

and

Jason Bloch for
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 21st day of June, 1996, mailed to: Arnold R. Ginsburg, P.A. and Richard B. Burke, Esq., 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130.

Assistant County Attorney

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APPENDIX

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Appendix Part 1

IN THE CIRCUIT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT.

CASE NO. 94-01737
L.T. Case No. 91-21366

FB #699373

ORLANDO REYES and BEATRIZ REYES,

Appellants,

vs.

METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida,

Appellee.

_____/

NOTICE OF
SUPPLEMENTAL AUTHORITY

Pursuant to Florida Rule of Appellate Procedure 9.210(g) undersigned counsel hereby files White v. Soni, 550 So.2d 75 (Fla. 3d DCA 1989) (Plaintiff waives his right to challenge the summary judgement where plaintiff's attorney agrees to unauthorized procedure by which summary judgment was entered), and Rubin v. Gordon, 165 So.2d 824 (Fla. 3d DCA 1964) (Dismissal of complaint could not be challenged on appeal by plaintiff, where plaintiff agreed to unorthodox procedure, attempting to make reviewing court first court to consider and rule on sufficiency of complaint). These cases are cited for support of the proposition that plaintiffs, by agreeing and/or inviting the trial court to grant a directed verdict before the commencement of trial, waive their right to challenge the order granting directed verdict.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That a true and correct copy of the foregoing instrument was faxed and mailed to Todd R. Schwartz, Esquire, ARNOLD R. GINSBERG, P.A. & RICHARD B. BURKE, ESQ., 410 Concord Building, Miami, FL 33130 this 24 day of July, 1995.

Evan Grob
Assistant County Attorney

Appendix Part 2

IN THE CIRCUIT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT.

CASE NO. 94-01737
L.T. Case No. 91-21366

FB #699373

ORLANDO REYES and BEATRIZ REYES,

Appellants,

vs.

METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida,

Appellee.

_____/

MOTION FOR HEARING, CLARIFICATION AND MOTION FOR REHEARING EN BANC

Comes Now the Appellee, METROPOLITAN DADE COUNTY, by and through undersigned counsel, hereby files its motion for rehearing and clarification pursuant to F.R.App.P 9.330 and Motion for Rehearing En Banc pursuant to F.R.Civ.P. 9.331 and states as follows:

This case involves the trial court granting a final judgment in favor of the Defendant based on a directed verdict heard before commencement of trial. The plaintiff was a delivery man for a purveyor.

Dade County had filed a Notice of Supplemental Authority in which it cited to Rubin v. Gordon, 165 So.2d 824 (Fla. 3d DCA 1964). In Rubin, the Third District held that a dismissal of a complaint could not be challenged on appeal, where plaintiff agreed to having a dismissal taken against it. In the case at bar, counsel for the plaintiff asked the trial court to grant a directed verdict in order that the granting of a motion in limine excluding hearsay in a written statement by an inmate of the facility could be reviewed by the Third District prior to trial (R. 188-226). The opinion of this Court overlooks this argument

that the plaintiff asked the trial court to direct a verdict when the trial court indicated it was not prepared to do so. The court's opinion neither rejects nor accepts the County's position that by having plaintiff's counsel ask the trial judge to grant a directed verdict in order that the motion in limine could be reviewed by the Third District prior to the commencement of trial, waives any right that the plaintiff might have to appeal the issue of the directed verdict.

In Rubin, the Defendant filed a motion to dismiss a complaint. A hearing was held before the trial court at which the trial judge stated he was of the opinion that substantial portions of the complaint failed to state a cause of action but requested memorandum of law from both parties in support of their respective positions. Plaintiff's counsel submitted a letter to the trial court in which it essentially stated that considering the indications of the court, that it intends to dismiss most of the complaint as not stating a cause of action, that the court grant the motion to dismiss so the matter could be taken up on appeal. The letter further stated that it is "written not in agreement with the contention of the Defendant nor in agreement with the indications of the court to rule against the plaintiff, but it's done with the thought in mind that further delays can be avoided by presenting the complaint in the Appellate Court." Id. at 824. This Court held that the procedure employed by the plaintiff circumvented the normal channels of pleading, and in effect, attempted to make the Appellate Court the first court to consider and rule upon the sufficiency of the complaint. Such procedure, would in effect, allow the plaintiff to do indirectly

what he could not do directly under the Florida Rules of Civil Procedure. Therefore, this Court held that plaintiff waived his right to appeal.

Likewise, after the trial court indicated that it was not comfortable in granting a directed verdict prior to trial, plaintiff's counsel specifically asked the trial court to grant the County's Motion for Directed Verdict in order that the order granting the County's Motion in Limine could be reviewed by the Third District.

Furthermore, Appellees would request that this court move this court for clarification in its holding that it is not necessary for the wife to give separate notice of her consortium claim to the Department of Insurance pursuant to Sec. 768.28(6)(a) Florida Statute, (1989). It is requested that this Court find a direct and express conflict with Orange County v. Piper, 523 So.2d 176 (Fla. 5d DCA 1988). In Piper, the Court held that the loss of consortium is a separate cause of action belonging to the spouse of the injured married partner. Notice to the Department of Insurance of a consortium claim is required by Section 768.28(6), Florida Statute. This is in direct conflict with this Court's holding and it is hereby requested that this Court certify the question in order that the Supreme Court can maintain uniformity among the District Courts.

WHEREFORE, Appellee, METROPOLITAN DADE COUNTY, requests a motion for rehearing, clarification and rehearing en banc and ask the Third District to affirm the trial court's granting of its directed verdict and/or certify its opinion as being in direct

and express conflict with the Fifth District Court of Appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That a true and correct copy of the foregoing instrument was faxed and mailed to Todd R. Schwartz, Esquire, ARNOLD R. GINSBERG, P.A. & RICHARD B. BURKE, ESQ., 410 Concord Building, Miami, FL 33130 this 14 day of September, 1995.

Evan Grob
Assistant County Attorney

Appendix Part 3

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT.

CASE NO. 94-01737

L.T. Case No. 91-21366

Fla. Bar No. 765960

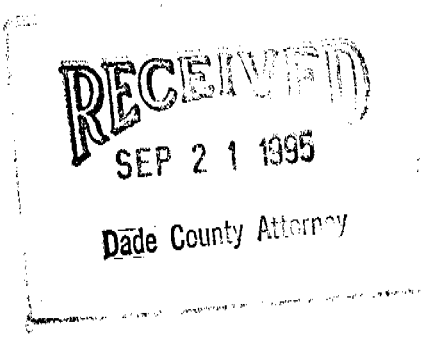
ORLANDO REYES and BEATRIZ REYES,

Appellants,

vs.

METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida,

Appellee.
_____/



APPELLANTS' REPLY TO APPELLEE'S MOTION FOR REHEARING

Appellants, ORLANDO REYES and BEATRIZ REYES, by and through undersigned counsel, reply to Appellee, METROPOLITAN DADE COUNTY's, "Motion for Rehearing, Clarification and Motion for Rehearing En Banc" as follows:

1. As Appellee concedes in its motion for rehearing, all of the asserted points were previously briefed and orally argued to, and considered by, this Honorable Court. While Appellee contends that "the opinion of this Court overlooks" certain of Appellee's arguments, there is no suggestion that this Court, as a tribunal, overlooked or misapprehended anything. Appellee's subject motion violates the prohibition against re-argument of the merits of the Court's order. Rule 9.330(a), Fla.R.App.P.

2. On the merits -- once again -- the record reflects that neither Appellants nor Appellee objected to the trial court's independent suggestion that it consider Appellee's motion for

directed verdict at the start, rather than at the close, of the evidence. The record clearly reflects that Appellants did not ask the trial court to direct a verdict against them, but simply consented, as did Appellee, to consideration of the motion at an earlier stage of the proceedings. It is telling that such appellate afterthought was first raised in a "Notice of Supplemental Authority" filed by Appellee a few days before oral argument rather than in the brief.

3. In any event, the parties thoroughly addressed, and this Court carefully considered, the issue at oral argument.

4. Appellee also requests "clarification" and "rehearing en banc" of the loss of consortium notice issue, which this Court has already ruled upon en banc in Chandler v. Novak, 596 So.2d 749 (Fla. 3rd DCA 1992), cited by the Court in its opinion at bar!

WHEREFORE, Appellants respectfully suggest that Appellee's Motion for Rehearing, Clarification and Rehearing En Banc be denied.

Respectfully submitted,

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By: _____
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I DO HEREBY CERTIFY that a true copy of the foregoing Appellants' Reply to Appellee's Motion for Rehearing was mailed to the following counsel of record this 20th day of September, 1995:

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