IN THE SUPREME COURT OF FLORIDA

Case No. SC10-302
Lower Tribunal No.: 3D07-3314

THE PUBLIC HEALTH TRUST OF
MIAMI-DADE COUNTY d/b/a
JACKSON MEMORIAL HOSPITAL,

Petitioner,

v.

ODETTE ACANDA, as Personal
Representative of the Estate of Ryan
Rodriguez, Deceased,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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RESPONSE TO STATEMENT OF FACTS

Petitioner, the Public Health Trust, appealed a final judgment on a jury verdict finding it liable for the death of Respondent's newborn son, Ryan Rodriguez. The Trust challenged the denial of its motions for mistrial, directed verdict, judgment notwithstanding verdict, and new trial. The Third District affirmed. Public Health Trust of Miami-Dade County v. Acanda, 23 So. 3d 1200 (Fla. 3d DCA 2010). The majority opinion set forth the following facts:

> After the testimony of Ryan's father, Plaintiff's counsel stated: cYour Honor, we are *going to* rest now and start with some procedural matters that we want to take up with the Court.c The court told the jury that cthe plaintiff is *getting close to resting* or has rested.c The attorneys then went sidebar:
>
> > Mr. Gressman [hospital counsel]: Have they officially rested?
> >
> > Ms. Tejedor [Plaintiff's counsel]: No, No.
> >
> > The Court: That was the oddest resting I've ever seen.
> >
> > Ms. Tejedor [Plaintiff's counsel]: We need to introduce a few records and stuff.
> >
> > Mr. Diez-Arguelles [Plaintiff's counsel]: We need to make sure we have the proper stipulations that we think we have before we rest.
>
> After a brief discussion about other matters, the court excused the jury. The parties made certain stipulations and the court announced it would reserve ruling until the morning on an issue concerning mortality tables. It was then that the Trust moved for a directed verdict. The Trust argued, among other grounds, that the Plaintiff cfailed to serve process in conformity with Section 768.28(7), Fla. Stat. (1990)c, by neglecting to serve process on the Department of Financial Services.

> By the next morning, before court started, Plaintiff's counsel had obtained service and filed the proof of service in the clerk's office. Plaintiff's counsel proffered it to the court, the court reserved ruling, and the Trust proceeded with its case. Ultimately, the jury returned a verdict for the Plaintiff, finding the Trust 100% at fault. The court denied the Trust's motion for new trial and motion for judgment in accordance with the motion for directed verdict and entered judgment for the Plaintiff.

23 So. 3d at 1201-1202 (court's emphasis; footnotes omitted).

Because the Plaintiff had not clearly rested when the Trust made its motion, the court ruled that it would have been error to direct a verdict before the Plaintiff had completed presentation of her case in chief. 23 So. 3d at 1202. Further, the requirement of §768.28(7) was satisfied before the trial court ruled on the reserved evidentiary matter or on the Trust's motion for directed verdict. 23 So. 3d at 1202.

SUMMARY OF THE ARGUMENT

The decision does not expressly and directly conflict with any of the dozen or so cases Petitioner cites. In determining express and direct conflict, the Court is confined to the four corners of the majority opinion. Most of Petitioner's arguments improperly rely on the dissent. The majority opinion does not conflict with cases requiring strict compliance with §768.28, Fla. Stat., with cases on the burden of establishing service of process, or with cases on waiver or preservation of an issue. Nor does the decision conflict with cases on what Petitioner describes as "creation of evidence" or with cases on estoppel.

The decision does not affect a class of constitutional or state officers. Contrary

to Petitioner's contention, it does not allow such officers to be sued without strict compliance with §768.28, Fla. Stat.

The decision is a correct application of Fla.R.Civ.P. 1.480, which requires a court to wait until a plaintiff has completed presentation of her case in chief before ruling on a motion for directed verdict.

ARGUMENT

I. THE DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OF THE DECISIONS CITED BY PETITIONER.

Relying heavily on the dissent below, Petitioner cites a laundry list of decisions, on a variety of issues, with which it contends the decision below conflicts. Jurisdictional conflict under Art. V, §(3)(b)(3), Fla. Const. "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). No such conflict appears here.

First, contrary to Petitioner's arguments at p. 3 and 6, the decision does not conflict with cases requiring strict, mandatory compliance with §768.28, Fla. Stat. The District Court below approvingly cited cases requiring compliance. 23 So. 3d at 1202-1203. The Court did not relieve the Plaintiff of the requirements of the statute. It merely held that the trial court properly denied a directed verdict because the Plaintiff complied with §768.28(7) by serving the Department of Financial Services and demonstrating it to the court before finally resting. None of the cases

Petitioner cites[1] allow direction of a verdict before the plaintiff has completed her case.

Nor do any of these cases prohibit a plaintiff from demonstrating that she has served the Department of Financial Services before the trial court has ruled on a motion for directed verdict. In fact, of the cases Petitioner cites, only Levine v. Dade County School Board, 442 So. 2d 210 (Fla. 1983) even mentions service of process under §768.28(7) and Levine mentions it only in a footnote. The holding in Levine addresses failure to provide presuit notice under §768.28(6), not service under §768.28(7). None of the cases deals with the issues in this case: the timing of a motion for directed verdict or the timing of service on the Department under §768.28(7).

Nor does the decision conflict with cases placing the burden on the plaintiff to establish service of process. Contrary to Petitioner's contention, the decision below does not hold that the Plaintiff need not satisfy that burden. In Re-Employment Services, Ltd. v. National Loan Acquisitions Co., 969 So. 2d 467 (Fla. 5th DCA 2007), the trial court denied a motion to dismiss, without a hearing, even though the return of service was defective on its face. The court held that personal jurisdiction would be "suspended and will lie dormant until [the plaintiff] submits proper proof of service."

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[1] Levine v. Dade County School Board, 442 So. 2d 210 (Fla. 1983); Menendez v. North Broward Hosp. Dist., 537 So. 2d 89 (Fla. 1988); Public Health Trust v. Menendez, 584 So. 2d 567 (Fla. 1991); Sheriff of Orange County v. Boultbee, 595 So. 2d 985 (Fla. 5th DCA 1992).

969 So. 2d at 427. The trial court below did not relieve the Plaintiff of her obligation to demonstrate proof of service; rather the Plaintiff submitted proof of service before the trial court ruled. That is all that Re-Employment Services required.

The decision does not conflict with Canada Dry Bottling Co. of Florida, Inc. v. K.M.A., Inc., 349 So. 2d 846 (Fla. 2d DCA 1977). There, the court held that the circuit court, "*as an appellate tribunal*," erred when it reversed the trial court's denial of a defendant's motion to dismiss *at the close of all the evidence*, but then remanded the case to allow the plaintiff to reopen and present additional evidence. In the present case, it was the trial court, not the appellate court, which allowed the presentation of the proof of service, and the trial court did so before the Plaintiff rested and before the trial court ruled on the motion. The Plaintiff had not rested when the Defendant moved for directed verdict, stating "No, No," when the trial court asked if she had rested; the trial court had reserved ruling on some evidentiary matters; the Plaintiff still had records to introduce; and the Plaintiff had stated, "We need to make sure we have the proper stipulations that we think we have before we rest." 23 So. 3d at 1202.

The decision does not conflict with Silber v. Cn'R Industries of Jacksonville, Inc., 526 So. 2d 974 (Fla. 1st DCA 1988). In Silber, the plaintiff had not paid the stamp tax on a note at the time he rested. The trial court allowed the plaintiff to "reopen its case, remove the note from evidence, purchase the requisite documentary

stamps and affix them to the note, and again place the note, now properly taxed, in evidence." 526 So. 2d at 976. The court held the procedure followed was improper where it resulted in an award of attorney's fees to the plaintiff for work done before the stamps were paid. But the court did not order a directed verdict, as Petitioner seeks here. Instead, it ordered remittitur of the fees to limit them to those incurred after the stamps were paid, or a dismissal without prejudice.

In contrast to Silber, Respondent had not rested below when she served the Department. Although she said she was "going to rest," when the court asked if she had rested, she answered, "No, No", pointing to several remaining matters, including whether they had the stipulations they thought they had. And Respondent presented proof of service before the trial court ruled on either the reserved evidentiary matter or the motion for directed verdict. Moreover, the Trust's argument on this point relies, in part, on the view of the facts presented by the dissent below, which this Court cannot consider in determining conflict. Reaves, supra.

Nor does the decision conflict with American Home Assur. Co. v. Plaza Materials Corp., 908 So. 2d 360 (Fla. 2005) by rendering a portion of a statute "meaningless." The role of the Department of Financial Services appears to be only to provide reports to the Legislature. Levine v. Dade County School Board, 442 So. 2d 210, 211 (Fla. 1983). If the Legislature had wanted to place a time limit on service on the Department in §768.28(7), it would have done so. It put a time limit in

§768.28(6), requiring presuit notice. It knows how to write a time limit.

The decision does not conflict with cases concerning "raising issues for the first time on appeal." Petitioner's Brief p. 6. The majority opinion does not discuss what Respondent argued to the trial court, other than the fact that counsel stated they were not resting and had more evidence and stipulations to deal with. This Court cannot look beyond the majority opinion for jurisdiction. See Reaves, supra.

Moreover, Respondent was the appellee below, not the appellant, and was permitted to argue any issue appearing in the record in support of the trial court's ruling. This Court stated in Dade County School Board v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999), one of the cases that Petitioner cites as conflicting, that "the appellee can present any argument supported by the record even if not expressly asserted in the lower court." 731 So. 2d at 645.

Finally, the decision does not "conflict with the doctrine of estoppel" discussed in Town of Oakland v. Mercer, 851 So. 2d 266 (Fla. 5th DCA 2003), as Petitioner contends at p. 7. Petitioner relies on the dissent below to support this argument, which is prohibited by Reaves, supra. Moreover, Town of Oakland applies estoppel to prevent a party which has prevailed on an issue in a *prior proceeding* from taking a contrary position in a *subsequent case*; it does not prevent a party from making arguments in the alternative in the same case, or from using the "tipsy coachman" doctrine approved in WQBA, supra.

Petitioner has not demonstrated express and direct conflict with any of the cases it cites.

II. THE DECISION DOES NOT EXPRESSLY AFFECT A CLASS OF CONSTITUTIONAL OR STATE OFFICERS.

The decision does not expressly affect a class of constitutional or state officers under Art. V, §(3)(b)(3), Fla. Const. No constitutional or state officers are parties to this case. The Trust, as a body, is the only defendant. The Trust is not a "constitutional or state officer." It is not an "officer" at all. It is a board, an organization created by Dade County under Chapter 25A of the Miami-Dade County Code. See generally Florida State Bd. of Health v. Lewis, 149 So. 2d 41 (Fla. 1963) (Supreme Court lacked jurisdiction where decision affected the Board of Health, not individual members).

Beard v. Hambrick, 396 So. 2d 708 (Fla. 1981), on which Petitioner relies, does not support jurisdiction here. Beard involved a sheriff, a constitutional officer under Art. VIII, §1(d), Fla. Const. There is nothing in the Florida Constitution about the Public Health Trust. Wallace v. Dean, 3 So. 3d 1035 (Fla. 2009) also involved a sheriff, but the basis of this Court's jurisdiction was express and direct conflict. 3 So. 3d at 1038-1040. Wallace provides no support for jurisdiction here.

Petitioner has not cited any case applying such a broad reading of that clause. Petitioner's interpretation would subject *every* decision involving the Public Health Trust to discretionary Supreme Court review. In fact, this Court has granted review

in very few cases of the many involving the Trust, and we have found none granted on the basis that a class of constitutional or state officers was expressly affected.

This Court rejected a similarly broad construction of this basis for jurisdiction in Spradley v. State, 293 So. 2d 697, 701 (Fla. 1974):

> A decision which caffects a class of constitutional or state officers' must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state. Such cases naturally affect all classes of constitutional or state officers, in that the members of these classes are bound by the law the same as any other citizen. To vest this Court with certiorari jurisdiction, a decision must Directly and, in some way, Exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers.

The broad jurisdiction that Petitioner advocates would defeat the purpose of the formation of the District Courts of Appeal as courts of last resort with only limited exceptions enumerated in the Constitution. See generally, Spradley, 293 So. 2d at 701.

Contrary to Petitioner's argument, the decision does not "loosen a legislative requirement for waiver of sovereign immunity," nor does it "extend the waiver beyond the boundaries set by the Legislature" (Petitioner's Brief p. 8), nor "expand the limits of Fla. Stat. §768.28 waiver" (Petitioner's Brief p. 9). Section 768.28(7) requires service on the Department of Financial Services, and Respondents did serve the Department and presented proof of service before resting, and before the trial court ruled on the motion for directed verdict.

CONCLUSION

The Petitioner has shown no basis for review under either of the clauses of Art. V, §3(b)(3), on which it relies. The decision properly applies Fla.R.Civ.P. 1.480 by prohibiting a directed verdict before the plaintiff has finished presenting her case, and properly enforces the requirement that the plaintiff demonstrate compliance with §768.28(7), Fla. Stat. Review should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to: R.A. CUEVAS, JR., ESQUIRE, STEVE STEIGLITZ, ESQUIRE, ERIC K. GRESSMAN, ESQUIRE, Assistant County Attorneys, 111 N.W. 1st St., Miami, FL 33130 this _____ day of March, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in

14 point Times New Roman and complies with the requirements of Rule 9.210.

_____

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