

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.

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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STATEMENT OF THE FACTS AND CASE

The Third District Court of Appeal found that “even if we were to conclude that the Plaintiff had rested her case when the hospital was permitted to argue its motion for directed verdict, the notice requirement had been satisfied by the following morning before a ruling on either the ‘reserved’ evidentiary matter or the directed verdict.” *Public Health Trust v. Acanda*, 23 So.3d 1200, 1202 (Fla. 3rd DCA 2009); Appendix A-1. The dissent found that the instant case conflicted with holdings requiring strict compliance with the waiver of sovereign immunity statute, Fla. Stat. § 768.28.

The dissent further noted that the issue regarding whether or not the motion for directed verdict was premature was waived because Plaintiff never raised it below. Plaintiff allowed the motion for directed verdict to be heard without objection and even failed to raise the alleged premature nature of the motion for directed verdict in her Response in Opposition to Motion for Directed Verdict. “This argument was first raised by plaintiff on appeal and, therefore, the argument should be considered waived for appellate purposes.” Appendix, A-1, *Acanda*, 23 So.3d at 1204.

SUMMARY OF ARGUMENT

As recognized by Judge Suarez and apparently several other judges on the Third District, the instant opinion directly and expressly conflicts with a number of

district court opinions. The flawed Third District opinion also conflicts with the seminal decisions of this Honorable Court regarding strict compliance with Fla. Stat. § 768.28 requirements. Numerous district courts of appeal other than the Third District have followed this Honorable Court's holdings that require strict compliance with Fla. Stat. § 768.28.

Furthermore, the dissent emphasizes that contrary to precedent the Third District decided this case based on an issue waived by Appellee below. This decision to affirm where Plaintiff failed to object to the trial court's consideration of a motion for directed verdict allegedly prior to resting, is in direct and express conflict with numerous decisions.

As a final direct conflict, Plaintiff was permitted to create evidence after resting and inconsistently move to re-open and then claim on appeal she did not rest. The Fifth District has expressly prohibited creation of evidence after Plaintiff rests and the First District has specifically found that estoppel prevents a plaintiff from adopting such inconsistent positions. Thus, express and direct conflict jurisdiction radiates from the Third District's opinion.

Moreover, the instant decision expressly affects a class of constitutional or state officers, because, as decided by this Honorable Court, interpretations of Fla. Stat. Section 768.28 affect such officers. Such officers under the instant Third

District opinion may be sued without strict compliance with the waiver of sovereign immunity statutes.

ARGUMENT

I. THE INSTANT DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH FLORIDA SUPREME COURT AND DISTRICT COURT PRECEDENT.

The dissent by Judge Suarez traces the direct and express conflicts between the instant opinion and *Levine v. Dade County School Board*, 442 So.2d 210, 212 (Fla. 1983); *Re-Employment Servs., Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So.2d 467, 471-72 (Fla. 5th DCA 2007); and *Anthony v. Gary J. Rotella & Assocs.*, 906 So.2d 1205, 1207 (Fla. 4th DCA 2005). See Appendix, A-1, *Acanda*, 23 So.3d at 1203. The Fifth and Fourth Districts, as well as this Court, have required strict compliance with Fla. Stat. § 768.28. The Third District's opinion is in derogation of such requirements. Further examination of the opinion shows that it conflicts with numerous decisions of this Honorable Court and other district courts of appeal.

As recognized by the dissent, this decision will nullify the mandatory compliance provisions of the statute and violate separation of powers in that the District Court of Appeal has rewritten the statute to allow non-compliance so long as the trial court does not make a decision on a motion for directed verdict. Compare Appendix, A-1, *Acanda*, 23 So.3d at 1202, with *Acanda*, 23 So.3d at

1203 (the comparison highlights the failure of plaintiff to comply with the *mandatory* provisions of Fla. Stat. § 768.28(7) and the majority's tolerance of such violations of the statutory mandates). Indeed, the statutory requirement of service on the Department of Financial Services is rendered meaningless by the Third District's newly adopted interpretation of the statute whereby service of the complaint can be effected *after* the close of Plaintiff's case-in-chief in the trial of that very complaint. *See American Home Assur. Co. v. Plaza Material Corp.*, 908 So.2d 360, 367-68 (Fla. 2005) (holding that courts should avoid readings of statutes that render parts of the statute meaningless); Appendix, A-1, *Acanda*, 23 So.3d at 1202. Such an overstepping of the judicial boundaries regarding sovereign immunity and separation of powers constitutes a direct conflict with established law of this Honorable Court.

Contrary to the Third District, the Fifth District in *Sheriff of Orange County v. Boulton*, 595 So.2d 985, 987 (Fla. 5th DCA 1992), has ruled that plaintiffs must comply with the strict requirements of Fla. Stat. § 768.28 and the plaintiff must prove such compliance at trial.

The Fifth District's decision in *Re-Employment Servs., Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So.2d at 471-72, conflicts with the instant decision by holding that the burden to establish proper service of process is upon the party seeking to invoke the court's jurisdiction. The instant decision, contrary to *Re-*

Employment Services, holds that Plaintiff herein need not satisfy such a burden and, instead, can avoid a directed verdict by complying after the presentation of her case in chief.

Further, the instant decision conflicts with *Canada Dry Bottling Co. of Florida, Inc. v. K.M.A., Inc.*, 349 So.2d 846, 847-48 (Fla. 2d DCA 1977), which holds that once the plaintiff has failed to prove a part of a claim, it is incumbent on the trial court to dismiss or enter a directed verdict, and that it would depart from the essential requirements of law to remand the case to allow plaintiff to re-open and present evidence where the trial court excluded hearsay. This Opinion allows Plaintiff to re-open her case on appeal, present evidence after the motion for directed verdict and create evidence after the motion for directed verdict. The Opinion thereby directly conflicts with *Silber v. Cn'R Industries of Jacksonville, Inc.*, 526 So.2d 974, 978 (Fla. 1st DCA 1988).

The Third District created a rule whereby plaintiffs are able to circumvent motions for directed verdict where a plaintiff has not presented evidence essential to her case-in-chief at the time of the motion. See Appendix, A-1, *Acanda*, 23 So.3d at 1202. Here, after closing, Plaintiff asked the Court for additional time to check her file to respond to the Defendant's motion for directed verdict and to answer the Court's inquiry as to whether she already complied with section 768.289(7) – a statutory element of her case-in-chief. Instead of checking her file

or the relevant case law, Plaintiff appears to have hired a process server and served the Department of Financial Services – thus creating evidence necessary for her case-in-chief after resting and without reopening. *See* Appendix, A-1, *Acanda*, 23 So.3d at 1203-04. Such practices are inconsistent with the rules of civil procedure and directly conflict with *Silber v. Cn’R Industries of Jacksonville, Inc.*, 526 So.2d at 978. The instant decision also conflicts with *American Home Assur. Co. v. Plaza Material Corp.*, 908 So.2d at 367-68 (holding that courts should avoid readings of statutes that render parts of the statute meaningless), since it renders Fla. Stat. § 768.28(7) meaningless.

The majority opinion herein deviates from long standing rulings from this Honorable Court and other District Courts that the requirements of Fla. Stat. § 768.28 must be strictly applied. *Menendez v. North Broward Hospital District*, 537 So.2d 89, 90-91 (Fla. 1988); *Public Health Trust v. Menendez*, 584 So.2d 567, 569 (Fla. 1991); *Sheriff of Orange County v. Boulton*, 595 So.2d 985, 986-87 (Fla. 5th DCA 1992); and *Levine v. Dade County School Board*, 442 So.2d 210, 212 (Fla. 1983). The deviation from this Honorable Court’s and district courts’ precedent justifies jurisdiction.

The Third District also conflicts with precedent regarding raising issues for the first time on appeal. The dissent of Judge Suarez identifies this direct and express conflict with prior precedent. *See* Appendix, A-1, *Acanda*, 23 So.3d at

1204. Both at trial and in post-trial motions, Plaintiff never objected to the timing of the motion for directed verdict or any alleged premature consideration of the motion by the trial court. *See* Appendix, A-1, *Acanda*, 23 So.3d at 1204. This issue of the timeliness of the motion for directed verdict may not be raised for the first time on appeal. The instant decision thus expressly conflicts with *Tennant v. State*, 205 So.2d 324, 324-25 (Fla. 1st DCA 1967); *Frenz Enterprises, Inc. v. Port Everglades*, 746 So.2d 498, 503 n. 3 (Fla. 4th DCA 1999); *Dade County School Board v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla. 1999); and *Thomas v. State*, 648 So.2d 298, 300 (Fla. 5th DCA 1995) (all holding that a party may not raise an issue for the first time on appeal).

Moreover, the Opinion conflicts with the doctrine of estoppel that precludes Plaintiff from taking inconsistent positions on the same facts in the same case as expressed in *Town of Oakland v. Mercer*, 851 So.2d 266, 268-69 (Fla. 5th DCA 2003). Here, Plaintiff moved to reopen (which would be impossible unless the case was closed), which was denied, and yet on appeal claims that Plaintiff had not rested. *See* Appendix, A-1, *Acanda*, 23 So.3d at 1204.

II. THE INSTANT DECISION EXPRESSLY AFFECTS A CLASS OF CONSTITUTIONAL OR STATE OFFICERS.

The instant decision affects a class of constitutional and state officers, namely those sued in their official capacities. Prior to this opinion, such officers were protected from plaintiffs who failed to strictly comply with the requirements

of Fla. Stat. § 768.28(7). For the first time, the Third District has deviated from this Court's dictates that such requirements must be strictly construed. Such a decision constitutes an overstepping of the boundaries of a court's domain and, in effect, loosens a legislative requirement for waiver of sovereign immunity that affects state or constitutional officers in their official capacities. *See Beard v. Hambrick*, 396 So.2d 708, 710 (Fla. 1981). This decision shall expand the scope of the waiver of sovereign immunity for such officers.

Particularly as to waiver of sovereign immunity, the appellate court has no authority to extend the waiver beyond the boundaries set by the Legislature. *Richman v. Shevin*, 354 So.2d 1200, 1205 (Fla. 1977), *cert. denied*, 439 U.S. 953 (1978); *Federal Ins. Co. v. Southwest Florida Ret. Ctr., Inc.*, 707 So.2d 1119, 1121 (Fla. 1998); *Spangler v. Florida State Turnpike Authority*, 106 So.2d 421, 424 (Fla. 1958); *U.S. v. Kubrick*, 444 U.S. 111, 117-18 (1979). *Richman*, 354 So.2d at 1205, shows that the instant Opinion's waiver of sovereign immunity beyond the boundaries set by the Legislature, expressly affects a class of state and constitutional officers. *Wallace v. Dean*, 3 So.3d 1035, 1053 (Fla. 2009), and *Beard v. Hambrick*, 396 So.2d at 710, hold that Fla. Stat. § 768.28 limits affect state or constitutional officers such as County sheriffs. *Beard*, 396 So.2d at 709-10, held that jurisdiction would lie for a decision concerning Fla. Stat. § 768.28 that affects a class of state or constitutional officers in their official capacities.

Similarly, under *Beard* and Art. V, § 3(b)(3), of the Florida Constitution, this Honorable Court has jurisdiction over the instant decision that expands the limits of Fla. Stat. § 768.28 waiver and thereby affects a class of constitutional or state officers.

CONCLUSION

For the foregoing reasons, Petitioner has established jurisdiction. This Court should grant review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Brief on Jurisdiction was served via U.S. Mail on this 3rd day of March, 2010, to: *Barbara Green, Esquire*, 300 Sevilla Avenue, Suite 209, Coral Gables, Florida 33134; *Maria D. Tejedor, Esquire*, Attorneys Trial Group, 540 N. Semoran Boulevard, Orlando, Florida 32807.

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the type size and style used in this Jurisdictional Brief of Petitioner is 14 point Times New Roman.

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PETITIONER, THE PUBLIC HEALTH TRUST'S APPENDIX

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