

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA DEPARTMENT
OF TRANSPORTATION,

Petitioner,

-vs-

CASE NO. 70,109

PAIGE SOLDOVERE,

Respondent.

PETITIONER'S REPLY BRIEF

On Petition for Review of a Decision
of the Fourth District Court of Appeal

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A R G U M E N T

I. SOLDOVERE'S CAUSE OF ACTION
 ACCRUED ON AUGUST 18, 1981,
 THE DATE OF HER INJURY.

Soldovere's reliance on Burleigh House Condominium, Inc. v. Buchwald, 368 So.2d 1316 (Fla. 3d DCA 1979), and Berger v. Jackson, 156 Fla. 251, 23 So.2d 265 (1945), fails to acknowledge that neither case involved a requirement of notice preliminary to filing suit. Such a requirement, this Court has held, is a mere condition precedent to filing suit and has no effect on when the cause of action accrues. State Farm Mutual Automobile Insurance Co. v. Kilbreath, 419 So.2d 632 (Fla. 1982). Thus, neither Burleigh House nor Berger supports the statement in Soldovere I that a condition precedent delays the accrual of a cause of action. Moreover, Berger involved the narrow question of when a claim may be filed against an estate--specifically, whether it could be filed before appointment of the personal representative. Soldovere offers no reason why the ruling in Berger should be expanded beyond the facts of that case to control the interpretation of § 768.28(6), Fla.Stat. (1981).

Soldovere argues that Keith v. Dykes, 430 So.2d 502 (Fla. 1st DCA 1983), "correctly states the law applicable to the accrual date of causes of action against state agencies prior to the 1983 amendments." (Brief at 4-5). As shown in Petitioner's Initial Brief, precisely the opposite is true. Keith v. Dykes, from which sprang Soldovere I and II, is not a correct statement

of the law. That is the whole point of this appeal. Moreover, contrary to Soldovere's argument, these decisions do have precedential value because there are numerous cases pending against the state that involve injuries incurred before October 1, 1981, and claims denied after that date.

Soldovere appears to suggest that this Court is bound by its denial of review in Soldovere I and cannot now review the accrual issue. This suggestion is made without citation to authority. In fact, the mere denial of review is not an adjudication of the merits of any question. Moreover, Soldovere I was an interlocutory, venue appeal. DOT now seeks review of the final judgment that relied on Soldovere I's reasoning to award Soldovere increased damages. That also is an issue which this Court has not considered on its merits. Soldovere cites no authority foreclosing this Court's review.

II. NEITHER THE FLORIDA SUPREME COURT NOR THE FOURTH DISTRICT COURT OF APPEAL IS BOUND UNDER THE LAW OF THE CASE DOCTRINE BY THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN SOLDOVERE I.

Soldovere contends that her case does not fall within the "manifest injustice" exception to the law of the case doctrine because the 1983 remedial amendment to § 768.28(6)(b), Fla.Stat., was not made retroactive. Thus, it should be presumed that the Legislature intended Soldovere's case be controlled by the Keith v. Dykes holding. This argument, which cites no authority,

ignores established principles of statutory construction. A remedial statute is an exception to the general rule that statutes be applied prospectively; a remedial statute can and should be applied retroactively in order to serve its intended purpose. City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986); St. John's Village I, Ltd. v. Department of State, 497 So.2d 990 (Fla. 5th DCA 1986). Remedial statutes apply to pending cases, "operat[ing] retrospectively in the sense that all pending proceedings, including matters on appeal, are determined under the law in effect at the time of the decision rather than that in effect when the cause of action arose or some earlier time." Fogg v. Southeast Bank, N.A., 473 So.2d 1352, 1353 (Fla. 4th DCA 1985).

These principles are especially apposite in construing the 1983 amendment. That amendment would be pointless if it did not apply retrospectively--and specifically to cases in which injuries occurred before October 1, 1981. By virtue of the 1981 amendments, any claimant injured after October 1, 1981 (the effective date of Ch. 81-317, Laws of Florida), would be entitled to the increased damages limitation and to venue where injured, rather than in Leon County. The 1983 amendment would have no effect in such cases. Obviously, it was intended to respond to the ruling in Keith v. Dykes; it would be meaningless if it did not apply to injuries incurred before October 1, 1981.

For the remainder of her argument, Soldovere contends that the issue before this Court is the issue decided in Soldovere I and therefore the law of the case controls, and this Court has no authority to say otherwise. We submit that a decision on liability limits, no matter the reasoning on which it relies, is categorically different from a decision on venue, and the law of the case doctrine applies only to questions actually presented and considered. U. S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983); Joyner v. Bernard, 160 Fla. 681, 36 So.2d 364 (1948). The First District did not consider or decide liability limits in Soldovere I. We further point out that neither question has been decided in these proceedings by the Florida Supreme Court, and Soldovere points to no authority that would justify denying DOT its day in the State's highest court. This Court has authority to overrule erroneous district court decisions at any time.

Finally, Soldovere contends that the holding in Keith v. Dykes, has been nullified by the 1983 amendment to § 768.28(6)(b), Fla.Stat., and that overruling Keith v. Dykes would serve no purpose. This is inconsistent with its argument that the amendment is not retroactive, or else it presumes that there are no other tort cases pending against the State involving injuries occurring before October 1, 1981, and claims denied after that date. There are, indeed, a large number of pending cases involving exactly those facts. In a motion to certify this

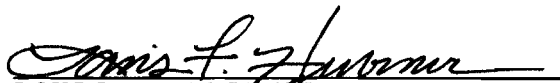
case to the Florida Supreme Court filed with the Fourth District Court of Appeal, the appellant represented that the number of cases exceeds 100, with a damages differential running into the millions of dollars. Obviously, the First District Court of Appeal could have had no idea of the ramifications of its terse venue decisions in Keith v. Dykes and Soldovere I, and that is precisely why the State is now entitled to its day in the Supreme Court.

CONCLUSION

The decision of the Fourth District Court of Appeal should be quashed and the case remanded for entry of judgment against DOT in the amount of \$50,000.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

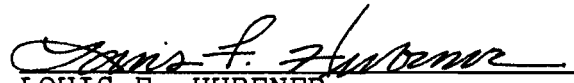

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF has been furnished to DAVID WIITALA, ESQUIRE, Post Office Box 14125, West Palm Beach, Florida 33408, by U. S. Mail this 12th day of August, 1987.


LOUIS F. HUBENER
Assistant Attorney General