

# **Third District Court of Appeal**

**State of Florida, July Term, A.D. 2009**

Opinion filed September 2, 2009.  
Not final until disposition of timely filed motion for rehearing.

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No. 3D07-3314  
Lower Tribunal No. 06-20016

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**Public Health Trust of Miami-Dade County  
d/b/a Jackson Memorial Hospital**  
Appellant,

vs.

**Odette Acanda, as Personal Representative of the estate of Ryan  
Rodriguez, deceased,**  
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Victoria S. Sigler, Judge.

R.A. Cuevas, Jr., Miami-Dade County Attorney, and Eric K. Gressman, Assistant County Attorney, for appellant.

Diez-Arguelles & Tejedor and Carlos Diez-Arguelles and Maria Tejedor (Orlando); Barbara Green, for appellee.

Before WELLS, SUAREZ, and CORTIÑAS, JJ.

WELLS, Judge.

The Public Health Trust of Miami-Dade County, Jackson Memorial Hospital's governing body, appeals from a final judgment finding that the hospital was liable for the death of premature infant, Ryan Rodriguez, and from an order denying the hospital's motions for a mistrial, directed verdict, judgment notwithstanding verdict, and new trial. On the following brief analysis, we affirm.

Odette Acanda, Ryan's mother, was seven months pregnant when her doctor sent her to Jackson, concerned that her amniotic fluid levels were low. Acanda delivered Ryan nearly two months early. Five days after his birth, Ryan died of an infection. Acanda, as personal representative of Ryan's estate, sought damages from the hospital claiming medical negligence and the case proceeded to a jury trial. After the testimony of Ryan's father, Plaintiff's counsel stated: "Your Honor, we are *going to* rest now and start with some procedural matters that we want to take up with the Court." The court told the jury that "the plaintiff is *getting close to resting* or has rested." 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 "failed to serve process in conformity with Section 768.28(7), Fla. Stat. (1990)<sup>1</sup>", by neglecting to serve process on the Department of Financial Services.<sup>2</sup>

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

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<sup>1</sup> Section 768.28, addressing "[w]aiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs," provides in relevant part:

(7) In actions brought pursuant to this section, process shall be served upon the head of the agency concerned and also, except as to a defendant municipality or the Florida Space Authority, upon the Department of Financial Services; and the department or the agency concerned shall have 30 days within which to plead thereto.

<sup>2</sup> Plaintiff's complaint alleged compliance with all statutory conditions precedent and statutory requirements. The Trust's answer included a general denial. Also, in its affirmative defenses, the Trust alleged that "[t]he Trust has not waived sovereign immunity and the Complaint fails to state a cause of action because Plaintiff has failed to serve process in conformity with Section 768.28(7), Fla. Stat. (1990)." The answer asked the Court to dismiss the complaint but the Trust did not set a hearing or raise the issue until its motion for directed verdict at trial.

proffered it to the court,<sup>3</sup> 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.

The cases are legion which find that a violation of Florida Rule of Civil Procedure 1.480,<sup>4</sup> "occurs where a party moves for and obtains a directed verdict before the time that the party moved against has completed its case in chief." Williams v. Salem Free Will Baptist Church, 784 So. 2d 1232, 1232-33 (Fla. 1st DCA 2001).<sup>5</sup> In this case, it is not definitively clear that the Plaintiff had

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<sup>3</sup> The court granted the Plaintiff's motion to supplement the record with a certified copy of the notice of filing with the returns of service attached.

<sup>4</sup> Florida Rule of Civil Procedure 1.480 provides:

**Motion for a Directed Verdict Effect.**

(a) A party who moves for a directed verdict at the close of the evidence offered by the adverse party may offer evidence in the event the motion is denied without having reserved the right to do so and to the same extent as if the motion had not been made. The denial of a motion for a directed verdict shall not operate to discharge the jury. A motion for a directed verdict shall state the specific grounds therefor. The order directing a verdict is effective without any assent of the jury.

<sup>5</sup> See Dodge v. Weiss, 191 So. 2d 71, 73 (Fla. 1st DCA 1966) (stating that "[a] motion for a directed verdict cannot, of course, be properly made by the defendant until the plaintiff has completed the presentation of his evidence"); Sapp v.

completed her case-in-chief when the hospital was allowed to begin arguing its motion for directed verdict. In response to the direct question of whether the Plaintiff had “officially rested,” Plaintiff’s counsel responded “No, No.” And, the trial court “reserved” at least one evidentiary issue in Plaintiff’s case for determination the following morning. 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 at issue had been satisfied by the following morning before a ruling on either the “reserved” evidentiary matter or the hospital’s motion for directed verdict. This satisfied both the requirements of section 768.28(7), and this Court’s prior precedents. See Metro. Dade County v. Lopez, 889 So. 2d 146, 148 (Fla. 3d DCA 2004) (observing that “[a]t the time the jury rendered its verdict . . . [Plaintiff] still had not complied with section 768.28(7)” and that “[a]fter the jury had returned a verdict, it was too late to turn

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Redding, 178 So. 2d 204, 207 (Fla. 1st DCA 1965) (finding that “a defendant . . . cannot properly make a motion for a directed verdict before the plaintiff has completed the presentation of his evidence,” because the directed verdict rule contemplates that the movant will move for directed verdict at the close of the evidence offered by the adverse party); see also Zerillo v. Snapper Power Equip., 562 So. 2d 819, 820 (Fla. 4th DCA 1990) (“[A] party may not obtain a directed verdict prior to the time that the party moved against has completed his case-in-chief, since to do so would constitute a denial of due process of law.”); Carmichael v. Shelley Tractor & Equip. Co., 300 So. 2d 298, 299 (Fla. 4th DCA 1974) (“At trial upon the issues made by the pleadings, a party may not move for and obtain a directed verdict prior to the time that the party moved against has completed his case-in-chief. Otherwise, such party would be denied due process of law.”).

back the clock”); Metro. Dade County v. Braude, 593 So. 2d 563, 564 (Fla. 3d DCA 1992) (concluding that service was not timely when “[t]wenty-three days after the trial had concluded and thirteen days after the entry of judgment, the plaintiff effected service upon the Department of Insurance”); Miami-Dade County v. Meyers, 734 So. 2d 507, 508 (Fla. 3d DCA 1999) (confirming that where no process is served on the Department of Insurance, the County is immune from suit); Williams v. Miami-Dade County, 957 So. 2d 52, 52 -53 (Fla. 3d DCA 2007) (also observing that failure to comply “with the process service requirements of section 768.28(7) . . . is fatal to [an] action”).

Accordingly, we find no abuse of discretion in the trial court’s ruling and affirm the final judgment entered in the plaintiff’s favor.

CORTIÑAS, J., concurs.

SUAREZ, J., dissenting.

I respectfully dissent. It is undisputed that the Appellant, the Public Health Trust of Miami-Dade County, is a governmental entity. Therefore, in order to bring an action against the Public Health Trust, the plaintiff was mandated to comply with the provision of section 768.28(7), Florida Statutes (2005),<sup>6</sup> which states that service of process shall be effected, not only upon the governmental agency or entity being sued, but also upon the Department of Financial Services. The language of the statute is mandatory. The burden of proof to establish proper service of process is upon the party seeking to invoke the court's jurisdiction. Re-Employment Servs., Ltd. v. Nat'l Loan Acquisitions Co., 969 So. 2d 467 (Fla. 5th DCA 2007). If service is not effected as mandated by the legislature in section 768.28(7), the governmental entity is immune from suit. See Levine v. Dade County Sch. Bd., 442 So. 2d 210, 212 (Fla. 1983). By failing to strictly comply

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<sup>6</sup> (7) In actions brought pursuant to this section, process shall be served upon the head of the agency concerned and also, except as to a defendant municipality or the Florida Space Authority, upon the Department of Financial Services; and the department or the agency concerned shall have 30 days within which to plead thereto.

(emphasis supplied).

with the statutory service requirement of serving the Department of Financial Services, the plaintiff has failed to meet her burden of proof. Thus, the trial court had no option, but to grant a directed verdict due to plaintiff's failure to serve and consequent failure to prove her case. The trial court erred by denying the Public Health Trust's Motion for Directed Verdict.

The Public Health Trust, in its answer to the complaint, denied that all conditions precedent had been met, and, as an affirmative defense, put the plaintiff on notice that she had failed to serve the Department of Financial Services as mandated by section 768.28(7). The case proceeded with discovery. At trial, plaintiff presented her evidence and proof in her case-in-chief, but failed to present proof that the Department of Financial Services had been served. The record shows that plaintiff had not even perfected the required service prior to the Public Health Trust's Motion for Directed Verdict. In open court, plaintiff stated that she was "going to rest now and start with some procedural matters." When the court inquired if she had officially rested, the plaintiff stated, "No, no. . . . We need to introduce a few records and stuff." The transcript in pertinent part states:

MR. DIEZ-ARGUELLES: Your Honor, we are going to rest now and start with some procedural matters that we want to take up with the Court.

. . . .

MR. GRESSMAN: Have they officially rested?

MS. TEJEDOR: No, no.

THE COURT: That was the oddest resting I've ever seen.

MS. TEJEDOR: We need to introduce a few records and stuff.

The trial court then released the jury until the next day and told the jury that the attorneys and the court were going to stay and work on some legal issues. The court and the trial attorneys then had a lengthy discussion regarding stipulations and jury instructions. At the conclusion of the discussion, the following took place wherein the plaintiff rested and the Public Health Trust moved for a directed verdict.

THE COURT: We will reserve on the one issue in the morning, mortality table.

Now, assuming you have rested, any motions anybody wants to make outside of the jury at this time or not?

MR. GRESSMAN: We have a motion for directed verdict, Your Honor.

....

MR. STIEGLITZ: Judge, they have not complied with Florida statute Section 768.

THE COURT: What?

MR. STIEGLITZ: Subsection 7.

THE COURT: I lost you on first seven. You may want to slow down a little bit.

MR. GRESSMAN: Florida Statute section 768.28(7) requires service of process upon the Department of Financial Services.

MR. DIEZ-ARGUELLES: I thought I resolved that issue.

MR. STIEGLITZ: No, we haven't, Judge. There's separate required service of process upon the Department of Financial Services. They haven't done it.

(emphasis supplied).

The Public Health Trust moved for directed verdict on grounds of plaintiff's

failure to serve the Department of Financial Services as mandated by section 768.28(7). The trial judge then asked whether the plaintiff could show the court that service had been effected on the Department. In response, the plaintiff requested the judge allow her time until the following morning for her to check her file to see if service previously had been made or to bring in cases on the issue. After checking her file overnight and realizing service had not been made, in the morning, plaintiff represented to the court that it was not until that morning that she served the Department of Financial Services.<sup>7</sup> The court reserved ruling on the motion for directed verdict until after jury verdict, although it recognized that “the complaint failed to state a cause of action because plaintiff has failed to process in conformity with 768.28(7), Florida Statutes.”

The majority admits that it was not clear if the plaintiff had completed her case-in-chief when the Public Health Trust moved for directed verdict. However, the record does make it clear that there was no objection, or even an attempt to argue, that the plaintiff had anything further to present, when the trial judge stated, “Now, assuming you [plaintiff] have rested, any motions anybody wants to make . . . at this time or not?” Although plaintiff attempts to argue on appeal that she had

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<sup>7</sup> The majority implies that the plaintiff’s duty to serve the Department of Financial Services was not, in any way, subject to any time restriction or that proof of service did not have to be presented prior to the motion for directed verdict at the close of the plaintiff’s case-in-chief. The very cases relied upon by the majority hold otherwise.

not rested prior to the time the Public Health Trust raised on directed verdict the issue of service, the record shows otherwise. Nowhere in the record, including plaintiff's Response in Opposition to Motion for Directed Verdict, does the plaintiff argue that she had not rested prior to the motion for directed verdict. This argument was first raised by plaintiff on appeal and, therefore, the argument should be considered waived for appellate purposes.

It is my opinion that, based on the record, the required, strict construction of the mandatory terms of section 768.28(7), and legal precedent from this Court and others, the trial court was required to grant the directed verdict. The Public Health Trust is a political subdivision and may only be sued by waiver of sovereign immunity pursuant to section 768.28(7). Statutes governing service of process and, in particular, section 768.28(7) must be strictly construed. See Anthony v. Gary J. Rotella & Assocs., 906 So. 2d 1205 (Fla. 4th DCA 2005) (holding that statutes that govern service of process are to be strictly construed to insure receipt of notice of the proceedings; the burden to prove the validity of service is on the plaintiff); Levine v. Dade County Sch. Bd., 442 So. 2d at 210 (holding that waiver of sovereign immunity statutes must be strictly construed since sovereign immunity is wholly within the legislative domain; where the time for notice has expired, the trial court has no alternative but to dismiss the case). As plaintiff failed to comply with the mandatory terms of the statute, the Public Health Trust

was immune from suit and a directed verdict was required. This Court has held, in cases almost identical, that, because the plaintiff failed to serve process pursuant to the statute, the governmental entity was immune from suit and a directed verdict was required. See Williams v Miami-Dade County, 957 So. 2d 52, 52 (Fla. 3d DCA 2007) (affirming the trial court’s order granting directed verdict in favor of Miami-Dade County as plaintiff failed to prove compliance with the process service requirements of section 768.28(7); such failure was “fatal to his action”); Metro. Dade County v. Lopez, 889 So. 2d 146 (Fla. 3d DCA 2004) (holding that section 768.28(7), requiring service on the Department of Insurance to be strictly construed as part of sovereign immunity, leaves the trial court no choice but to grant directed verdict in favor of Miami-Dade County where failure to serve process on the Department was asserted as a defense and properly raised in a motion for directed verdict at close of plaintiff’s case)<sup>8</sup>; Miami-Dade County v. Meyers, 734 So. 2d 507 (Fla. 3d DCA 1999) (reversing and remanding with directions to enter judgment for the County where the plaintiff had failed to comply with mandatory service of process requirement of section 768.28(7), which

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<sup>8</sup> The majority’s reliance on Metropolitan Dade County v. Lopez, 889 So. 2d at 148, is misplaced since the reference in the majority opinion is to the dicta in that case. Slip op. at 5.

was raised as an affirmative defense and properly asserted on a motion for directed verdict before the case went to the jury).<sup>9</sup>

I realize that the consequence of mandatory compliance may appear overly harsh. The statute does not have a provision for substantial compliance. It is definite and, as our Court has held, must be strictly complied with. Additionally, I do not see this as a “gotcha.”<sup>10</sup> The Public Health Trust put plaintiff on notice by raising non-service as an affirmative defense. The plaintiff had the opportunity to timely comply, but did not.

For the above, I would reverse with instructions for the trial court to enter judgment for the Public Health Trust. Metro. Dade County v. Lopez, 889 So. 2d at 148; Miami-Dade County v. Meyers, 734 So. 2d at 508.

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<sup>9</sup> The cases raised by plaintiff do not apply as each case concerns the issue of whether the Department must be served within 120 days.

<sup>10</sup> See Salcedo v. Asociacion Cubana, Inc., 368 So. 2d 1337, 1339 (Fla. 3d DCA 1979).