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Florida's Limited Waiver of Sovereign Immunity Requires Proof that Pre-Suit Statutory Notice of Claim Actually be Received within the Limitations Period

By J. David Marsey
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Sovereign immunity stands for the long-standing premise that the government cannot be sued without its consent. The immunity applies to the State of Florida and all subdivisions of the state, including counties, municipalities, districts, school boards, and other governmental entities. Like the federal government and other states, Florida has enacted a *limited* waiver of its immunity that permits those aggrieved by state agencies or subdivision of the state to pursue civil remedies for the harm caused by government employees. Florida's limited waiver contains several requirements and conditions that must be strictly enforced, and failure to comply with its conditions may preclude suit entirely. The Third District Court of Appeal recently addressed one such condition – compliance with the pre-suit notice provision.[1]

In most cases, Florida's mandatory pre-suit notice provision requires three things: (1) the claimant must present a written claim to the agency to be sued; (2) the claimant must present a written claim to the Department of Financial Services; and (3) the claim must be presented within three years after the cause of action accrues. An abundance of authority provides that if a plaintiff fails to strictly comply with the pre-suit notice requirement within the three-year limitations period, the lawsuit will be dismissed with prejudice, and the plaintiff may recover nothing. Despite voluminous litigation on these issues, no Florida court had ever analyzed what it meant to "present" a claim, within the context of Florida's limited waiver of sovereign immunity. The *Simmons* Court decided this issue of first impression, holding that proof that pre-suit notice was *received* is necessary to establish compliance with the statute. Proof of timely *mailing* of the notice is insufficient as a matter of law, and fails to satisfy the mandatory notice requirements.

[1] *Simmons v. Public Health Trust of Miami-Dade County*, 2022 WL 1397454 (May 4, 2022) (pending final release, currently subject to revision or withdrawal).

In *Simmons*, the Court evaluated a case where a plaintiff mailed the pre-suit notice to the required agencies on the last day of the three year limitation period. Although the notices were received, they were received after the limitations period expired. In analyzing the timeliness of the notices, the Court parsed what it means to "present" a claim. The Court considered the federal court's interpretation of the Federal Torts Claims Act, upon which Florida's waiver is based, as well as other Florida statutes where the term "present" has been interpreted. These cases have concluded that to "present" a claim, requires the *actual receipt* of the notice and that the mere sending or mailing of the notice was insufficient to satisfy the strictly construed pre-suit requirement. Accordingly, in all tort claims against Florida governmental agencies the mandatory pre-suit notice must be received by statutorily designated agencies before the expiration of the three-year limitations period or the lawsuit may be dismissed with prejudice.

Many view the pre-suit notice process as a mere formality, a technical requirement that gets little scrutiny. However, agency heads, risk managers and litigation counsel should carefully scrutinize compliance with the notice requirements, and fail to do so at their own risk. The failure to promptly analyze pre-suit notice compliance and to assert the appropriate defenses may result in a waiver of the ability to seek summary judgment on a dispositive defense. *Simmons* has state-wide implications. Unless or until another Florida District Court of Appeals reaches a different decision, all Florida trial courts are bound by its holding. Agencies and their counsel should pay careful attention to this mandatory pre-suit condition precedent or risk inadvertently waiving a dispositive defense.

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