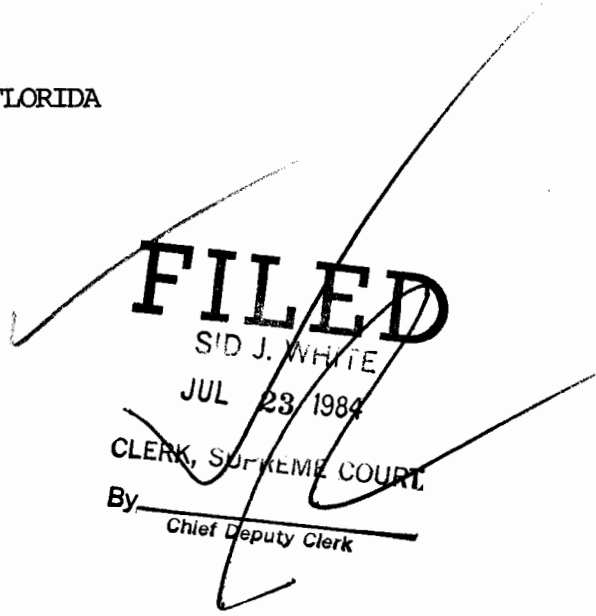
O/A 11-14-84

IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

CASE NO. 64,586



MICHELE HESS, a minor, by and through her parents and next friends, DON HESS and CONNIE TIPPETT; and DON HESS and CONNIE TIPPETT, individually,

Petitioners,

vs.

METROPOLITAN DADE COUNTY,

Respondent.

BRIEF OF DADE COUNTY TRIAL LAWYERS ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF POSITION OF PETITIONERS

DADE COUNTY TRIAL LAWYERS ASSOCIATION

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TABLE OF CONTENTS

TABLES OF AUTHORITIES

OTHER AUTHORITIES

QUESTION PRESENTED

DOES DADE COUNTY'S HOME RULE CHARTER SHIELD IT FROM LAWFUL JUDGMENTS AUTHORIZED BY THE LEGISLATURE PURSUANT TO §768.28(5), FLORIDA STATUTES?

ARGUMENT

UNDER FLORIDA LAW RESPONDENT, METROPOLITAN DADE COUNTY, CANNOT USE ITS HOME RULE CHARTER AS A SHIELD TO PROTECT ITSELF FROM HAVING TO PAY LAWFUL JUDGMENTS RENDERED AGAINST IT BY CO-EQUAL OR SUPERIOR BRANCHES OF GOVERNMENT.

It must first be stressed that Dade county has not proffered a coherent, defensible, or legally justificable rationale for its refusal to satisfy the lawful judgment rendered against it. However, the county has adopted the curious and untenable position that because it has "control" over its' county budget under home rule, the state is precluded from passing conceededly valid general laws that impact directly upon that budget.

-A-

Metropolitan Dade County Is a Creation of the State

It is hornbook law in this state that local charter governments cannot use their charter in any interpositionary fashion to avoid compliance with valid general enactments of the legislature. Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962). Kaulakis is uniquely applicable to the instant case, for it is virtually a "mirror image" of the present parties' positions. In Kaulakis Dade County was attempting to waive statutory immunity by utilizing its home rule charter in contravention of Article III, § 22, Fla. Const. (1885), with its express grant of power to the

legislature to waive soverign immunity by way of general law only. The Supreme Court of Florida ruled this attempt under the guise of the home rule charter to waive sovereign immunity was unconstitutional. Id. at 507.

Even though the Dade County "home rule" ordinance waiving sovereign immunity was grounded on a Constitutional grant of power under Article VIII § 11, of the 1885 Constitution, it was in conflict with the constitutional grant of power in Article III, § 22 of the 1885 Constitution to the state legislature, which provided, "Provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating." Kaulakis v. Boyd, supra at 506 (emphasis in original).

Thus, it is the exact corollary to the present issue. Once again, Dade County, acting under a constitutional grant of power, in the form of its home rule charter, is attempting to contravene a valid general law--768.28--enacted under a constitutional grant of power to the state legislature.

While not to be explicitly found in the Kaulakis reasoning or holding, it is helpful to consider the following. While both constitutional grants of power in the 1885 constitution were valid--Art. VIII, § 11 to Dade County to enact a home rule charter and Art. III, § 22 to the legislature to enact general laws as to soverign immunity and tort liability, when the two otherwise valid constitutional grants came into conflict, the Supreme Court affirmed the ascendancy and paramount nature of the grant of power to the superior branch of government--their legislature--over the otherwise valid constitutional grant of power to the inferior branch of government--the County of Dade.

Thus, it is clear that the county is a creature of the state, and not vice versa. The County of Dade is not a co-equal soverign with the State of Florida. This is abundantly clear from the reasoning employed by the Kaulakis court. It again bears repeating that Article III, § 22 stated in its entirety: "Provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating." Note that this provision facially deals only with the state by its very own terms, and does not mention counties. However, the action under the Dade County home rule charter violated the constitutional grant of power to the state legislature because, "Counties, unlike municipalities are organized as political subdivisions of the state and constitute a part of the machinery of government." Kaulakis v. Boyd, supra at 507 (emphasis added). Thus, the totality of the power to waive sovereign immunity, and the allocation of fiscal responsibility for negligence allowable as a result of that waiver, rests with the state legislature, not the counties.

Dade County is an arm of the state government, subservient to, and under control of the general law of the state legislature, notwithstanding the unique governmental status it enjoys. And so it must be, otherwise, Dade County could do as it is attempting to do in the case sub judice, that is frustrate a clear mandate from a superior branch of government by shielding itself with its home rule charter.

This all seems remarkably reminiscent of the throughly discredited notion of interposition and the relationship of state action under the federal supremacy clause. Perhaps this doctrine is what the court had in mind when it discredited Dade County's position in Kaulakis.

In Kaulakis, Dade county's sovereign immunity flowed from the state well. Dade County could not shut off the tap. In the case sub judice, the state legislature has choked off the flow by implementing Fla. Stat. 768.28. Just as Dade County was unable under its home rule charter to divest itself of state-compelled sovereign immunity in Kaulakis, it cannot now cloak itslef with remnants of that sovereign immunity, and refuse to "pay the bill" as the state has compelled it to do via 768.28, and the mechanism for exceeding the $100,000 cap.

The clear issue then is: Which is paramount, an exercise of power under a constitutional grant to Dade County, or a valid exercise of power under a constitutional grant to the State Legislature? To allow Dade county "veto power" over a valid geneal law of the State of Florida would be tantamount to a grant of independence to the County of Dade, far beyond the limited degree of autonomy in local affairs allowable under the home rule amendment.

The subservience of the Dade County home rule charter to the state constitution, and that charter's subservience to grants of power form that state constitution to the legislature appears in the home rule amendment itself. This limitation was noted and quoted with approval by Kaulakis:

> The [Dade County home rule] amendment does, however, preserve the supremacy of the Constitution. Paragraph (5) of Section 11 provides . . . the home rule charter, provided for herein shall not conflict with any provision of this Constitution . . . except as expressly authorized in this section . . . (emphasis supplied). Paragraph (9) further provides, . . . that the provisions of this Constitution . . . shall be the supreme law in Dade County, Florida, except as expressly provided herein and this section shall be strictly construed to maintain such supremacy of this Constitution . . . Kaulakis v. Boyd, supra at 507 (emphasis supplied by Kaulakis court.)

Thus, in Kaulakis the Dade County home rule charter was "strictly construed" and because its provisions came into conflict with a grant of power to the state legislature the provisions in question and as applied were found to be unconstitutional. It is clear that the current position advanced by Dade County falls squarely within the ambit of Kaulakis and thus, the county's attempt to avoid liability for its negligence must fall.

The Kaulakis court further held, "In view of the above quoted constitutional mandates, it is clear that any provision contained in the Dade County home rule charter which is in conflict with the constitution must be held invalid, unless the subject is expressly covered in the home rule amendment to the Constitution." Id. at 507 (Citations omitted). It is clear, therefore, that the current position advanced by Dade County under its home rule charter is in conflict with the Constitutional grant of power to the state legislature under Article X, § 13 and a valid general law 768.28, promulgated under that grant, and must be repudiated. Nevertheless, in an attempt to frustrate and contravene the express mandate of the state legislature, Dade County relies on its' "control" of its county budget and on Dickinson v. Board of Public Instructions of Dade county, 217 So.2d 553 (Fla. 1968). However, Dickinson is clearly inapposite to the present fact situation.

First, Dickinson was decided prior to the passage of 768.28, the controlling statute in the present case. Thus, Dickinson does not even mention the statute that controls the resolution of the case sub judice.

Second, the special compensation bill held invalid in Dickinson was "passed without prior publication of notice of its intended

introduction." Id. at 554. Dade County could advance no such claim relative to the valid general law at issue here.

Third, the Dickinson court spoke of the special compensation bill in that case as being in the nature of meeting a "moral obligation" Id. at 55. Dade County would have this court believe that the bill relative to the case sub judice is also in the nature of a "moral obligation." This of course flies in the face of the fact that Dade County's obligation is governed by 768.28 and the statutory mechanism for exceeding the $100,000 limit, and also by the fact that there exists a valid tort judgment against the county in the present case. Dade county is not seeking escape from a "moral obligation," it is seeking to escape a statutory obligation under 768.28, and it is seeking to evade a valid judgment rendered against it in a court of competent jurisdiction. It is thus seeking relief from both a statutory obligation under 768.28, and to evade a valid judgment rendered against it in a court of competent jurisdiction.

The fact that there is a valid court judgment rendered against Dade County--a point not contested--becomes of special significance in examining the totality of the Dickinson opinion. The Dickinson result was reached by a bare majority of four justices, with two justices joining a strongly critical concurrence, and one justice dissenting.

In his concurrence, Mr. Justice Drew was joined by Mr. Justice Hopping in the result, but it is clear that the two-justice concurrence might well have gone the other way if there was a valid court judgment rendered against the county, as is the situation in the present case. The court's language is instructive:

> If the State is to be liable for the tortious acts of its agents, such liability should be

> determined and damages fixed in an orderly judicial proceeding so that all citizens would be treated alike. As it is now, this is simply not being done and to continue to require the citizens to beg for relief, and accept whatever may be offered, will only breed disrespect for government and could eventually result in fiscal chaos. Id. at 558 (emphasis added.)

The bill compelling Dade County to pay in the case sub judice would thus apparently meet the concerns expressed above. In reality, the bill passed under 768.28 is an attempt by the legislature to assist Dade County to be in full compliance with a lawful judgment rendered against the county.

Mr. Justice Ervin, in his dissent found the claim bill in Dickinson to be Constitutional, noting that:

> Claim bills are enacted to satisfy the moral obligations of the State, its agencies or political subdivisions. Claims against the State are referred to as moral obligations because sovereign immunity precludes suit thereon as legal claims absent legislative consent. (such legislative consent coming after this opinion was written, via 768.28) . . . the fact that monies from a particular fund are appropriated for the payment of a claim recognized as a moral obligation of the State does not convert the general legislation authorizing payment into a special or local act. Once a claim is recognized as a state obligation by passage of a claim bill, the incidental requirement therein that it be paid from a particular fund--perhaps from the funds of a political subdivision--does not convert the relief act into local legislation . . . Not infrequently a claim bill is introduced providing for the claim to be paid from the State's General Fund, but the claims committee decides the equities of the claim are such that it should be paid from . . . local funds of a political subdivision of the State, and amends the bill accordingly. Id.

Fourth, the special compensation bill in Dickinson was found unconstitutional because "we concur in the view that in maters which affect only Dade County, and which are not the subject of specific constitutional provisions or valid general acts pertaining to Dade

County and at least one other county, the electors of Dade County 'may govern themsleves autonomously and differently than the people of other counties of the state.'" Id. at 555 (cites omitted, emphasis added).

Of course, by this very language in Dickinson, it renders that case inapplicable to the present case because 768.28 applies to all counties, not just Dade. The valid general law directing payment in this case is provided for in 768.28 by way of a statutory mechanism for judgments exceeding the $100,000 cap. The only reason the general law directing payment affects Dade County in this particular instance is because of the actions of the county itself.

By Dade County's own negligence, it perpetrated injuries requiring just compensation beyond the exceedable cap in 768.28. It is exactly and precisely because of the county's actions that a valid judgment has been rendered against it. The statutory mechanism can only be "triggered" when an act of negligence necessitates just compensation beyond $100,000. Dade County itself "triggered" this mechanism, which was provided for by the legislature, and is applicable to all 67 counties.

To follow the "logic" of the Dade County's position, it would mean that the county acquieces in the legislature's waiver of its sovereign immunity, but only to an extent. Exactly where the county finds the authority to "draw the line" in terms of its financial responsibility for its negligence under the state legislature's waiver of its sovereign immunity, it never makes clear.

From Kaulakis, "it is clear that any provision contained in the Dade County home rule charter which is in conflict with the Constitution must be held invalid, unless the subject is expressly covered in the

home rule amendment to the Constitution. Kaulakis v. Boyd, supra at 507. (Emphasis added.) And it is abundantly clear that there is nothing in the Dade County home rule amendment that expressly authorizes the county to limit a waiver of its sovereign immunity ordered by the legislature, or an allocation of the fiscal consequences resulting from negligence under such waiver.

In Kaulakis, as has been noted, supra, the county was attempting to shed itself of sovereign immunity. Exactly as it does in the present case, Dade County argued that expenditure of county funds to satisfy judgments rendered against it as a result of the attempted county waiver of soverign immunity was and is a "local affair," governed by the home rule charter, and hence immune from legislative action. "The complete answer to this argument," the Kaulakis court responded, is that "immunity from suit is not a matter of local concern but must be dealt with by general law only." Id. at 507. The "complete answer" to Dade County's current position is exactly the same--the extent of the WAIVER of "immunity form suit is not a matter of local concern," but is vested exclusively with the legislature, and the allocation of fiscal responsibility resulting from that waiver "must be dealt with by general law only," exactly as the legislature has done in the case sub judice.

It cannot be emphasized enough that all counties, including Dade, are "political subdivisions of the state and constitute a part of the machinery of state government." Id. As such, "subdivisions of the state," being a "part of the machinery of the state government" must obey the control and direction as established by that state government. The ONLY DEGREE of autonomy that Dade County can enjoy from that state control is if its home rule charter amendment EXPRESSLY AUTHORIZES OR

PROVIDES for such autonomy in such a situation. And, as has been noted supra, there is nothing in the amendment that EXPRESSLY AUTHORIZES OR PROVIDES for the county to ignore a valid general law compelling payment by Dade County under the 768.28 mechanism.

-B-

A County's Claim of Sovereignty Immunity is Subject to State Regulation

"A county is a POLITICAL SUBDIVISION of the state . . . It may be CREATED BY THE STATE without the solicitation, consent, or concurrence of the inhabitants of the territory thus set apart; it is the representative of the soverignty of the state, AUXILIARY TO IT, an AID to the more convenient administration of the government." Keggin v. Hillsborough County, 71 Fla. 356, 71 So. 372 (Fla. 1916) (emphasis added).

Keggin involved the question of a county's immunity from a suit in tort under sovereign immunity. The court in Keggin found that a county's sovereign immunity is a one-way street, with the traffic controlled by the legislature. The extent or non-extent of a county's sovereign immunity is whatever the state legislature deems just: "Counties, BEING BUT POLITICAL DIVISIONS OF THE STATE, organized as part of the machinery of the government for the performance of functions of a public nature, partake of the state's immunity from liability, and may not be sued except in such transactions AS THE STATUTE DESIGNATES." Id. at 372 (Emphasis added).

The unanimous court in Keggin further held that "the counties are . . . political divisions of the state . . . the county . . . being a mere governmental agency through which many of the functions and power of the state are exercised." Id. at 373. Keggin concluded that:

> (T)he matter of authorizing suits against a county for damages resulting to one person from the negligent performance by the county of some duty imposed upon it is one for the consideration of the legislature, to whose wisdom the arguments used by the learned counsel for plaintiffs in error may appeal: but until such action is taken by the legislative branch of this government. . . " Id. at 373.

[Of course, the legislature with the enactment of 768.28 has now waived sovereign immunity for itself, its agencies and subdivisions.]

Bragg v. Board of Public Instruction of Duval County, 36 So.2d 222 (Fla. 1948, Div. B) found that the extent of a county's sovereign immunity "piggybacks" off of the state. Bragg felt compelled to use this doctrine to shield the county school board from tort liability when a student's hand was crushed in a school printing press. Bragg is of further interest because of its most telling observation: "It may be that in the years ahead the policy of spreading the damages occasioned by accidents of this kind will be approved and that society in this OR SOME OTHER WAY will be required to help bear the burden, but THIS IS A LEGISLATIVE FIELD that the courts are not permitted to enter." Id. at 323 (emphasis added). Of course now by way of 768.28 and the mechanism for exceeding the $100,000 cap, the legislature, adopted "some other way," and in its sound judgment determined that the county or subdivision of the state that perpetrated the acts that caused the injury should "help bear the burden," rather than the taxpayers n the 66 other counties.

Debolt v. Dept. of Health and Rehabilitative Services, 427 So.2d 221 (Fla. 1st DCA 1983) sweeps away the arguments of Dade County and its misplaced reliance upon Dickinson. DeBolt, unlike Dickinson, directly interprets the controlling statute in the present case: 768.28.

In DeBolt, the Department of Health and Rehabilitative Services (hereinafter HRS) was sued for negligence when a minor in an HRS "attention home" was negligently injured by a gunshot wound. HRS, like Dade County, was and is a creation of the state legislature, and must be obedient to the commands of that legislature. Just as Dade County is granted a limited degree of autonomy under its home rule charter amendment, HRS claimed it too was immune from a tort suit, and any judgment rendered as a result of that suit. Id. at 223. Indeed, HRS claimed its sovereign immunity sprang from a specific statutory provision, 402.34, rather than a general reliance on a county charter. HRS argued that 402.34 took precedence over 768.28. Id. at 223-224.

In an attempt to reconcile the two conflicting statutes, the DeBolt court found that:

> (R)ules of statutory construction must be applied to reconcile, if possible, the conflict. We are aided n this task by the maxim that 'legislative intent is the pole star by which we must be guided in interpreting the provisions of the law.' (cite omitted) . . . In our attempt to discern the legislative intent behind the conflicting statutes, we must consider 'the history of the Act, the evil to be corrected, the purpose of the enactment, and the law then in existence bearing on the same subject.'" Id. at 224 (cite ommited).

The court found that the "clear legislative intent" of 768.28 was to waive sovereign immunity and thus:

> expose the state AND ITS SUBDIVISIONS to tort claims 'in cases where a private person would be liable' (cite ommited) . . . The 'evil' to be corrected by 768.28's sweeping changes was unquestionably the prior system

> of absolute sovereign immunity which denied, to anyone having the misfortune of being injured due to the negligence of a GOVERNMENTAL ENTITY OR ITS AGENTS, THE RIGHT TO RECOVER DAMAGES FOR SUCH INJURIES IN COURT." Id. at 225 (emphasis added).

The Court concluded that the doctrine of "implied repeal" mandated the ascendancy and control of 768.28 over the previously enacted immunity statute, 420.34:

> The interpretive rule of 'implied repeal,' generally stated, means that a general statute covering an entire subject-matter, and manifestly designed to embrace all the regulations of the subject, MAY SUPERSEDE A FORMER STATUTE COVERING A PORTION ONLY OF THE SUBJECT, WHEN SUCH IS THE MANIFEST INTENT, EVEN THOUGH THE TWO ARE NOT WHOLLY REPUGNANT. (Cite omitted, emphasis in original) . . . we . . . conclude that the implied repeal rule is particularly applicable in this case in which a spcific statute (section 402.34), purportedly dealing with the sovereign immunity of a particular agency, conflicts with a general statute (section 768.28) that expresses the legislative intent to revise completely the law of Florida regarding sovereign immunity . . . Recognizing the general presumption that the legislature, statutes on the same subject, it was found that 'when the legislature makes a complete revision of a subject it serves as an implied repeal of earlier acts dealing with the same subject unless an intent to the contrary is shown.'" Id. (cites omitted).

The untenable nature of Dade County's current position is further highlighted by Betancourt v. Metropolitan Dade County, 393 So.2d 21 (Fla. 3d DCA 1981). Like DeBolt, Betancourt was called upon to reconcile the seeming conflict between 768.28 and 325.29, a statute continuing sovereign immunity coverage for county operated vehicle inspection stations and inspectors. In affirming the validity of 325.29--an exception to the general 768.28 waiver--this court noted: "We find no impediment to the simultaneous and harmonious coexistence of Sections 325.29 and 768.28, Florida Statutes (1977). Under Article X, § 13, the legislature may generally withdraw the soveriegn immunity of the

state and its agencies, and then MAKE EXCEPTIONS FROM that waiver." Id. at 22 (emphasis added).

Taken in conjunction, DeBolt and Betancourt, though the two cases reach facially disparate results on the scope of 768.28, they converge and establish a crucial point, to wit: the intent of the legislature is controlling. In DeBolt, the court found the controlling intent of the legislature to be that 768.28 waives sovereign immunity for one of its creations: HRS. In Betancourt, the legislature's controlling intent to continue sovereign immunity protection for another of its creations--counties and their vehicle inspection programs--was found to be paramount. "Section 325.29 has been continually re-enacted without modification since its original enactment on July 1, 1967 . . ." Betancourt v. Metropolitan Dade County, supra at 21 fn. 1.

-C-

The Present Case Establishes
Clear Evidence of Legislative Intent

The intent of the legislature--found to be controlling by both DeBolt and Betancourt--is not open to dispute in the present case. By enacting a general law directing Dade County to satisfy the lawful judgment rendered against it by the circuit court, the legislature is exercising its virtual plenary power, bounded only by constitutional limits, to convey, withdraw, alter, abolish, modify and assign the liability for negligent acts coming from a waiver of sovereign immunity. As Kaulakis demonstrates, the only impediment to this allocation of liability by the legislature would be an EXPRESS, SPECIFIC provision to

the contrary in the Dade County home rule amendment. And it is clear that there is no EXPRESS, SPECIFIC provision in that amendment to the contrary. Indeed, the EXPRESS SPECIFIC affirmation of the home rule charter amendment is that the Constitution and valid general laws of the State of Florida are supreme in Dade County.

The full authority of the Legislature to control and modify the liability of Dade County under the waiver of sovereign immunity has been noted by the Third District Court of Appeal: "The county's tort immunity, save for certain exclusions and limitations not relevant here, has been specifically waived by statute for all tort incidents occuring after January 1, 1975 . . . Dade County may no longer rely on the defense of sovereign immunity as to the tort action herein." Welsch v. Metropolitan Dade County, 336 So.2d 2d 518, 520 (Fla. 3d DCA 1979). The Welsh tort was grounded on the county's negligent failure to maintain safe conditions on a public roadway.

The Welsh court also applied the controlling statute, 768.28, specifically to Dade County's claim of sovereign immunity, and found the County's position wanting:

> Section 768.28(1) Florida Statutes (1975), merely RENDERS THE COUNTY LIABLE IN TORT FOR DAMAGES CAUSED BY THE ACT OR OMISSION OF ONE OF ITS EMPLOYEES WHILE ACTING WITHIN THE SCOPE OF HIS OFFICE OR EMPLOYMENT under circumstances in which [the county,] if a private person, would be liable to the claimant in accordance with the general laws of this state." Id. at 521 (emphasis added.)

Thus, Welsh reasoned that 768.28 strips sovereign immunity from Dade County, and places the county in the same position as a private citizen, exactly as the legislature intended: "This clearly means that the plaintiff must still plead and prove a recognized cause of action

against the county under the state's established principles of tort law in order to recover. Absent such pleading or proof, THE COUNTY LIKE A PRIVATE PERSON, is entitled to a judgment in its favor." Id. at 521 (emphasis added).

Can there be any argument at all, that a private person or entity in the circumstances of the present case, and with $1 BILLION in assets, as Dade County has, could evade the satisfication of a valid judgment rendered against it? To state the question is to answer it.

-D-

The Dade County Charter and Home Rule Amendment Do Not Authorize Autonomy Under The Present Facts

The only issue that remains is whether the Dade County Charter and the home rule amendment are unique in their language, as Dade County would appear to suggest. It is clear that the home rule charter amendment is by no means a talisman whereby the County of Dade can wave away state law.

In considering whether the county charter can supersede a valid general law, the Florida Supreme Court enunciated the exceedingly narrow grounds on which such a result may stand:

> Although the Dade County Home Rule Amendment allows that county to enact ordinances which conflict with state law, IT CAN DO SO ONLY WHEN SUCH CONFLICT IS IN AREAS SPECIFICALLY AUTHORIZED IN THE HOME RULE AMENDMENT . . . We have kept in mind the home rule amendment's admonishment that section 11 is to be liberally construed in order to effectuate the purpose of giving home rule to Dade County. Section 11 also provides, however, that, IF CONFLICT IS NOT EXPRESSLY AUTHORIZED, GENERAL STATE LAW MUST PREVAIL. Indeed, if unauthorized conflict is

> found, construed to maintain . . . [the] supremacy of this Constitution AND OF THE LEGISLATURE IN THE ENACTMENT OF GENERAL LAWS PURSUANT TO THIS CONSTITUTION." Art. VIII, § 11 (9), Fla. Const. (1885)." METROPOLITAN DADE COUNTY v. CITY OF MIAMI, 396 So.2d 144 at 148. (Fla. 1981) (emphasis added).

In Dade County v. Miami the court quashed Dade County's attempt to regulate taxicabs in Miami and Miami Beach, because the otherwise valid county ordinance clashed with a valid general law giving that authority to the municipalities. Because there was not a SPECIFIC, EXPRESS authorization allowing such a conflict in § 11 [now § 6], of the home rule charter amendment, the Dade County ordinance was found subservient to state law, and hence, non-controlling. The court held that "Dade County does not have the authority to usurp the regulation of taxicabs" in the two cities. Id. at 148.

Just as clearly, Dade County has no authority to "usurp the regulation" of liability resulting from a waiver of soveriegn immunity. Such regulation and allocation is in the province of the legislature, and any county ordinance to the contrary must fall if there is no specific, express authorization in §11 [now § 6] allowing such a conflict with state law.

The court also noted that the courts of Florida have vigorously enforced the supremacy of the Constitution and the Laws of the State, and have not hesitated in holding otherwise valid Dade County ordinances invalid when they clash with general law: "Numerous decisions have invalidated Dade County ordinances and parts of the Dade County Charter, however, because of impermissible, unauthorized conflict with the state constitution OR WITH GENERAL STATE LAWS." Id. at 146-147 (emphasis added.)

In Board v. County Commissioners of Dade County v. Wilson, 386 So.2d 556 (Fla. 1980), the supreme court articulated the test to be employed in determining when a Dade County ordinance may prevail over state legislation:

> If any provision of the Dade County Charter, or any action taken pursuant to the Charter, contravenes the limitations or prescriptions of Article VIII, section 6 of the 1968 Constitution it is necessarily unconstitutional and void (cites omitted) . . . THE FOCUS THUS NARROWS TO WHETHER THE PROPOSED ORDINANCE IS AUTHORIZED BY THE ENABLING CONSTITUTIONAL LANGUAGE." Id. at 559 (emphasis added).

Therefore, it is a very narrow ground indeed upon which it can be legitimately asserted that action under the Dade County Charter can constitutionally prevail over state legislation. Kualakis and Dade County v. Miami teach that provision for any such conflict must be found in SPECIFIC AND EXPRESS terms in the home rule amendment. Wilson demonstrates a further restriction on any assertion by Dade County of ascendancy of a county ordinance over state legislation. If the asserted county action "contravenes the limitations or prescriptions of Article VIII, § 6 . . . it is necessarily unconstitutional and void, "Board of County Commissioners of Dade County v. Wilson, supra at 559, with the "focus" being on the constitutional enabling language n the home rule amendment.

Thus it is clear that in any balancing of the validity of state action vis a vis county action, there is a strong presumption in favor of the validity of the state action overcoming the county action. See, e.g., Kaalakis v. Boyd, supra, Dade County v. Miami, supra. As noted previously, the only way that this presumption cna be rebutted is if there is EXPRESS, SPECIFIC language to the contrary in Article VIII of

the 1968 Constitution allowing such a conflict, thereby permitting the county action to prevail over the state action. Furthermore, as Wilson noted, even if the presumption is rebutted and express language found, the county action must still be fully harmonious and compatible with Article VIII, § 6, or it must fail.

In overturning a proposed Dade County ordinance that would have substituted a millage different than that authorized by the legislature, the Wilson court reasoned:

> Moreover, in subsection (9) of section 11 [1885 Const.] it is declared to be the intent of the legislature and electors of Florida that 'the provisions of the Constitution and GENERAL LAWS WHICH SHALL RELATE TO DADE COUNTY . . . SHALL BE THE SUPREME LAW IN DADE COUNTY FLORIDA . . .' Clearly then, the provision of the Home Rule Charter and the ordinances adopted pursuant thereto must be in accordance with general law unless there is express constitutional authorization otherwise . . . (S)ubsection 6 of section II, Article VIII of the 1885 Constitution mandates that GENERAL LAWS ENACTED SUBSEQUENT TO THE ADOPTION OF THE HOME RULE CHARTER 'shall apply to Dade county and to all municipalities therein to the same extent as if this section had not been adopted and such general laws shall supersede any part or portion of the home rule charter provided for herein in conflict therewith and shall supersede any provision of any ordinance enacted pursuant to said charter and in conflict therewith . . . ' HENCE IT IS THE GENERAL LAW WHICH SUPERSEDES THE HOME RULE CHARTER." Board of County Commissioners of Dade County v. Wilson, supra at 561 (emphasis added.).

Dade County's reliance on Dickinson to evade the lawful judgment rendered against it has been universally critized by contemporary authorities who have considered the action. Furthermore, Dade County appears to place reliance upon one opinion from the Florida Attorney General's Office, 1976 Op. Att'y Gen. Fla. 076-147 (June 29, 1976).

The speculative nature of the opinion, and its limited persuasive value is acknowledged in the document itself: ". . . and until judicially determined otherwise . . . " Dade County doesn't have to pay. Therefore, the opinion itself concedes and specifices that it may be changed or modified by a court, and at that court's will.

Another opinion of the Attorney General's Office is closer to the mark. This opinion deals precisely with the present issue--that being the authority of the legislature to compel a tortfeasor political subdivision to satisfy a judgment that is over and above the $100,000 limit.

The opinion holds, in pertinent part: "[L]egislative approval of payment of that portion of a judgment which is in excess of the statutory limits of liability must be accompanied by an appropriation, THE LEGISLATURE MUST DETERMINE WHETHER THE PAYMENT IS TO BE MADE FROM THE FUNDS OF THE AGENCY RESPONSIBLE or from the general revenue funds . . . It appears that this decision will be made by the Legislature on a case-by-case basis. If the judgment is against a political subdivision and payment of the amount which is in excess of the statutory limits is approved, the legislature may INSTRUCT THE SUBDIVISION TO PAY THE EXCESS but will not specify the fund of the political subdivision from which payment is to be made." 1975 Op. Att'y Gen. Fla. 075-69 (March 11, 1975) (emphasis added).

IN SUMMARY

1. Dade County's reliance on Dickinson is wholly misplaced because that case does not interpret the controlling statute--768.28. Dickinson is further inapposite because the obligation of Dade County is legal and statutory.
2. Dade County's reliance on Attorney General Opinion 076-147 is also wholly misplaced. 076-147 interprets Dickinson, which, as has been demonstrated, supra, is inapposite to the instant case.
3. Dade County has no constitutional basis in refusing to satisfy tort judgment rendered against it. See, e.g., Dade County v. Miami, supra, and Board of County Commissioners of Dade County v. Wilson, supra.
4. The legislature has plenary power to abolish or modify Dade County's sovereign immunity. Keggin v. Hillsborough County, supra, Kaulakis v. Boyd, supra, and Welsh v. Metropolitan Dade County, supra.
5. The legislature has full authority by way of the 768.28 cap exceeding mechanism to compel Dade County to obey the legislation and the valid judgment underlying same.
6. These issues are ripe for resolution.

CONCLUSION

It is respectfully submitted that the will of the legislature be implemented and Dade County be ordered to pay petitioner the amount in question.

DADE COUNTY TRIAL LAWYERS ASSOCIATION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail, this 23rd day of July, 1984 to JAMES A. JURKOWSKI, Asst. County Attorney, 16th Floor, Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130 and to JULIAN D. CLARKSON, Holland & Knight, P.O. Drawer 810, Tallahassee, Florida.

Mary Friedman
MARY FRIEDMAN