

IN THE SUPREME COURT OF FLORIDA

FILED

DEC 5 1983

SID J. WHITE
CLERK SUPREME COURT

Chief Deputy Clerk

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,

v.

Case No. 64,586

METROPOLITAN DADE COUNTY,

Respondent.

PETITIONERS' BRIEF ON JURISDICTION

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INTRODUCTION

This case involves the refusal of Metropolitan Dade County (Metro-Dade) to comply with a statutory directive from the Florida Legislature to pay the full amount of a judgment of the Dade County Circuit Court awarding tort damages to petitioners. The legislature directed payment of that portion of the judgment exceeding the limits specified in section 768.28(5), Florida Statutes, the "waiver of sovereign immunity" statute. Metro-Dade's refusal was founded on its belief that the Dade County Home Rule Amendment¹ to the Florida Constitution insulates it and it alone from the general law providing a method for victims of governmental torts to recover their full damages.

Metro-Dade's defiance of the circuit court judgment and the legislative act directly collides with this Court's recent pronouncement in Cauley v. City of Jacksonville:²

It is our decision that, in this state, sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner. . . . It is important to note that, although section 768.28 imposes a \$50,000/\$100,000 ceiling on tort recovery against government in the judicial forum, the section specifically provides that one suffering injuries in excess of the ceiling may seek additional relief by petition to the legislature.

That collision, however, is not the jurisdictional basis for this petition. As will appear hereafter, petitioners

¹Art. VIII, §6, Fla.Const. (1968).

²403 So.2d 379, 387 (Fla. 1981).

invoke the jurisdiction of this Court because of the holding below that mandamus is not an available remedy in this case to enforce payment of a judgment against a public body.

STATEMENT OF THE CASE AND FACTS

Three years ago a bus operated by Metropolitan Transit Authority of Dade County struck an 11-year old Dade County child, causing massive, multiple injuries. A Dade County jury found the bus driver guilty of negligence and awarded Michele and her parents verdicts aggregating \$609,000, which were reduced by the trial court to \$365,400 based upon a finding of comparative negligence. Judgment was entered awarding the reduced amount, plus costs.

"The county satisfied the judgment to the extent authorized by section 768.28(5), Florida Statutes (1981), by making payment of \$100,000 to the petitioners. Thereafter the Legislature of the State of Florida enacted chapter 83-393, 1983 Fla. Laws 117, directing payment by the county of an additional sum of \$270,329.95 to satisfy the total judgment. The county refused to pay the additional sum."³

Petitioners sought a writ of mandamus in the Third District Court of Appeal⁴ to compel the county to pay the balance of their judgment as directed by the legislature. Ordered to show cause why the writ should not issue, Metro-Dade responded by arguing that chapter 83-393 (A 5) was unconstitutional because it

³The quoted language is copied from the district court of appeal decision (A 1-2).

⁴The district courts of appeal have concurrent jurisdiction with circuit courts to issue writs of mandamus directed to local governments. This Court's original mandamus jurisdiction is limited to "state officers and state agencies." Art. V, sec. 3(b)(8), Fla.Const.

related only to Dade County and consequently violated the Dade County Home Rule Amendment.

The district court of appeal refused to pass on the merits of the constitutional question (A 2). Instead, it held, succinctly, that

A writ of mandamus will be granted only when there is no other adequate remedy available to a petitioner. (Citations omitted) Because there are other adequate remedies available to the petitioner we decline to issue the writ. In so doing we do not reach the merits of the petition, but hold only that the availability of alternative relief precludes resort to the extraordinary writ of mandamus in this court.

ARGUMENT

MANDAMUS IS THE ONLY AVAILABLE REMEDY TO ENFORCE PAYMENT OF A JUDGMENT AGAINST A PUBLIC BODY.

The district court's opinion did not specify what alternative remedy is available to petitioners, perhaps because the court was either unable to identify it or unwilling to articulate it. Be that as it may, there is no remedy other than mandamus.

The amount of Metro-Dade's liability to petitioners has been adjudicated by a court of competent jurisdiction. Payment of the full extent of that liability has been directed by the Florida Legislature under authority of general law. Metro-Dade refuses to heed either mandate.

The authorities relied on by the district court of appeal do not address such a situation. In each, there was,

indeed, a clearly defined remedy other than an extraordinary writ: Shevin ex rel. State v. Public Service Commission⁵ (review of agency action under Administrative Procedure Act); School Board of Lee County v. Malbon⁶ (same); State ex rel. Lang v. Carey⁷ (injunction against collection of illegal tax); Laundry Public Health Committee v. Board of Business Regulation⁸ (pendency of declaratory judgment action seeking same relief makes writ unavailable).

The cases cited by the district court suggest no alternative remedy of which these petitioners could avail themselves. Neither injunctive relief nor review of agency action under the Administrative Procedure Act fits this case. Nor is it any answer to suggest that these petitioners might bring a declaratory judgment action that would necessarily effect recovery of their damages caused by the county's tort. Metro-Dade would no more be coerced to honor that judgment than the one petitioners already have.⁹

⁵333 So.2d 9 (Fla. 1976).

⁶341 So.2d 523 (Fla. 2d DCA 1977).

⁷121 Fla. 515, 164 So. 199 (1935).

⁸235 So.2d 346 (Fla. 1st DCA 1970).

⁹If declaratory relief is the appropriate mechanism for resolving this controversy, it is Metro-Dade, not petitioners, that should have sought it. By enacting Chapter 83-393 (A 5), the Florida Legislature directed Metro-Dade to draw a warrant in favor of petitioners. Rather than seeking a judicial determination that the act violates the Florida Constitution, Metro-Dade "declared" it unconstitutional and refused to pay the judgment (A 9).

Since Marbury v. Madison,¹⁰ the writ of mandamus has been the essential process used to command a public official to act "where he is directed by law to do a certain act affecting the absolute rights of individuals."¹¹ This Court has consistently recognized the indispensability of the writ, even against the highest officials of state government. Willits v. Askew, 279 So.2d 1 (Fla. 1973) (governor may be coerced by mandamus to issue a state warrant); Roberts v. Askew, 260 So.2d 492 (Fla. 1972) (mandamus ordered to compel Board of Trustees of Internal Improvement Trust Fund to pay cost judgment). See also Board of Commissioners v. Board of Pilot Commissioners, 52 Fla. 197, 42 So. 697, 703 (1906) (mandamus lies to require county commissioners to pay expenditure authorized by a valid law).

The district court's ruling that mandamus is "preclude(d)" in this case directly conflicts with this Court's holding (A-3) in City of Ocoee v. State ex rel. Harris, 155 Fla. 514, 20 So.2d 674 (1945). There the Court held:

Aside from the contention that Section 55.11, Fla.Statutes 1941, same F.S.A., precludes the issuance of the writ such as was issued in this case, we see no necessity of any specific discussion. As we construe the section of the statute, supra, it does not preclude mandamus against a municipality to require the payment of a judgment. It appears to us that to so construe the statute would be equivalent to holding that a judgment creditor of a municipality would have no means available to enforce the payment of such judgment.

¹⁰1 Cranch 137, 2 L.Ed. 60.

¹¹1 Cranch at 171.

20 So.2d at 675 (emphasis added).

That holding is directly applicable here. Petitioners obtained a judgment against Metro-Dade and then dutifully followed the method prescribed by law for recovering the excess portion of their judgment. The legislature passed the "further act" authorized by general law, see section 768.28(5), Florida Statutes, and directed payment of the additional amount due under the judgment. Metro-Dade refused to pay (A 9). Petitioners cannot levy against public property to satisfy their judgment and are thus without remedy unless the writ of mandamus issues to compel payment as in City of Ocoee.¹²

The cases cited by the district court suggest no alternative relief of which these petitioners could avail themselves.

Additional Reason for Granting
Discretionary Review

Aside from clear conflict between the decision below and a prior decision of this Court, review should be granted to pass upon the constitutional objection raised by Metro-Dade and to settle authoritatively the question whether Dade County, like Florida's other 66 counties, is subject to all the provisions of

¹² See also Peacock v. State ex rel. American Mortgage & Finance Corporation, 122 Fla. 25, 164 So. 680, 681 (1935): "That mandamus lies to compel a municipal corporation to make provision for paying judgments duly rendered against it scarcely admits of serious argument contra."

the "waiver of sovereign immunity" statute, section 768.28, Florida Statutes.¹³

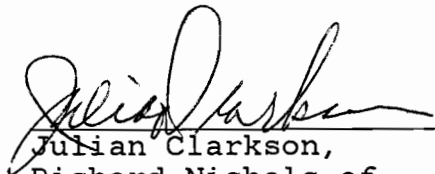
Just two years ago, this Court held that sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner. Cauley v. City of Jacksonville, supra. One of Florida's 67 counties refuses to accept that statement as meaning what it says. This case presents an undeniable opportunity to accord to victims of Metro-Dade's torts the same rights under law as those afforded victims of governmental torts in the other 66 counties.¹⁴

¹³The 1983 session of the legislature passed a total of three bills ordering payment of judgments against Metro-Dade (A 10).

¹⁴Local governments other than Metro-Dade that received similar legislative directions in 1983 to pay excess judgments were Palm Beach School Board and Jacksonville Electric Authority (A 10-11).

CONCLUSION

Petitioners ask that this Court grant discretionary review, quash the decision of the Third District Court of Appeal holding that mandamus is not an appropriate remedy against respondent and adjudicate that Chapter 83-393, Laws of Florida, and section 768.28(5), Florida Statutes, are valid legislative enactments binding upon respondent.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to MERRETT STIERHEIM, Dade County Manager, 73 West Flagler Street, Dade County Courthouse, Miami, Florida 33130; and JAMES A. JURKOWSKI, Assistant County Attorney, Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130, this 5th day of December, 1983.



Julian Clarkson