O/A 11-14-84

IN THE SUPREME COURT OF FLORIDA

MICHELE HESS, etc., et al.,

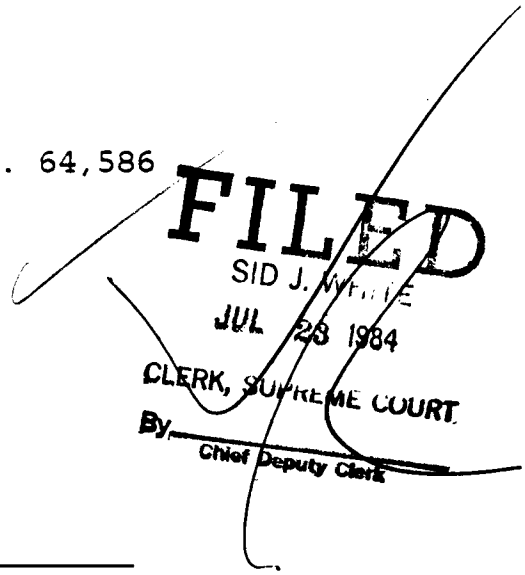
Petitioners,

vs.

METROPOLITAN DADE COUNTY,

Respondent.

Case No. 64,586



ON DISCRETIONARY REVIEW OF A DECISION
OF THE THIRD DISTRICT COURT OF APPEAL

PETITIONERS' BRIEF ON THE MERITS

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NOTE:

All emphasis is supplied unless otherwise noted.

The symbol "A" refers to the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

In May, 1980, a bus operated by Metropolitan Transit Authority of Dade County struck a minor pedestrian, 11-year-old Michele Hess, knocking her into a bridge abutment. Michele sustained serious injuries, including permanent brain damage, orthopedic fractures requiring a metal plate and screws in her leg, scars, cosmetic deformities and serious psychological damage (A 1).

Michele's parents brought suit against Metropolitan Dade County (Metro-Dade) seeking damages for the negligent operation of the bus. A jury returned a verdict awarding Michele $500,000 and her parents $109,000. Because the jury also found Michele to have been 40 percent at fault, the trial court reduced the verdicts by 40 percent and entered judgment against Metro-Dade awarding Michele $300,000 and her parents $65,400, plus costs (A 1).

Metro-Dade satisfied the judgment to the extent required by section 768.28(5), Florida Statutes (1981), by paying $50,000 to Michele and $50,000 to her parents (A 2). Thereafter, the Hess family presented to the Florida Legislature their claim for the portion of the judgment exceeding $100,000 as authorized by the statute (A 9).

The legislature enacted Chapter 83-393, Laws of Florida, directing Metro-Dade to pay the Hess family the remaining amount of $270,329.95 to satisfy the judgment in full (A 1-4). The act directed Metro-Dade to draw a warrant in favor of

the Hess family upon funds of the county not otherwise appropriated (A 3).

Through their counsel the Hess family requested payment as directed by the legislature (A 5, 6). Metro-Dade responded in relevant part as follows (A 7):

> Dade County is authorized to disburse funds only upon a valid, constitutional enactment of the State Legislature.
>
> Because Chapter 83-393 is violative of Article 8, Section 11 of the Florida Constitution of 1885, we must deny your request for payment.

Being without other remedy to compel a public body to respond to the judgment of a court of competent jurisdiction and to the legislative directive ordering payment pursuant to general law, the Hess family sought a writ of mandamus in the Third District Court of Appeal. Ordered to show cause why the writ should not issue, Metro-Dade responded by arguing that Chapter 83-393 was unconstitutional because it related only to Dade County and consequently violated the Dade County Home Rule Amendment.

The district court of appeal refused to pass upon the merits of the constitutional question, holding (A 27):

> 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.

Hess v. Metro. Dade County, 447 So.2d 267, 268 (Fla. 3d DCA 1983). The district court did not suggest what alternative remedy was available.

The Hess family then invoked the jurisdiction of this Court because of the holding below that mandamus is not an available remedy to enforce payment of a judgment against a public body. This Court has now accepted jurisdiction and ordered the filing of briefs on the merits.

ARGUMENT

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

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, section 768.28(5), Florida Statutes.[1] Metro-Dade refused to heed either mandate.

After obtaining their judgment against Metro-Dade, petitioners 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 and directed payment of the additional amount due under the judgment. Metro-Dade refused to pay. Petitioners cannot levy against public property to satisfy their judgment and are thus without remedy unless the writ of mandamus issues to compel payment.

This Court has repeatedly approved use of the writ of mandamus to compel payment of a lawful obligation by a public body. In City of Ocoee v. State ex rel. Harris, 155 Fla. 514, 20

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[1]That section provides in relevant part: ". . . that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature."

So.2d 674 (1945), a case construing section 55.11, Florida Statutes,[2] the Court said:

> 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.

In Board of Commissioners v. Board of Pilot Commissioners, 52 Fla. 197, 42 So. 697 (1906), the board of pilot commissioners for the port of Pensacola sought a writ of mandamus requiring the board of county commissioners to pay expenses incurred in policing the waters of the port as authorized by state law. Affirming grant of the peremptory writ, this Court held:

> When an expenditure by a county is authorized by a valid law, and the correctness of the amount due by the county is ascertained and approved as the laws (sic) directs, there being no question of bona fides, it is the duty of the county commissioners to audit, approve, and pay the same, and such payment may be enforced by mandamus.

42 So. at 703.

To the same effect are 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

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[2] "No money judgment or decree against a municipal corporation is a lien on its property nor shall any execution or any writ in the nature of an execution based on the judgment or decree be issued or levied." Florida Statutes (1983). The 1945 version of the statute was the same in substance.

make provision for paying judgments duly rendered against it scarcely admits of serious argument contra"); and Meriwether v. Kilbee, 154 Fla. 631, 18 So.2d 534 (1944)(lands of drainage district are not subject to execution to satisfy common law judgment but mandamus may be employed against the district).

The district court of appeal refused to issue a writ of mandamus, quoting the familiar rubric that "(a) writ of mandamus will be granted only when there is no other adequate remedy available to a petitioner." That same ground was relied upon by the First District Court of Appeal in its contemporaneous decision in Fine v. Firestone, 443 So.2d 253 (Fla. 1st DCA 1983). Unlike the Third District, which did not identify the adequate remedy available to the Hess family, the First District identified an action for declaratory judgment in the circuit court as being available to petitioner Fine. On review, this Court had little difficulty in finding that mandamus was an appropriate remedy because the case "involved straightforward legal questions which did not require factfinding." 9 FLW 104, 105. Hess meets that test.

The district court should have passed upon the merits of petitioners' application for a writ of mandamus ordering Metro-Dade to pay the sum awarded by the Dade County Circuit Court and ordered paid by the legislature. Because of the district court's abstention, and particularly in view of Metro-Dade's insistence that Chapter 83-393 is unconstitutional, it becomes appropriate for this Court to pass upon the legal question presented.

II. CHAPTER 83-393 IS NOT UNCONSTITUTIONAL. SOVEREIGN IMMUNITY FROM SUIT CAN ONLY BE DEALT WITH BY GENERAL LAW.

> Suits against the state.--Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.
>
> Article X, section 13, Florida Constitution
>
> * * *
>
> (I)mmunity from suit is not a matter of local concern but must be dealt with by general law only.
>
> Kaulakis v. Boyd, 138 So.2d 505, 507 (Fla. 1962)

In its argument on the merits below, Metro-Dade asked the court to construe section 768.28(5), Florida Statutes, in a manner that imposes one standard affecting the citizens of Dade County and a different standard affecting the citizens of Florida's other 66 counties. Such a construction would directly collide with this Court's prior decision that "in this state, sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner." Cauley v. City of Jacksonville, 403 So.2d 379, 387 (Fla. 1981).[3]

Section 768.28(5), originally enacted in 1973, does three things: (1) it waives the sovereign immunity from tort liability of the State of Florida and its agencies and subdivi-

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[3] Justice Overton's opinion for the majority details the history of the sovereign immunity doctrine, tracing back to its common law origin. That territory will not be replowed here.

sion, including Metro-Dade; (2) it imposes a cap on the amount that may be recovered by an injured person; and (3) it authorizes recovery of any portion of a judgment exceeding the cap "by further act of the Legislature." The statute was passed as a general law equally applicable to all 67 counties.

In this case, Michele Hess sustained massive injuries because of the negligence of the driver of a bus operated by Metropolitan Transit Authority of Dade County. The Dade County Circuit Court entered judgment against Metro-Dade in the total amount of $365,400 plus costs. Metro-Dade paid $100,000 of the judgment, the ceiling imposed by section 768.28(5), but then argued that the excess allowed by that same statute at legislative direction could not be paid out of county funds.

Metro-Dade's argument is totally incompatible with the clear intent of the Dade County Home Rule Amendment,[4] expressed as follows:

> (9) It is declared to be the intent of the Legislature and of the electors of the State of Florida to provide by this section home rule for the people of Dade County in local affairs and this section shall be liberally construed to carry out such purpose, and it is further declared to be the intent of the Legislature and of the electors of the State of Florida that the provisions of this Constitution and general laws which shall relate to Dade County and any other one or more counties of the State of Florida . . . enacted pursuant thereto by the Legislature shall be the supreme law in Dade County, Florida, except as expressly provided herein

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[4]Article 8, section 11, Constitution of 1885, carried forward as article 8, section 6 in the Constitution of 1968.

> and this section shall be strictly construed to maintain such supremacy of this Constitution and of the Legislature in the enactment of general laws pursuant to this Constitution.

This provision of organic law elevates the statutory scheme prescribed by section 768.28(5) for waiver of sovereign immunity, and conditions accompanying the waiver, over any right of Dade County to be exempted from legislative direction. The language used expressed no purpose to grant Dade County a more favored position than other counties with respect to public liability but rather "means that when the Legislature exercises its power it may not treat Dade County differently than it treats at least one other county in the state." S & J Transportation, Inc. v. Gordon, 176 So.2d 69, 71 (Fla. 1965).

Petitioners dutifully followed the method prescribed by law for recovering the excess portion of their judgment from respondent. The legislature passed the "further act" authorized by general law and directed payment of the additional amount due under the judgment. Metro-Dade's argument below that petitioners can only be made whole through expenditure of state funds rather than county funds finds no support in the statute that placed a cap on the county's liability for its torts.

Metro-Dade bottoms its "home rule" argument on this Court's decision in Dickinson v. Board of Public Instruction of Dade County, 217 So.2d 553 (Fla. 1968), holding that the legislature, at that time, could not constitutionally require payment of a "moral obligation" by Dade County in light of the Home Rule Amendment. The decision in no way dealt with waiver of sovereign immunity.

The rationale of the Dickinson decision is emphasized by the following statement in the majority opinion:

> (I)t appears to us that in regard to matters of the nature under consideration, the people of Dade County have adequate authority through the referendum process to make provision in their Home Rule Charter for meeting moral obligations of this type. Actually, in so doing they would be following a course little different than if they were required to pursue a constitutional referendum on a local law. The trial judge expressed concern that in the absence of some alternative procedure, a strict application of the Dade County Home Rule amendment might make it impossible to provide for compensation to claimants justly entitled to relief in that particular county. What we have last written precludes the possibility of such an injustice or inequality.

217 So.2d at 555.

Dickinson clearly recognized the legislature's power to enact general laws affecting Dade County notwithstanding the Dade County Home Rule Amendment. The majority opinion stated:

> As we have done on other occasions, we concur in the view that in matters 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 themselves autonomously and differently than the people of other counties of the state."

Id.

The case that controls the Hess family's claim is not Dickinson; it is Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962). There this Court addressed the question whether Dade County could, without legislative authority, waive its own sovereign immunity by a provision in its home rule charter. The Court's

decision expressly recognized the supremacy of the Florida Constitution over Dade County's home rule powers as to any matter not expressly covered in the Home Rule Amendment. The opinion stated:

> The study of Article VIII, Section 11 discloses that there is no provision relating to the waiver of tort immunity by Dade County. The 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* * *." 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* * *"

138 So.2d at p. 505 (emphasis by the Court). In recognizing that the Dade County "waiver of sovereign immunity ordinance" was unconstitutional, the Court specifically held:

> Since, as previously observed, Section 11 of Article VIII does not purport to deal with immunity from suit, it follows that Section 8.03 of the charter must be held invalid.

138 So.2d at p. 507.

It is clear from Kaulakis that neither the Dade County Home Rule Charter nor the Florida constitutional amendment authorizing home rule for Dade County addresses the issue of sovereign immunity. In rejecting any argument that payment of funds could be separated from the question of sovereign immunity, the Court succinctly held:

> It is (the claimant's) position that since the funds which would be used in satisfaction of a judgment in his favor are County funds, the matter of immunity from tort liability involves essentially "local affairs". The complete answer to this argument is that by virtue of Article III, Section 22 of the Constitution, immunity from suit is not a matter of local concern but must be dealt with by general law only.

Id.[5]

Subsequent to the Dickinson decision, the legislature in 1973 enacted a general law, the waiver of sovereign immunity statute, section 768.28, Florida Statutes, which applies equally to all counties, including Dade, and procedurally sets forth the mechanism for recovery of excess judgments. That statute provides in relevant part:

> However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $50,000 or $100,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.[6]

Thus, Chapter 83-393 (The Hess claims bill) itself was passed under authority of general law applicable to counties throughout the state of Florida, and this disposition fully comports with

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[5] Article III, section 22 was the predecessor of article X, section 13, of the present Constitution.

[6] The 1981 Florida Legislature increased the amounts recoverable to $100,000 per person and $200,000 per incident.

subsections (5), (6) and (9) of the Dade County Home Rule Amendment.[7] Indeed, as noted above, this Court recently opined:

> 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. We find that section 768.28 provides a responsible method for this equal application. . . .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.

Cauley v. City of Jacksonville, supra, at 387.

The basis for invalidating a claims bill in Dickinson -- that the Dade County Home Rule Charter should be used to process claims amounting to "moral obligations" -- is not involved here. The sovereign immunity statute, a general enactment of the legislature applicable to all counties, provides the exclusive method by which an injured person may recover damages exceeding the statutory cap: "by further act of the Legislature." Petitioners pursued that method. Metro-Dade's constitutional objection is without merit, and it has no lawful basis for declining to obey the directives of Chapter 83-393.

In summary, (1) the Florida Constitution grants to the legislature the exclusive authority to deal with the subject of sovereign immunity, (2) the legislature by general law has

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[7]These subsections expressly confirm the power of the legislature to enact general laws relating to Dade County "and any other one or more counties."

prescribed the method of recovering damages caused by governmental torts, (3) that method was followed in this case with the enactment of Chapter 83-393 and (4) this Court's prior decisions in the Dickinson and Kaulakis cases support the conclusion that section 768.28 applies to Dade County as well as Florida's other counties.

III. IF CHAPTER 83-393 IS UNCONSTITUTIONAL AS APPLIED TO DADE COUNTY, THERE IS NO CAP ON DADE COUNTY'S LIABILITY.

If Metro-Dade is correct in its argument that the "further act" of the legislature in this case, Chapter 83-393, is unconstitutional because it violates the Dade County Home Rule Amendment, then this Court should further decide how much of the statute must fall. This is so because those portions of a statute that are closely interrelated to the offending language must fall with that language in order that the court not reach a result obviously not intended by the legislature. Small v. Sun Oil Company, 222 So.2d 196 (Fla. 1969).

As originally enacted in 1973,[8] section 768.28(5) provided as follows:

> (5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like

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[8]The 1979 version of the statute retains essentially the same substance as the original version but has undergone style and drafting changes.

> circumstances, but liability shall not include punitive damages or interest for the period prior to judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $50,000, or any claim or judgement [sic], or portions thereof, which, when totaled with all other claims or judgments paid by the state arising out of the same incident or occurrence exceeds the sum of $100,000, provided, however that a judgment or judgments may be claimed and rendered in excess of these amounts, and may be settled and paid pursuant to this act up to $50,000 or $100,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the legislature but may be paid in part or in whole only by further act of the legislature.

The legislature's intent is unmistakably expressed in a two-step sequence: (1) the first sentence waives sovereign immunity from tort liability; (2) the second sentence imposes a monetary cap on the sovereign's tort liability with the proviso that the legislature retains the right to require payment of the adjudicated amount exceeding the statutory cap.

If one part of the legislative limitation of liability must fail because of the Dade County Home Rule Amendment, then both fairness and undeniable legislative intent require that its companion part fail with it. If the provisional limitation of liability is removed, then in Dade County (and in Dade County alone) there is no statutory ceiling on the recoverable amount of a judgment awarded to compensate a victim of Dade County's tortious conduct.

Assuming, without conceding, that the legislature "adopted a mechanical form which violates the Constitution" and that "by simple change in the mechanics of the statute the valid legislative intent can and should be accomplished," Small v. Sun

Oil Company, supra, at 202, it becomes a simple matter for this Court to invalidate the second sentence quoted above from the original version of the statute, as applied to Dade County alone, with the end result that there is no statutory cap on Dade County's liability for its torts and no consequent need for the legislature to concern itself with claims bills emanating from Dade County.[9]

Either way, petitioners are entitled to recover the full damages caused by Metro-Dade's tortious activity. Any other result would trigger the "injustice or inequality" spoken of by Justice Thornal's opinion in Dickinson and would furhter constitute a denial of equal protection of the law in violation of the Florida and federal constitutions.[10] There can be no rational basis for treating citizens of Dade County differently from those residing in the other counties of Florida in providing redress for governmental torts.[11]

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[9]The 1983 session of the Florida Legislature approved claims from three different localities (Dade County, Palm Beach County, Jacksonville). See A 21-22.

[10]Article I, section 2, Florida Constitution; Fourteenth Amendment, United States Constitution.

[11]Hollenbeck v. State, 91 So.2d 177, (Fla. 1956)("statutory classification by counties. . .that in effect impose(s) burdens on some of the citizens of the state that in kind or extent are not imposed on other citizens of the state under practically similar conditions" held to constitute denial of equal protection).

CONCLUSION

Metro-Dade's misreading of the Dickinson case has caused it to wrongfully withhold payment of damages due the Hess family. Dickinson dealt with a moral obligation, not legal liability. This case, on the other hand, involves sovereign immunity, an issue outside the scope of the Dade County Home Rule Amendment. The supremacy clause of the Home Rule Amendment, read in tandem with article 10, section 13 of the Florida Constitution and section 768.28, Florida Statutes, controls the outcome of this case.

Mandamus being an appropriate remedy in these circumstances, Metro-Dade should be ordered to pay to petitioners the balance of the judgment as ordered by the legislature. The district court of appeal should have granted the peremptory writ. Its decision declining to do so should be quashed and the case remanded with appropriate instructions.

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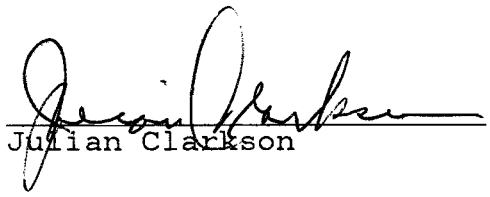
CERTIFICATE OF SERVICE

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 23rd day of July, 1984.



Julian Clarkson