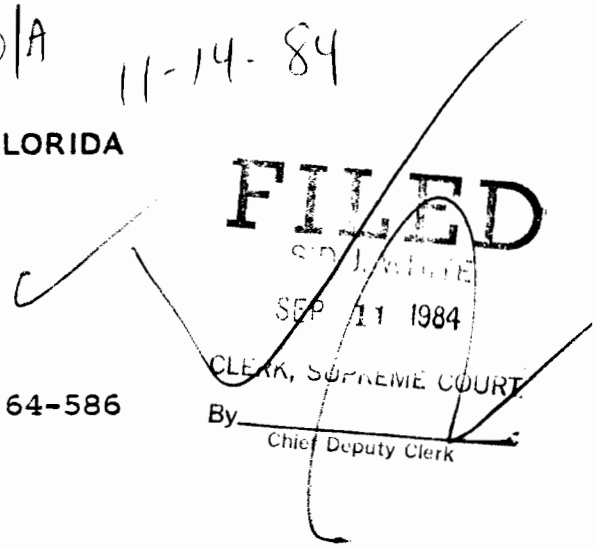
2/A 11-14-84

IN THE SUPREME COURT OF FLORIDA



MICHELE HESS, etc., et al.,

Petitioners,

vs. Case No. 64-586

METROPOLITAN DADE COUNTY,

Respondent.

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

PETITIONERS' REPLY BRIEF

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INTRODUCTION

> . . .legislators not elected by and not responsible to the citizens of Dade have taken it upon themselves to tax those citizens and those citizens alone. (Respondent's Answer Brief at 14)

By this provincial assertion, Metro-Dade demonstrates its refusal to admit that the money it adamantly withholds from Michele Hess and her parents was awarded by six Dade County jurors and ordered paid by a Dade County Circuit Judge. As a matter of legislative grace, the total amount of damages caused by Metro-Dade's tort could not be initially paid; Metro-Dade availed itself of the $100,000 ceiling imposed by law. But that which the legislature gives it can also take away. Under its retained power, authorized by general law and evenhandedly applied to all of Florida's 67 counties, the legislature determined that no valid reason exists to enforce the cap in Michele's case.

Metro-Dade's answer brief places total reliance on Dickinson v. Board of Public Instruction of Dade County. But that case dealt with a moral obligation, not legal liability as this one does. Stripped of its Dickinson argument, Metro-Dade has no defense and the result is clear: the judgment must be paid.

And Florida law leaves no doubt as to who must pay the judgment. Although Metro-Dade argues (Br. 23) that state funds should be used to pay for the consequences of Metro-Dade's tort, the Florida statute clearly specifies where the money comes from: the excess portion of the judgment "may be paid. . .only by further act of the Legislature." The judgment is against Dade County.

ARGUMENT

I. Mandamus Is The Only Adequate Remedy Available To Enforce The Judgment And Legislative Mandate

The County initially contends that conflict jurisdiction is lacking here because the Third District did not abuse its discretion in denying the Hess' petition for mandamus on the ground that "there are other adequate remedies available to petitioner." Hess v. Metropolitan Dade County, 447 So.2d 267, 268 (Fla. 3d DCA 1983). Although the district court did not indicate what "other adequate remedies" it had in mind, the County suggests that this Court "has endorsed the statutory remedy of declaratory relief" as an alternative remedy in this situation. [Brief 6 n. 1.] Moreover, the County insists that even if mandamus is the only available remedy, the district court could properly deny the writ "where by its issuance the public would be injuriously affected, or where it would operate inequitably upon the defendant. . .or would injuriously affect third persons."

This Court's acceptance of jurisdiction was clearly correct and proper. It is now settled that under article V, section 3(b)(3), "this Court has certiorari jurisdiction based on conflict when a district court of appeal misapplies the law by relying on a decision which involves a situation materially at variance with the one under review." Gibson v. Avis Rent-A-Car Systems, Inc., 386 So.2d 520, 521 (Fla. 1980). The four decisions on which the district court relied in denying mandamus below are all materially different from the present case in that each of those decisions identified a clearly adequate and appropriate

alternative remedy that was available to the petitioner; moreover, none involved a situation in which a party, having already obtained a judgment establishing its right of recovery, sought to compel a governmental entity to comply with a legislative mandate confirming the petitioner's entitlement to the relief requested.[1]

While it may be true that the Hess family could institute a declaratory judgment action as suggested by the County, the existence of such "other remedy" -- if a declaratory judgment, obtainable only by the investment of more time and money, could be regarded as a "remedy" in this case -- is not sufficient to bar mandamus. This Court held early on that "[i]t is a mistake to suppose that mandamus is excluded or avoided by the mere fact that there is another remedy," because "[t]he law is that there must be another specific and adequate remedy." State ex rel. Lamar v. Johnson, 30 Fla. 433, 11 So. 845, 855 (1892) (emphasis added).

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[1]In Shevin ex rel. State v. Public Service Commission, 333 So.2d 9 (Fla. 1976), where public counsel sought to compel the Public Service Commission to allow it to participate in agenda conferences, mandamus was denied because review of the agency action could have been obtained by a timely petition for certiorari. In State ex rel. Long v. Carey, 121 Fla. 515, 164 So. 199 (1935), where a homeowner sought to compel a county commission to revise a tax levy, mandamus was denied because of the absence of indispensable parties and because the petitioner had "an adequate, easy, and expeditious remedy" under a specific statute to challenge the legality of the tax assessment. In School Board of Lee County v. Malbon, 341 So.2d 523 (Fla. 2d DCA 1977), as in Shevin, supra, mandamus was denied because the petitioner, who sought to compel the school board to issue a final written order terminating his employment, should properly have sought review of the agency action under the Administrative Procedure Act. Finally, in Laundry Public Health Committee v. Board of Business Regulation, 235 So.2d 346 (Fla. 1st DCA 1970), where the petitioner sought to compel an agency to expunge an administrative rule, mandamus was denied because there was already pending an action in circuit court under the APA challenging the rule.

Indeed, this Court has specifically recognized that where the petitioner seeks to compel a county to pay a lawful claim, no alternative remedy will be considered sufficient unless it is both complete and speedy, because "[t]he holder of such a claim has an immediate right to the money. . .and a remedy which imposes any of the delay indicated, and its attendant expense, is entirely inadequate." Ray v. Wilson, 29 Fla. 342, 10 So. 613, 615 (1892). In any event, as recently held by this Court in Fine v. Firestone, 448 So.2d 984, 987 (Fla. 1984), mandamus is the proper remedy notwithstanding the availability of declaratory relief in circuit court where, as here, the case "involve[s] straightforward legal questions which [do] not require fact-finding."

Finally, the County urges that mandamus could properly be denied in this case, even though the Hess family might thereby be left without any remedy, because issuance of the writ would injuriously affect the public or would be inequitable to the County. Under the circumstances of this case, and particularly in light of the County's position that the Hess family must either be satisfied with what they have already received (amounting to less than one-third of the judgment) or look to the other 66 counties of Florida to make good on Dade County's obligation, any attempt by the County to claim inequity or injustice is so unconscionable and preposterous that it cannot be taken seriously, and certainly does not merit the dignity of a reply.

II. Chapter 83-393 Is Not Unconstitutional Because Sovereign Immunity Is Governed By General Law, Not By Dade County's Home Rule Amendment

On the merits, the County initially contends that chapter 83-393 is prohibited by the Dade County Home Rule Amendment. The County buttresses this assertion by characterizing local and special laws as "the precise evil sought to be avoided by home rule," because they are "objectionable interferences by the state legislature" that are "often passed without careful deliberation or consideration," are "ordinarily guided by personal and constituent interests," and are "inefficient and unjust." Finally, the County suggests that the claims process encourages "profligate encroachments on [local governments'] treasures" because legislators are eager "to spend money from a treasury for which they bear neither responsibility nor accountability," and "in the vast majority of cases, the legislature does nothing more than rubber stamp the claims bills as filed."

These charges and characterizations, though certainly convincing proof of the County's political paranoia, have no relevance whatsoever to this case or to the legal issues presented herein. In fact, the County's liability to Michele Hess and her parents was not the product of political machinations by irresponsible outside legislators who conspired to persecute the people of Dade County; rather, it was determined by a jury of Dade County citizens through a trial conducted in the Dade County Circuit Court. Moreover, this claims bill, which was sponsored by a Dade County legislator, does not "interfere" with the "governmental functions" of Dade County or hinder the County's "ability to effec-

tively provide for its residents," and there is certainly nothing "inefficient and unjust" about it; on the contrary, the act is necessary to ensure that Dade County justly provides for the compensation of Dade County residents who were injured as a result of Dade County's negligence, in accordance with an adjudication of liability by a judge and jury in Dade county. Finally, any notion that the Florida Legislature merely "rubber stamps the claims bills as filed" is refuted by the Final Report on Claims in the 1983 Session [A 21-24], which reflects that in 1983 a total of 33 claims bills were introduced, of which six (including the Hess bill) were approved for the total amount requested and two were approved only in part.

On the legal issues, the County has advanced no argument or authority that can be regarded as sufficient justification for its refusal to comply with chapter 83-393. First, the County asserts that "Subsection (5) and (6) of [the Home Rule] Amendment proscribe that the State Legislature may not lawfully adopt any act which relates only to Dade County," citing Chase v. Cowart, 102 So.2d 147 (Fla. 1958). A reading of subsections (5) and (6) together with the Chase decision reveals, however, that the County has it backwards. Subsections (5) and (6) do not prescribe restrictions on the legislature, but rather, as this Court stated in Chase, "clearly prescribe limitations on the power of home rule." 102 So.2d at 151 (emphasis added).

For purposes of this case, the dispositive provision is Subsection (6), which expressly provides that "[n]othing in this section shall be construed to limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County

and any other one or more counties. . .and all such general laws shall apply to Dade County . . .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. . . ." (Emphasis added.) Since it is undisputed that the Florida Legislature subsequently enacted section 768.28 as a general law relating to Dade County and all other counties, that act -- including subsection (5) thereof which authorizes the legislature to provide for payment of the excess of a claim over the statutory cap by "further act" -- must by the very terms of the Home Rule Amendment (a) apply to Dade County as if the Home Rule Amendment had never been adopted, and (b) supersede any part or portion of the Home Rule Amendment in conflict therewith.

Manifestly, if the legislature cannot enact claims bills for Dade County residents as it can for residents of other counties, then section 768.28 does not "apply to Dade County. . .to the same extent as if [the Home Rule Amendment] had not been adopted." It is equally clear that if the provisions of section 768.28 somehow conflict with any part or portion of the Home Rule Amendment -- a notion put to rest by this Court's holding in Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962), that no provision of the Home Rule Amendment relates to the waiver of sovereign immunity -- then by the force of the Home Rule Amendment itself any such conflicting part or portion thereof is superseded by the subsequently enacted general law.

Thus, the County's contention that the legislature "is without authority to circumvent the Home Rule Amendment" because "[t]he Legislature may not authorize itself to do what the consti-

tution prohibits" is wholly irrelevant here. Simply stated, the Florida Constitution does not prohibit but specifically authorizes the legislature to provide by general law for waiving sovereign immunity, article X, section 13, and the legislature has done so through section 768.28, which applies to all "state agencies or subdivisions" including counties. §768.28(2). The Home Rule Amendment contains no provision which expressly or impliedly purports to restrict the authority of the Legislature in this regard; even if it did, the clear language of subsection (6) would dictate that article X, section 13 and section 768.28 must prevail in the event of a conflict. It is for this reason that the County's reliance on Dickinson v. Board of Public Instruction, 217 So.2d 533 (Fla. 1968) -- a case decided before the legislature first waived sovereign immunity through the enactment of section 768.28 -- is misplaced.

The County nonetheless urges that "[s]uch an absurd result was not intended by the drafters of the Home Rule Amendment, nor by the citizens of this state who voted to make that amendment part of their constitution." Yet subsection (9) of the Home Rule Amendment declares it "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. . .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 and of the Legislature. . . ." This Court reaffirmed that principle in the very case cited by the County:

> We feel it necessary to point out that the provisions of subsection (1)(c) [of The Home Rule Amendment] provide only for a change in the structure or form of the government of Dade County. . . . This subsection does not, nor does any other portion of [the Home Rule Amendment], empower the electors of Dade County. . .to relieve the Metropolitan government of Dade County from performing any functions or duties imposed on the government, people or property in Dade County and on the government or people in any other one or more counties in the State, either by general act of the Legislature or the Constitution. Nor does it relieve the government, people or property in Dade County from the regulation or restriction, nor take from the government, people or property in Dade County any of the benefits or protection offered under such a general act. . . .

Chase v. Cowart, 102 So.2d at 153. (Emphasis added.) In considering the intent of the Home Rule Amendment, the Court should question whether those who drafted and adopted that provision contemplated the result which the County suggests is appropriate -- i.e., that Dade County should enjoy the same benefit as all other counties from the statutory cap on liability prescribed by section 768.28(5), but unlike the other 66 counties should be immune from the proviso of that same law, which reserves to the legislature the power to provide for payment of claims exceeding the statutory cap by further act.

With respect to section 768.28(5), the County argues in the alternative that the statute does not authorize the legislature to pass claims bills. Although section 768.28(5) provides that "that portion of the judgment that exceeds [the statutory cap] may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature," the County contends (a) that "[s]urely the cited oblique statutory reference to a 'further

act' does not clearly and unequivocally allow the Legislature to compel the County to disburse monies over and above the limited waiver of sovereign immunity"; (b) that an interpretation of the language which would authorize such claims bills "conflicts with the clear language in the same section" imposing the $50,000/100,000 cap; and (c) that the legislative history of section 768.28 "tends to indicate that the Legislature did not intend for local governments to have any liability exposure, by claims bill or otherwise, for amounts in excess of the statutory maximums."

While the County's arguments on this point are so utterly frivolous as to hardly warrant a reply, the Hess family feels compelled to identify a few fatal flaws. First, if the statutory language referring to payment of claims in excess of the statutory cap "by further act" does not refer to claims bills, then it is difficult to imagine what the legislature had in mind when it adopted that provision. Since the County does not favor the Court with any alternative interpretation, the construction proposed by the County effectively renders that statutory clause a meaningless nullity -- a construction which should never be indulged by this Court. In addition, the construction of the disputed clause as authority for the legislature to approve payment of claims in excess of the statutory cap does not conflict with, but manifestly complements, the preceding clause that establishes the cap. The use and placement of the word "however" unmistakably evinces the legislative intent that the specific limitation on liability is subject to the proviso that the legislature may by further act require payment of all or part of the excess. Finally, the best

evidence of what the legislature "intended" in section 768.28(5) is not the legislative history, which the County concedes is "meager," but the manner in which the legislature has actually interpreted and exercised the authority granted thereunder. In sum, section 768.28(5) means exactly what it says and what the legislature has obviously believed it to say since its enactment a decade ago.

In any event, the County's contentions have already been rejected by this Court in Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981):

> 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.

Id. at 387 (emphasis added).

As its final point, the County urges that chapter 83-393 "is unconstitutional regardless of Dade's home rule status because sovereign immunity can be waived only by general law," and thus "all legislation relating to governmental liability must be by general law." From this premise, the County concludes that section 768.28(5) is valid to the extent that it establishes the statutory cap on the liabilities of local governments, but contravenes article X, section 13 of the Florida Constitution insofar as it authorizes the legislature "to supercede [sic] the statutory maximums on liability by way of local law." The County then suggests

that the legislature "could have easily and constitutionally satisfied whatever further obligation it perceived by appropriating general state revenues."

The complete answer to this argument is that section 768.28 is a general law waiving sovereign immunity, and its character as such is not altered by the fact that the waiver is made subject to certain reasonable conditions and limitations. Moreover, the County's interpretation necessarily leads to an absurd conclusion -- i.e., that when the legislature exercised the power granted by article X, section 13 to waive sovereign immunity by general law, it forfeited the authority to pass any claims bills.[2] It is simply inconceivable that the people of Florida when adopting article X, section 13 and the legislature when enacting section 768.28 intended or contemplated that the result would be a restriction of sovereign immunity rather than a relaxation thereof.

Metro-Dade seeks to characterize Chapter 83-393 as a local bill. The characterization is wrong. In the first place, the enactment is an extension of section 768.28(5), being the "further act" specified in that statute, which admittedly is a general law applying to all 67 counties. Further, the statement in the Dickinson case that a claims bill must be passed as a local bill is unfortunate obiter dictum that ignored legislative practice to the

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[2]In this regard, it should be noted that if the County is correct in its contention that claims bills are prohibited by article X, section 13 and by article III, section 11 (barring certain classes of special or local laws), then it is clearly wrong in suggesting that the legislature could have constitutionally provided for payment to the Hess family out of state revenues, because such an act would by nature be a special law in that it affects only particular persons.

contrary. The dissenting opinions of Justices Drew and Ervin correctly state the law on that point.[3]

III. If That Portion Of Section 768.28(5) Authorizing Claims Bills Is Unconstitutional As Applied To Dade County, Then The Statutory Cap Provided Therein Must Likewise Fall

In response to the Hess' point that the statutory cap and the proviso authorizing claims bills to pay excess amounts under section 768.28(5) are so closely intertwined that they must stand or fall together, the County merely dismisses the argument as "spurious" and -- in a paradoxical twist -- proclaims that this Court "is obliged to construe a law, if possible, so as to sustain its constitutionality." Like the proverbial party wishing "to have its cake and eat it too," the County asks the Court to consider legislative intent and apply rules of strict construction where such an approach may benefit the County's position, but not where the result may be unfavorable.

While the Hess family is content to rely on the arguments and authorities embodied in its Initial Brief on this point, it bears mention that the County's position here is absolutely reprehensible. With unprecedented audacity, the most populous and prosperous county in this state seriously contends that (a) it is entitled to the benefit of the statutory cap under section 768.28 like all other counties, but it alone is not subject to the proviso

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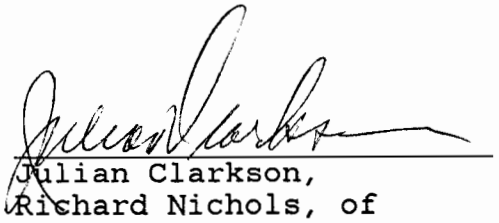
[3] "It is common knowledge that the Legislature has always treated claim or relief bills as general bills rather than local bills." (Ervin, J., dissenting, 217 So.2d at 560.)

of that section authorizing claims bills for payment of the excess amount of a judgment; (b) any other county found liable for negligence in an amount exceeding the statutory cap may be compelled by the legislature to pay the difference, but Dade County's excess liabilities can be paid only out of state funds; (c) it would be "unjust" to make Dade County satisfy a judgment rendered against it in a Dade County court by a jury of Dade County citizens for the compensation of Dade County residents who suffered injuries as a consequence of Dade County's negligence; and, most importantly, (d) that the Hess family "should not be heard to complain that such a result is harsh or unfair."

The decision of the district court denying mandamus should be quashed, and this case should be remanded with directions to issue the writ requiring the County to comply with chapter 83-393 forthwith.



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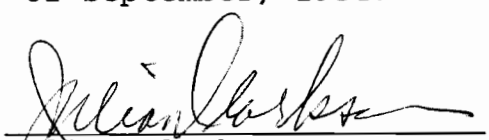
CERTIFICATE OF SERVICE

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; FLETCHER N. BALDWIN, JR., University of Florida, Holland Law Center, Gaineville, Florida 32611; and MARY FRIEDMAN, Second Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130, this 11th day of September, 1984.



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