B-5

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CITY OF DAYTONA BEACH, a Municipal Corporation,

Petitioner,

vs.

HELEN B. PALMER, as Personal Representative of the Estate of William Gregory Palmer, Jr., Deceased,

Respondent.

CASE NO. 64,773

On Appeal From The Fifth District Court of Appeal

State of Florida

Case No. 83-416

AMICUS CURIAE BRIEF ON BEHALF OF THE FLORIDA LEAGUE OF CITIES, INC.

JAMES R. WOLF
General Counsel
HARRY MORRISON, JR.
Assistant General Counsel
Florida League of Cities, Inc.
Amicus Curiae
201 West Park Avenue
Post Office Box 1757
Tallahassee, Florida 32303
904/222-9684

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INTRODUCTION

The Florida League of Cities, Inc., appears as amicus curiae for the purpose of representing the interests of Florida municipalities and assisting the Court in making its determination of a question of tremendous importance to all municipalities in Florida.

This brief, which supports the position of Petitioner, considers the issue of whether a city can be held liable in tort to a property owner for damages caused by the negligent acts of the city's firefighters in combating a fire.

The statement of the case and facts in Petitioner's brief is adopted in this brief.

II.

QUESTION ON APPEAL

CAN A CITY BE HELD LIABLE IN TORT TO A PROPERTY OWNER FOR DAMAGES CAUSED BY THE NEGLIGENT ACTS OF THE CITY'S FIREFIGHTERS IN COMBATING A FIRE?

III.

ARGUMENT

The question certified to this Court sub judice concerns the fundamental question of whether a city can be held liable in tort to a property owner for damages caused by the negligent acts of the City's firefighters in combating a fire. This particular question appears to be one of first impression for Florida's highest court.[1]

Amicus respectfully submits that a municipality may not be subjected to tort liability for the acts of its firefighters in combating a fire. The conduct of a fire department in combating a fire must remain immune from scrutiny by judge or jury as to the wisdom of that conduct because to do otherwise would strike at the very heart of government's ability to provide for the general health, safety, and welfare of its citizens.

Traditionally, and under the recent decisions of the Florida Supreme Court, the performance of this sphere of governmental functions would and should not subject a municipality to tort liability. Historically, the courts have recognized that certain functions of government must be protected from suits in tort because to do otherwise would significantly impair government's ability to govern. While the courts have utilized various legal doctrines when addressing municipal liability, the net effect is that they

[1] The Supreme Court has several times refused to apply the doctrine of immunity to protect a municipality from liability for the negligent operation of its fire equipment. City of Miami v. Thigpen, 151 Fla. 800, 11 So.2d 300 (1943); Barth v. City of Miami, 146 Fla. 542, 1 So.2d 574 (1941); City of Miami v. McCorkle, 145 Fla. 109, 199 So. 575 (1940); City of Tallahassee v. Kaufman, 87 Fla. 119, 100 So. 150 (1924); Maxwell v. City of Miami, 87 Fla. 107, 100 So. 147 (1924). However, these cases dealt chiefly with the operation of fire trucks upon the public streets and liability turned primarily on the municipality's failure to keep its streets in a reasonably safe condition thereby creating a nuisance, Maxwell, supra.

have refused to extend liability when the activity is an essential governmental function that is inherent to the very act of governing. This protection was initially embodied in the governmental-proprietary distinction of government's activities, City of Miami v. Oates, 152 Fla. 21, 10 So.2d 721 (1943). Subsequently, this protection was embodied by the general duty-special duty dichotomy emanating from Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967). Today, though it was the legislative intent in enacting Sec. 768.28, Fla. Stat., to waive sovereign immunity on a broad basis, certain discretionary governmental functions nevertheless remain immune from tort liability. Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979).

In Commercial Carrier, the Florida Supreme Court held that a government's immunity from tort liability is not predicated upon the premise that the sovereign can do no wrong. It is grounded instead upon a concept of separation of powers which will not permit the substitution of the judgement of a judge or jury for the judgement of governmental officials as to the wisdom of reasonableness of the performance of particular governmental functions. It bases:

> ... immunity on the policy of maintaining the administration of municipal affairs in the hands of state or municipal executive officers as against the incursion of courts and juries. 371 So.2d at 1018.... This is because certain functions of coordinate branches of government may not be subjected to scrutiny by judge or juty as to the wisdom of their performance. Id at 1022.

Simply put, this Court, in Commercial Carrier, recognized that to allow a judge or jury to revisit and scrutinize the wisdom of an official's discretionary decisions would substantially impair government's ability to govern. In order to identify those discretionary functions which should be immune from

tort liability, this Court adopted the analysis of Johnson v. State, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968), which distinguishes between the "planning" and "operational" levels of decision. In Johnson, the California Supreme Court opted for an analysis predicated on policy considerations and adopted a test articulated in Lipman v. Brisbane Elementary School District, 55 Cal.2d 224, 11 Cal.Rptr. 97, 99, 359 P.2d 465, 467 (1961):

> Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which government liability might impair the free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages.

447. P.2d at 357.

In Commercial Carrier, this Court also cited with approval the case of Wong v. City of Miami, 236 So.2d 132 (Fla. 1970), which specifically recognized that certain discretionary acts of governments were immune from liability. In Wong, several merchants' properties were damaged when a rally culminated in civil disorder and plundering. During the course of the rally, the City had increased police protection in the area. Subsequently, the City, through its mayor, ordered the increased police forces removed from the area on the grounds that the high visibility of the police forces was raising the tensions of the rally's participants and that withdrawal from the area might ease the volatile situation. When the rally subsequently got out of hand and the participants damaged the merchants' property, the merchants sued the City alleging it had negligently handled the rally. This Court, in holding that the City was not liable for the riot damage to the merchants' businesses, directed its attention to the decision to remove the police officers and

held that this decision was within the realm of governmental discretion. Thus, as early as 1970, the Florida Supreme Court recognized that a municipality could not be subjected to tort liability for its officer's discretionary decisions. Likewise, the Court tacitly recognized that actions implementating a discretionary decision also could not be subjected to review by a judge or jury.

A fire, not unlike a riot, is one of the most devastating and volatile foes of municipalities. At one time or another it has caused great devastation in urban areas in nearly every country in the civilized world. The burning of Rome in the year 64 A.D., the many fires in London, including the "Great Fire" in 1666, the numerous fires in the United States, such as the Boston fire in 1872, the St. Louis fire in 1851, the Chicago fire in 1871, and the San Francisco fire in 1906 are testiments to the fact that general fire protection has been, and always will be, a function of municipal government that is essential to the general health, safety, and welfare of the citizens of a locality. Furthermore, no two fires are alike. Factors such as the source of the fire, its size, its location, its ferocity, the damage it has wrought prior to the fire department's arrival on the scene, the temperature, the presence or absence of wind, and its direction all dictate the manner in which a fire is fought. Due to these numerous factors, man's lack of control over natural elements, and the speed in which the situation may change, a fire is a very volatile situation.

If Wong is to retain its vitality, it must be applied to a platoon commander's deployment of his firefighters at the scene of a fire as well as the implementation of that deployment. The circumstances surrounding a fire may change drastically on a moments notice, and the commander "ought to be left

to ... choose the tactics deemed appropriate without worry over possible allegations of negligence." Wong, 237 So.2d at 134. The platoon commander, contemplating the imminence of certain factors, may deploy his firefighters in a certain manner to attempt to battle the fire with the likely occurence of those factors in mind. If those particular factors fail to materialize, or if they materialize to a greater or lesser degree than the platoon commander contemplated, should a judge and jury, in the cool light of day, with the leverage of 20-20 hindsight, be able to second-guess the wisdom or reasonableness of the platoon commander's conduct at the scene of a very volatile situation. Amicus would adamantly suggest not.

One must understand that the fire department's principal purpose in combating a fire is not the preservation of any one particular piece of property in order to avoid tort liability. The primary purpose is to prevent the fire from spreading over a large area. A particular property may be saved while preserving the general community, but this cannot be the major concern of the city's firefighters. This is not to say that firefighters are oblivious to the potential for loss of life or property. This is to say, however, that the platoon commander, in deploying his firefighters may be faced with the decision of whether to direct his efforts, and the efforts of his firefighters, toward the salvation of one particular piece of property and, in doing so, to thereby risk forfeiting not only that particular piece of property, but also a substantially greater amount of property within the city. Alternatively, the platoon commander and his firefighters may have to abandon a particular piece of property as lost and direct their energies to saving the surrounding property by concentrating on containing the fire in the building that has been abandoned. Under these circumstances, a platoon commander may be likened to a military battlefield commander. Does the military commander direct his

troops to take the offensive in the hopes that a particular piece of ground will be gained and, in so doing, take the chance that his troops may be flanked and destroyed by the enemy? Or, does he direct his troops to abandon the ground, to retreat, and to entrench itself in a more defensible position in the hopes that he can contain the enemy's advance and thereby save a greater piece of ground? Surely, the government should not be subjected to tort liability for the potential damage that is inherent in either of these decisions.

In Wong, supra, the Florida Supreme Court, in holding the City was not liable for its employee's alleged negligence in handling a riot, reasoned:

> While sovereign immunity is a salient issue here, we ought not lose sight of the fact that inherent in the right to exercise police powers is the right to determine the strategy and tactics for the deployment of those powers .... The sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence.

237 So.2d at 134. And, the fact that the decisions may be made by a platoon commander at the scene of a fire does not in and of itself dictate that the decisions were operational in nature. In Ellmer v. City of St. Petersburg, 378 So.2d 825, 827 (Fla. 2nd DCA 1979), the 2nd DCA put it thusly:

> We reject the idea that any planning level function must occur at the scene and that any decision made on the scene must necessarily be operational. Sometimes, only persons in the field can make effective plans.

Likewise, in Department of Transportation v. Neilson, 419 So.2d 1071, 1077 (Fla. 1982), the Florida Supreme Court stated:

> With regard to the installation and placement of traffic control devices, we find the argument that such placement is exclusively the decision of traffic engineers, and as such, an operational-level function, to be without merit.

See also, Everton v. Willard, 426 So.2d 996 (Fla. 2nd DCA 1983).

An examination of the alleged negligent actions in the case sub judice conclusively demonstrates the reasons for excepting the municipality from tort liability. Respondent alleges the City's employees were negligent in that they failed to follow standard firefighting practices in fighting a fire. What are "standard fire fighting practices"? Firefighters combating a fire is not analogous to a certified public accountant's filling out a tax return with a Prentice Hall tax manual in hand. If a problem arises during the course of filling out the return, the accountant may put down his work, refer to the manual, deliberate over the problem in the cool light of day, and return to the work the following morning. Not so when combating a fire. Rather, the pressures of the moment dictate the fire department's actions are analogous to the police department's handling of a riot. Additionally, Respondent alleged the City's firefighters negligently combated the fire and thus caused the damage to Respondent's decedent's personal property in that the fire department's employees did not remove or allow the Respondent's decedent to remove items of personal property which could have safely been removed, that the firefighters completely terminated their firefighting efforts at one point to change shifts, and that the firefighters opened windows that in turn provided air to feed the fire and in turn acted to draw the fire into Respondent's decedent's office. Clearly, whether or not the scene of the fire was safe enough to allow Respondent's decedent to remove personal items from the office was a discretionary decision to be made by the fire department. Surely the term "safe" is such an abstract term that to second guess the fire department's judgement would be a substantial intrusion into the very propriety of the

city's objectives. Had the platoon commander allowed the Respondent's decedent to enter the office and Respondent's decedent was injured due to, for example, a gas explosion that turned the office into an instant inferno, would Respondent allege that <u>that</u> course of action was negligent? Or, suppose Respondent's decedent was successful in removing a portion of the personal property but the remaining property perished. Under those circumstances, could not Respondent allege that it was safe to enter the office at an earlier point in time and that the City's employees were negligent in not recognizing that to be the case? Similarly, the change in shift is a practice commonly used to provide fresh firefighters. What if the platoon leader had not ordered a change in shift, or had ordered the shift change one hour earlier or thirty minutes later than he did? Would not an allegation that had the platoon commander ordered a fresh shift of firefighters in, or had he ordered a shift in at an earlier or later time than he did, Respondent's decedent's property would not have been damaged? Likewise, the platoon commander could have ordered the windows open for a number of reasons: to provide ventilation for firefighters or to alleviate the heat in the building; to provide access for firefighters or equipment; or to facilitate search and rescue procedures. In other words, as articulated in <u>Wong</u>:

> Here the officials thought it best to withdraw their officers. Who can say whether or not the damages sustained by petitioners would have been more widespread if the officers had stayed, and because of a resulting confrontation, the situation had escalated with greater violence than could have been controlled with the resources immediately at hand? If that had been the case, couldn't petitioners allege just as well that <u>that</u> course of action was negligent?

237 So.2d at 134 (emphasis in original). Frankly, given the volatileness of a fire, could not any course of action taken by the fire department subject

the municipality to potential tort liability?

Sec. 768.28, Fla. Stat., provides that government is liable for its employee's negligent actions under circumstances in which the government, "if a private person, would be liable to the claimant in accordance with the general laws of this state ..." Sec. 768.28(1), Fla. Stat. Thus, government is liable for tort claims "in the same manner and to the same degree as a private individual in like circumstances..." Sec. 768.28, Fla. Stat. In Commercial Carrier, supra, respondents asserted that this language exempted all governmental functions from the waiver because the alleged tortious conduct (ie. the negligent maintenance of a traffic light or a traffic sign, or the improper maintenance of the letters "stop" on the pavement of the highway) were functions that private persons do not perform. In rejecting this argument, the Florida Supreme Court, citing Indian Towing Company v. United States, 350 U.S. 61, 100 L.Ed. 48, 76 S.Ct. 122 (1955) (construing the Federal Tort Claims Act's counterpart), observed that the statute imposed liability "under like circumstances" rather than "under the same circumstances". 371 So.2d at 1017.

Amicus would respectfully submit that, with respect to the functions herein complained of, there are no "like circumstances" in which a private person would be liable to the claimant. In Commercial Carrier, the maintenance functions that gave rise to tort liability closely paralleled the maintenance functions that have always subjected private individuals to tort liability. The facilities were in the exclusive control of the county and the county's negligent actions were no different than a private person's negligent maintenance of property within his exclusive control. The functions

complained of in the case sub judice have no corresponding equivalent in the private sector. Delehite v. United States, 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953), involved in part the alleged negligent failure to properly fight a fire. The U.S. Supreme Court, in holding the Federal Tort Claims Act did not subject the government to tort liability for its employees' actions in combating a fire, stated:

> As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.
>
> "... the liability assumed by the Government here is that created by 'all the circumstances', not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." Feres v. United States, 340 US 135, 142, 95 L Ed 152, 158, 71 S Ct 153.
>
> It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the Feres case. See 28 USC §§ 1346 and 2674. The Act, as was there stated, limited United States liability to "the same manner and to the same extent as a private individual under like circumstances." 28 USC § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then is much stronger than Feres. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining firefighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See Steitz v. Beacon, 296 NY 51, 64 NE2d 704, 163 ALR 342. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease. 346 U.S. at 43-44, 97 L.Ed. at 1444.

In Commercial Carrier, this Court explained that the phrase "like circumstances" included maintenance functions. However, this Court has the responsibility to determine what functions of government are not within the meaning

of the phrase. Municipalities perform certain functions of government that are clearly essential to the basic act of governing. These functions are clearly directed at preserving the general health, safety, and welfare of the public and are clearly functions that private individuals would not perform under any circumstances. Amicus submits that this phrase serves to protect government from tort liability when performing essential governmental functions. Amicus further submits that firefighting is one of the essential governmental functions that are protected by the phrase. Absolutely essential to a good, adequate, and reasonable system of government as we now know it is the ability to perform functions that are uniquely governmental in nature without the threat of tort liability for the performance thereof. The unique characteristic of these functions, as heretofore more thoroughly addressed, is that no matter how they are performed, there will always be room for the allegation that it was negligently performed. No matter how the function is performed, there will always be the opportunity to encroach on the public treasury and the opportunity to disrupt the orderly administration of government because the municipality can be sued at the instance of every citizen that comes into contact with the function the government performed. So it is in the case of fighting a fire.

In sum, the Courts have heretofore always protected a municipality from tort liability predicated upon its employee's alleged negligence in combating a fire. Under Oates, supra, fighting a fire was considered a governmental function and thus the municipality was immune from suit because of the sovereign character of the municipality. Under Modlin, supra, the municipality would have been immune from tort liability because its firefighters, in battling the fire, owed only a duty of care to the public generally. Today, amicus submits, the municipality is protected from tort liability because discretion,

as that term is contemplated in Wong, and as that term is recognized in Commercial Carrier, is inherent to the function of fighting fires. To hold otherwise would effectively take the administration of municipal affairs out of the municipal executive officials and place it in the hands of judge and jury. This, in turn, would amount to such a substantial intrusion by the judiciary into the affairs of the executive and legislative branches of government that it would significantly impair the ability of government to govern:

> Liability cannot be imposed when condemnation of the acts or omissions relied upon necessarily brings into question the propriety of governmental objectives or programs or the decision of one who, with the authority to do so, determined that the acts or omissions involved should occur or that the risk which eventuated should be encountered for the advancement of governmental objectives. Evangelical United Brethran Church v. State, 407 P.2d 440, 444 (1965), citing Peck, the Federal Tort Claims Act, 31 Wash.L.Rev. 207 (1956).

Commercial Carrier, 371 So.2d at 1019 (emphasis in original).

CONCLUSION

Based on the foregoing policy and legal considerations enumerated herein, the Florida League of Cities, Inc., as amicus, in support of the position of the City of Daytona Beach, respectfully submits that the certified question must be answered in the negative.

Respectfully submitted,

James R. Wolf
League Counsel
Florida League of Cities, Inc.
201 West Park Avenue
Post Office Box 1757
Tallahassee, Florida 32302
904/222-9684

Harry Morrison, Jr.
Assistant League Counsel
Florida League of Cities, Inc.
201 West Park Avenue
Post Office Box 1757
Tallahassee, Florida 32302
904/222-9684

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail this 14th day of February, 1984, to Alfred A. Green, Jr., Esquire, Post Office Box 5566, Daytona Beach, Florida 32018, attorney for Petitioner, and Fred S. Disselkoen, Jr., Esquire, Post Office Box 2633, Ormond Beach, Florida 32075-2633, attorney for Respondent.

Harry Morrison, Jr.