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IN THE SUPREME COURT OF FLORIDA

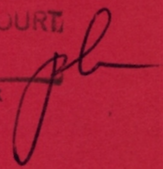
PHILLIP S. GERARD, et al., *

Petitioners, *

vs. * CASE NO. 65,855

DEPARTMENT OF TRANSPORTATION, *

Respondent. *



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RESPONDENT'S ANSWER BRIEF ON THE MERITS
DEPARTMENT OF TRANSPORTATION

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TABLE OF CONTENTS

PAGE

CITATION OF AUTHORITIES . . . . *ii - iii*

PRELIMINARY STATEMENT . . . . *iv*

STATEMENT OF CASE AND FACTS . . . . 1 - 2

ARGUMENT

POINT I . . . . 3 - 11

POINT II . . . . 12 - 14

POINT III . . . . 15 - 17

CONCLUSION 18

CERTIFICATE OF SERVICE 19

APPENDIX 20

INDEX TO APPENDIX . . . . *A - i*

CITATION OF AUTHORITIES

CASE | PAGE

Berek v. Metropolitan Dade Co.
396 So.2d 756 (Fla. 3rd DCA 1981) 10

Berek v. Metropolitan Dade Co.
422 So.2d 838 (Fla. 1982) 3, 4, 10

Burkett, et al. v. Calhoun County
441 So.2d 1108 (Fla. 1st DCA 1983) 16

Cauley v. City of Jacksonville
403 So.2d 379 (Fla. 1981) 11

City of Lake Worth v. Nicolas
434 So.2d 315 (Fla. 1983) 4

Commercial Carrier Corp. v.
Indian River Co.
371 So.2d 1010 (Fla. 1979) 16

Jetton v. Jacksonville
Electric Authority
399 So.2d 396 (Fla. 1st DCA 1981) 11, 15

Levine v. Dade County
School Board
442 So.2d 210 (Fla. 1983) 16

Schmauss v. Snoll
245 So.2d 112 (Fla. 3rd Dca 1971),
cert. denied 248 So.2d 172 16

State ex rel Division of
Administration, etc. v. Oliff
350 So.2d 484 (Fla. 1st DCA 1977) 16

Wilson, et al. v. Duval County
School Board, et al.
436 So.2d 261 (Fla. 1st DCA 1983) 9

OTHER AUTHORITIES

FLORIDA CONSTITUTION

Article 10, Section 13 5

FLORIDA STATUTES

Section 768.25 . . . . 7, 8

Section 768.28 . . 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16

LAWS OF FLORIDA

Chapter 77-86 . . . . 5, 13

Chapter 79-253 8

Chapter 81-317 . . . . 4, 7

30 Fla.Jur., Statutes,
Sections 79 and 80 11

1975 Op. Att'y Gen. Fla.
075-69 (Mar. 11, 1975) 13

1976 Op. Att'y Gen. Fla.
076-41 (Feb. 23, 1976) 5

Budetti, J. and Knight, G.,
The Latest Event in the Confused
History of Municipal Tort Liability,
6 Fla. State University L.Rev. 927 7

PRELIMINARY STATEMENT

For the purposes of this brief, the following symbols shall be utilized:

"R" refers to the Record on Appeal submitted in this cause.

"A" refers to the Appendix accompanying this brief.

STATEMENT OF CASE AND FACTS

The Department accepts the Statement of Facts provided by the Petitioner with the addition of the following supplemental factual statement.

The Petitioner has mentioned the fact that he has settled with the City of Lake Wales for the sum of $530,000. In addition, there were several other Defendants involved in this cause with which the Petitioner has also settled claims arising out of this incident: Hunt Brothers (owners of the citrus grove adjacent to the tree that fell) have paid $15,000; Cora Hargroves and Hargroves' insurer (who trimmed the trees under yearly contracts with Florida Power Corporation for approximately 30 years and which volunterred to remove the trees post-accident for the City of Lake Wales) paid $15,000; Florida Power Corporation (which cut or had cut all the trees to accommodate their power lines) paid $30,000.

The Petitioner notes that the silk oak trees were located on right-of-way within the City of Lake Wales. What was not mentioned is that during the trial against the City, the Petitioner argued that while the Department of Transportation maintained the actual roadway curb to curb, that portion of the right-of-way within which the trees were located was owned and maintained by the City of Lake Wales; that the City and not the Department had maintenance responsibility for the right-of-way where the trees were located, and that the area where the trees

were located was not Department of Transportation right-of-way. (A: 1-20)[1]

The trial court originally denied the Motion for Summary Judgment but reversed that decision at a subsequent pre-trial conference. (R: 93-98) (A: 21-26) The Petitioner has mentioned that he received no notice that the issue would be reconsidered. (Petitioner's Brief, p. 4) The Petitioner raised no objection at the hearing to the reconsideration of the issue, and has not addressed the procedural issue in his brief.

On October 14, 1983, the Petitioner filed a Notice of Appeal to the First District Court of Appeal of the Order granting Final Summary Judgment. On August 15, 1984, the First District Court of Appeal rendered a written opinion affirming the Order of the trial court. In the text of this opinion, the court certified the following question to be one of great public importance.

> WHETHER SATISFACTION OF A CLAIM BY PAYMENT OF THE STATUTORY AMOUNT SPECIFIED IN SUBSECTION 768.28(5), FLORIDA STATUTES, PRECLUDES A FURTHER CLAIM, OTHERWISE AUTHORIZED, IN EXCESS OF THE SPECIFIED STATUTORY AMOUNT.

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[1]The three volumes of transcript from the earlier trial against the City of Lake Wales were filed in the record below. They were not designated as part of the record on appeal in this cause due to the size (476 pages) and the minimal impact the trial transcript will have on resolution of the issue presented in this appeal.

ARGUMENT

POINT I

The Department agrees with the legal premises cited by the Petitioner on page 7 of his brief. However, since this case deals with the interpretation of a statutory provision waiving sovereign immunity, several other paramount rules of statutory construction should be set forth. Foremost among those rules is that a waiver of sovereign immunity must be strictly construed. Berek v. Metropolitan Dade Co., 422 So.2d 838, 840 (Fla. 1982).

The particular statutory section around which the dispute revolves is Section 768.28(5) (1980). This section provides:

> 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 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 judgment, or portions thereof, which when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $100,000. 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. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions

possessed sovereign immunity prior to July 1, 1974.[2] (Emphasis supplied)

It was the Department's position that the emphasized language precluded further recovery against a governmental defendant because the Petitioner had already recovered $530,000 from a subdivision of the state for the same incident or occurrence. The trial court and the First District Court of Appeal agreed. (R: 96) (A: 23) In spite of the clear and unambiguous language of the section, the Petitioner maintains that the legislative intent was not carried out by the trial court's order or the decision of the District Court.

Before discussing the intent issue, it should be noted that the provision in question has received strict and narrow construction in the past. Berek v. Metropolitan Dade Co., 422 So.2d 838 (Fla. 1982); City of Lake Worth v. Nicolas, 434 So.2d 315 (Fla. 1983). That approach should be applied in this instance also.

Regarding the issue of legislative intent, we begin with the fact that the waiver accomplished by Section 768.28, Florida Statutes (1973), is expressly limited "to the extent specified in this act." Thus, at the very beginning of the waiver provision we find a legislative intent to limit the waiver. Next, it has been uniformly held that the waiver of

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[2]The per person and per incident levels were increased to $100,000 and $200,000 respectively by Chapter 81-317, Laws of Florida. They are not applicale to this case since the cause of action accrued in 1980.

immunity enacted by the Legislature applies equally to the state, counties, and municipalities. The Legislature could obviously not have accomplished that task pursuant to Article 10, Section 13, Florida Constitution, unless the term "state" included all agencies or subdivisions of the state. The Legislature obviously assumed that fact when they wrote Section 768.28(1), waiving immunity "In accordance with s. 13, Art. X, State Constitution . . ."

Thus, contrary to the Petitioner's position, the term "state" as used by the Legislature, was not limited, but rather all inclusive. The legislative amendment that took place in Chapter 77-86, Laws of Florida, serves to demonstrate this fact. In response to an Attorney General Opinion finding that the legislative waiver contained in Section 768.28, "does not operate to limit in any substantive way the tort liability of municipalities . . .," 1976 Op. Att'y Gen. Fla. 076-41 (Feb. 23, 1976), the Legislature enacted Chapter 77-86, Laws of Florida. In the preamble it was noted that past case precedent had held "that the Legislature could restrict the amount of recovery for the torts of a municipality without unconstitutionally restricting the right of an individual to receive compensation for injuries, . . ." It also stated that the Attorney General Opinion had failed to recognize the "limitation of liability set forth in subsection (5) of Section 768.28 . . ." and that the opinion issued by the Attorney General had caused "uncertainty" among various local governments throughout the state. With this

in mind, the Legislature set about the task of "clarification of the present statute" (A: 28) In other words, they were going to clarify, with amendatory language, what they had intended all along when they first enacted Section 768.28(5).

Section 768.28(5) was amended as follows, the new language being emphasized:

> 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 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 judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state *or its agencies or subdivisions* arising out of the same incident or occurrence, exceeds the sum of $100,000. 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. *The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974.*

The placement of the amendatory language after the word *state*, contrary to Petitioner's contention, did nothing but clarify what the Legislature had intended all along: the term "state" was all inclusive. That intent was threatened by the opinion issued by the Attorney General and the Legislature

reacted to remedy the problem by making it quite clear that when they originally used the term state, it also included agencies and subdivisions. In fact, one article has referred to the amendment as nothing more than a correction of "an apparent drafting error in subsection 5." Budetti, J. and Knight, G., The Latest Event in the Confused History of Municipal Tort Liability, 6 Fla. State University L.Rev. 927, at 938.

Since the initial enactment of Section 768.25(5), the Legislature has intended all along to limit the liability of multiple "state" defendants involved in the same incident to the $100,000 maximum. It was never their intent to provide a $100,000 limit against each individual state agency or subdivision for a single incident or occurrence in which multiple state agencies or subdivisions are joined as party defendants. Rather, the clear and unambiguous intent of the language is to limit the maximum recovery for a claim against multiple state defendants, arising out of the same incident or occurrence, to $100,000.[3] The Department adopts the reasoning of the opinion of the First District Court of Appeal in this regard:

> . . . [W]e do not discern any legislative intention to sanction disparate recoveries dependent upon the number of tortious governmental entities involved. Section 768.28(5) expressly provides that the specified governmental entities shall not be liable for any claim or judgment, arising out of a single

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[3]Chapter 81-317, Laws of Florida, increased the amount recoverable to $100,000 per person and $200,000 incident.

> incident, which exceeds $100,000 "when totalled with all other claims [or judgments] . . ." This language imposes a cumulative per-incident limitation on aggregate recovery regardless of whether the source of payment is a single governmental entity or multiple governmental entities.

The Petitioner's position also disregards the impact of the language found in Section 768.28(5), where it provides:

> 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 and $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 language cited above clearly assumes that one or more judgments may be entered against one or more governmental entities for a single occurrence or incident. However, the maximum amount that may be paid or settled pursuant to the act is still limited to $100,000. Only by further act of the Legislature will a recovery of more than that amount be allowed.

The intent to limit recovery where multiple government defendants are involved in a single occurrence was reaffirmed with the enactment of Chapter 79-253, Laws of Florida, when the Legislature amended Section 768.28(13) as follows:

> The state and its agencies and subdivisions are hereby authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section. Agencies

<u>or subdivisions, and sheriffs for the purpose of police professional liability only, which are subject to homogeneous risks may purchase insurance jonintly, or may join together as self-insurers to provide other means of protection against tort claims, any charter provisions or laws to the contrary notwithstanding. Sheriffs may join together as self-insurers to provide coverage for police professional liability claims only.</u>

The new language provides that agencies and subdivisions may purchase insurance <u>jointly</u> or <u>join together</u> as self-insurers to cover risks that are common to those agencies or subdivisions. The purpose of the legislation was to provide yet another ". . . means of protection against tort claims . . ." By allowing joint purchase of insurance or joint participation in a self-insurance program, the Legislature reemphasized their intent that agencies or subdivisions, joined as defendants for a claim arising out of a single incident or occurrence, are <u>jointly</u> liable rather than individually liable, for the maximum amount, i.e., $100,000.

The Legislature's intent to impose a collective liability on multiple govermental defendants involved in the same incident is also analogous to the limitation of liability imposed in Section 768.28(9)(a), Florida Statutes.

Pursuant to that provision, a public employee acting within the scope of his employment may not be held personally liable or made a party defendant to the action. In <u>Wilson, et al. v. Duval County School Board, et al.</u>, 436 So.2d 261 (Fla. 1st DCA 1983), the court upheld the validity of the provision

and found that "the substantive liability of the school board and its employees is mutually exclusive." Id. at 263. The Legislature, when enacting Section 768.28(5), had that same intent: the recovery of the statutory per incident maximum ($100,000) against one of several governmental defendants joined in a suit arising out of a single occurrence would exclude any further recovery, in the judicial forum, against the other governmental defendants.

The interpretation given to Section 768.28(5), by the trial court does not lead to an absurd result as contended by the Petitioner. Rather, it carries forth the policy of "protecting the public against profligate encroachment on taxpayer's money . . ." Berek v. Metropolitan Dade Co., 396 So.2d 756, 758 (Fla. 3rd DCA 1981), decision approved 422 So.2d 838 (Fla. 1982).

The lower court's interpretation will not foster delay tactics and preclude early settlement of claims. To the contrary, it promotes early negotiations between the various governmental co-defendants and will allow them each to contribute an amount to the "pot," in accordance with their degree of negligence, in order to reach the "per incident" amount.

The interpretation is also consistent with the standard of legislative interpretation that a waiver of sovereign immunity must be strictly construed. Berek v. Metropolitan Dade Co., 422 So.2d 838, 840 (Fla. 1982).

Further, the interpretation continues to allow the parties to utilize the provisions of Section 768.28(5), Florida Statutes, and file a claims bill with the Legislature to recover any amount over and about the statutory limits imposed. This properly allows the Legislature to decide if additional sums should be paid from the public treasury. Jetton v. Jacksonville Electric Authority, 399 So.2d 396, 397 (Fla. 1st DCA 1981); Cauley v. City of Jacksonville, 403 So.2d 379, at 381, f.n. 5; 387 (Fla. 1981).

Finally, the interpretation is consistent with the clear and unambiguous language of the provision. The Legislature is presumed to know the meaning and effect of the words used in a statute, and where the language is plain and unambiguous the Legislature should be held to have intended what it has plainly expressed. 30 Fla.Jur., Statutes, Sections 79 and 80.

The trial court and First District Court of Appeal properly determined the legislative intent of Section 768.28(5) from the plain and unambiguous language of that provision and the finding should not be disturbed.

POINT II

Admittedly the undersigned is having difficulty in determining what rationale the Petitioner is relying upon to arrive at the conclusion that the payment of $530,000 by the insurer of the City of Lake Wales is not to be considered when determining if the $100,000 cap of Section 768.28(5) has been reached.

If by his argument the Petitioner is maintaining that the municipality was not authorized to purchase liability insurance and thus the $530,000 paid by the City's insurer cannot be considered when determining if the $100,000 cap has been reached, the argument is unfounded. If the Petitioner contends that the Legislature never intended that insurance purchased by a state subdivision would apply to the $100,000 cap found in Section 768.28(5), that argument is likewise unfounded.

Section 768.28(13), Florida Statutes (1979), specifically provides:

> The state and its agencies and subdivisions are authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section. Agencies or subdivisions, and sheriffs for the purpose of police professional liability only, which are subject to homogeneous risks may purchase insurance jointly or may join together as self-insurers to provide other means of protection against tort claims, any charter provisions of laws to the contrary notwithstanding. Sheriffs may join together as self-insurers to provide coverage for police professional liability claims only.

A municipality, as a subdivision of the state, per Section 768.28(2), is clearly authorized to purchase liability insurance.

Further, Section 768.28(13), makes it quite clear that the insurance purchased is to be used to pay "any claim, judgment, and claims bill which they may be liable to pay pursuant to this section." See: 1975 Op. Att'y Gen. Fla., 075-69 (March 11, 1975). Thus, a payment by an insurer for a claim of tort liability brought pursuant to Section 768.28, would indeed apply toward the $100,000 limit of liability found in Section 768.28(5). If it did not, the City of Lake Wales would still be liable to the Petitioner even though the City's insurer has already contributed $530,000 toward the claim. This result would be absurd.

The Petitioner's position also suggests that a payment by the insurer does not constitute a payment from the public treasury and therefore should not be considered when determining if the $100,000 cap has been reached. This argument, besides being contrary to the intent of Section 768.28(13), discussed above, also ignores the fact that the premiums for the insurance are paid from the public treasury! It was the fear of exorbitant insurance rates, which would have to be paid by local taxpayers, that prompted the amendments discussed earlier in this brief. (See: preamble to Chapter 77-86, Laws of Florida.) (A: 27-28)

To adopt the Petitioner's position would guarantee exorbitant rates. Counties and municipalities which assumed, according to the plain language of the state, that they would not be liable for payments in addition to those already made by governmental co-defendants in the same suit and which satisfied the monetary cap, would now be subject to monetary liability regardless of what had been previously paid by governmental co-defendants. This is a position analogous to that in which municipalities were placed by the Attorney General Opinion previously discussed. The insurance industry would respond with higher rates to cover the "new" liability exposure.

POINT III

The argument presented by the Petitioner in this section overlooks several crucial facts.

First, as recognized by the trial court, while Section 768.28(5), provides that judgments in excess of the statutory limit "may be reported to the Legislature," it does not provide that this is the only means by which a party may come to the Legislature to seek additional compensation over and above that already received by the party.

This court in Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981), stated that while the Legislature had placed a limit on recovery, "claimants remain free to seek legislative relief bills, as they did during the days of complete sovereign immunity." Id. at 397. Obviously, during the time of complete immunity there would have been no judgment against the state. The party merely followed the legislative procedural guidelines for filing a claims bill. That procedure is still available even without a judgment. The Legislature would still conduct an in-depth investigation of the incident, regardless of the presence of a judgment, to determine if further funds should be paid from the public treasury.

Second, the Petitioner already has available for legislative consideration the proceedings conducted against the City of Hallandale. Both the trial transcript and the settlement agreement from those proceedings could be considered by the Legislature in determining whether or not the Petitioner

is entitled to more than the $530,000 already received. There was absolutely no necessity for an entire retrial of the issues before the trial court in Leon County. The Petitioner has everything he needs to proceed with the filing of a claims bill for additional relief.

Finally, the Petitioner overlooks the fact that the limitation of liability to a maximum amount is an integral part of the legislative scheme of waiving sovereign immunity. Issues dealing with whether or not a party has met the legislative criteria for suing the state under a statutory waiver relates to the subject matter jurisdiction of the trial court. Schmauss v. Snoll, 245 So.2d 112 (Fla. 3rd DCA 1971), cert. denied 248 So.2d 172; State ex rel Division of Administration, etc. v. Oliff, 350 So.2d 484, 486 (Fla. 1st DCA 1977).

The failure of a party to allege the basis by which immunity has been waived, in accordance with the statutory waiver, requires dismissal of the complaint. State ex rel Division of Administration, etc. v. Oliff, supra at 486; Commercial Carrier Corp. v. Indian River Co., 371 So.2d 1010, 1022 (Fla. 1979); Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983); Burkett, et al. v. Calhoun County, 441 So.2d 1108 (Fla. 1st DCA 1983).

Section 768.28(5), Florida Statutes, specifically limits the state's liability, and thus limits the waiver of immunity to $100,000 for "claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident

or occurrence . . ." The facts are undisputed that the $100,000 cap has been exceeded in this cause by $430,000. Therefore, no additional waiver of immunity was available. The trial court lacked subject matter jurisdiction to proceed with a trial where no further monetary liability could be imposed in that judicial proceeding. Only the Legislature could waive the immunity further.

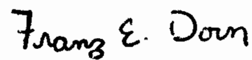
The trial court properly declined to proceed with another trial in this cause and the District Court of Appeal properly affirmed this point.

CONCLUSION

The order granting summary judgment should be affirmed.

Respectfully submitted,

ALAN E. DeSERIO



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 25th day of October, 1984, to JOSEPH P. MAWHINNEY, ESQUIRE and R. KENT LILLY, ESQUIRE, Frost, Purcell & Lilly, P.A., Post Office Box 2188, Bartow, Florida 33830.

ALAN E. DeSERIO