SUPREME COURT OF FLORIDA

PHILLIP S. GERARD, et al.)

Petitioner/Plaintiff,)

vs.) CASE NO: 65,855
DCA DOCKET NO. AV-327

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, et al.,)

Respondent/Defendant.)

BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

In its opinion of August 15, 1984, (A 45-53), the First District Court of Appeal affirmed the trial court's granting of summary judgment for Department of Transportion and certified the following question as being of great public importance:

> Whether satisfaction of a claim by payment of the statutory amount specified in §768.28(5), Florida Statutes, precludes a further claim, otherwise authorized, in excess of the specified statutory amount?

In reaching this conclusion, the Court addressed and dismissed Plaintiffs' three points on appeal, each of which went to the interpretation of §768.28(5) and its application to the facts of the present case. Because each of these points served as a basis for the District Court's decision and falls within the subject of the certified question, Plaintiff will present argument on each of these points for the Court's consideration.

In this Brief, Petitioner/Plaintiff, PHILLIP S. GERARD, et al., shall refer to Respondent/Defendant, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION as "DOT" and shall refer to himself as "GERARD" or "Plaintiff".

In compiling the Appendix filed herewith, Plaintiff has included only those portions of the record which he deems absolutely necessary to understand the certified question and has excluded those portions which, while supportive of the Statement of the Case and the Facts, are not believed to be of any substantive value in the consideration of the question.

THE STATEMENT OF THE CASE AND THE FACTS

The factual circumstances from which this case arises are as follows:

On April 28, 1980, PHILLIP S. GERARD ("GERARD") was operating his motor vehicle, a pick-up truck, on Alternate Highway 27 (South Scenic Highway) within the city limits of Lake Wales, Polk County, Florida. Accompanying GERARD at the time was his wife, KAREN B. GERARD, age 27, and their two minor children, ELIZABETH ANN GERARD, age 4, and CHRISTOPHER STEPHEN GERARD, age 19 months. At that time, several Silk Oak trees were located and growing on the unpaved right of way immediately bordering and adjoining that portion of Alternate Highway 27. One such tree was extensively decayed and weakened, and a limb of substantial length and weight separated from its trunk and fell upon the cab and hood of GERARD'S truck, crushing and killing his wife and their two minor children and causing injury to GERARD.

Suit was subsequently filed in Polk County Circuit Court by GERARD, individually, as personal representative of the estates of his wife and their two minor children and as surviving parent of the children, against the City of Lake Wales and its insurer, Hartford Accident and Indemnity Co.

Subsequent amendments to the Complaint joined other party Defendants, including the STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION ("DOT").

DOT moved for dismissal of the amended Complaint on the basis of the then-existing venue privilege to be sued in Leon County. The cause of action against DOT was thereby transferred to the Circuit Court of the Second Judicial Circuit, in and for Leon County, while the causes of action against the City of Lake Wales and other defendants remained in Polk County. GERARD subsequently moved to have the cause against DOT returned to Polk County on the basis of developing case authority and in an effort to avoid the necessity of two trials. That motion was opposed by DOT and denied.

On May 9, 1983, Honorable John A. Rudd, Circuit Judge of the Second Judicial Circuit, entered his Order for Pretrial Conference and Trial, setting trial of the Leon County action for the week of September 19-23, 1983. On July 13, 1983, DOT filed its Motion for Summary Judgment on several bases. (A 1-3).

The primary thrust of DOT's Motion for Summary Judgment, as argued at the August 10, 1983 hearing thereon and as pertinent to the issue of this appeal, was that GERARD, having already settled his claim against the City of Lake Wales by acceptance of $530,000 from the City's insurer, Hartford, was prohibited by Section 768.28(5) from obtaining a judgment for any additional damages from DOT. (See Paragraph III B, Motion for Summary Judgment, A 2, and transcript of hearing, A 13-16 and 18). Argument was restricted to that issue of law, assuming

arguendo Plaintiff's ability to carry its burden with regard to DOT's negligence, on the basis of, inter alia, testimony that DOT had received, pursuant to its own request, actual notice from its independent contractor tree surgeon prior to the subject accident that the subject tree was core-rotted and needed to be removed. (A 11-12 and 58).

The trial court, observing that "the purpose of the sovereign immunity statute is to limit the exposure of governmental agencies by putting the cap on the amount of recovery that can be had, to preserve the financial integrity of the political subdivision" and further observing that by Hartford's payment on its behalf, the City of Lake Wales was "out nothing" (A 28-29) denied DOT's Motion and entered its Order to that effect. (A 37).

At a subsequent pre-trial conference approximately a month later, the trial court announced that it was receding from its original Order. The trial court granted DOT's previously denied Motion for Summary Judgment on the basis that the per incident monetary cap of $100,000 applied collectively to the sum of any and all payments by the State and its political subdivisions and that payment on behalf of any governmental entity by its insurer was to be applied towards satisfaction of the statutory cap. Thus, the trial court concluded that GERARD, having collected in excess of $100,000 from the City of Lake Wales' insurer, was prohibited from proceeding to trial against DOT. (A 40-41).

Final Summary Judgment, on the basis of Paragraph III B of DOT's Motion, was entered on September 19, 1983. (A 44).

From that ruling, Plaintiff appealed to the First District Court of Appeal. On August 15, 1984, the District Court rendered its opinion (A 45-53) in which, by a split decision, it affirmed the trial court's ruling and certified the previously referenced question as being of great public importance.

POINT I

SUBSECTION 768.28(5), FLORIDA STATUTES (1979), SHOULD NOT BE INTERPRETED AS PROVIDING THAT, WHERE THE STATE AND/OR ANY OF ITS AGENCIES OR SUBDIVISIONS ARE JOINT TORTFEASORS, THE $100,000 PER INCIDENT LIMITATION OF LIABILITY REPRESENTS THE COLLECTIVE LIABILITY OF THOSE GOVERNMENTAL ENTITIES; RATHER, THE STATUTE WAS INTENDED TO PROVIDE A SEPARATE LIMITATION OF LIABILITY FOR EACH SUCH GOVERNMENTAL ENTITY.

Subsection 768.28(5), Florida Statutes (1979), reads 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 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.

Basic rules of statutory construction apply. As recognized by this Court in State v. Webb, 398 So.2d 820 (Fla. 1981):

> It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute. Furthermore, construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided.
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> * * *
>
> In determining legislative intent, we must give due weigh and effect to the title. . . . The title is more than an index to what the section is about or has reference to; it is a direct statement by the Legislature of its intent. at 824-825.

Similarly, this Court observed in Wakulla County v. Davis, 395 So.2d 540 (Fla. 1981):

> . . . the rule of statutory construction. . . provides that when the meaning of a statute is at all doubtful, the law favors a rational, sensible construction. Courts are to avoid an interpretation of a statute which would produce unreasonable consequences. (citations omitted). at 543.

Also, in State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977), the Court stated:

> . . . it is a cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent, and effect must be given to every part of the section and every part of the statute as a whole. at 153.

The interpretation of Section 768.28(5), Florida Statutes (1979), as applied to the case and facts sub judice, appears to present a case of first impression. While the First District has examined the statute as it applies to multiple claims against one governmental entity, State Board of Regents v. Yant, 360 So.2d 99 (Fla. 1st DCA 1978) and H.R.S. v. McDougall, 359 So.2d 528 (Fla. 1st DCA 1978), Plaintiff is unaware of any reported judicial interpretation of this statute's limits of liability as applied to multiple governmental entities as co-defendants. Therefore, the statute must be examined in light of the above rules of construction.

Looking first to the "polestar", the first sentence of the subsection gives strong, if not obvious, indication of the legislative intent, as it states, in pertinent part:

> (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 circumstances . . .

Plaintiff is unaware of any circumstances under which private individuals, as joint tort-feasors, are able to collectively pool and limit the extent of their exposure to liability. The obvious analogy, using the monetary limits provided in the statute, is to compare the case sub judice to two individuals, both with liability insurance coverage in the amount of $50,000 per person/$100,000 per incident. The limits of one individual's exposure for liability to the injured party is unaltered by the

presence of the other party or the extent of that party's exposure to liability.

The legislative history of Section 768.28(5) gives further credence to the above analogy to insurance coverage. As adopted by the Legislature in 1973, in Chapter Law 73-313, Section 1, the second sentence of the subsection read as follows:

> . . . 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 portion 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.

Had the wording of the statute remained as above at the time of the subject accident, there would be no doubt that the state, alone, was under the $100,000 per incident limitation. However, in 1977, by Chapter Law 77-86, the Legislature amended that sentence to read as follows:

> . . . 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 <u>or its agencies or subdivisions</u> arising out of the same incident or occurrence, exceeds the sum of $100,000. . . (emphasis added).

While this addition created the present confusion, an examination of the title and preamble to Chapter Law 77-86 further supports the insurance analogy. The title provided, in part, that the act was ". . . to clarify that agencies and

subdivisions are included in the $100,000 per occurrence limitation of liability . . ." and the preamble, citing problems created by Attorney General Opinion Number 076-41, stated, in pertinent part:

> . . . the Legislature finds that local governments throughout the state, because of the uncertainty caused by the Attorney General's opinion, are experiencing difficulty obtaining liability insurance, and, if the insurance is available, the rates are exorbitant and often beyond the ability of the local taxpayers to afford . . .

A reading of the referenced Attorney General's Opinion reveals that the problem lay in that Office's conclusion that municipalities possessed no sovereign immunity for tort liability prior to the adoption of Section 768.28 in 1973 and, thus, municipalities enjoyed no protection by virtue of the proported statutory waiver and its monetary limitations. From this, it is clear that, by adopting Chapter Law 77-86, the Legislature was merely attempting to afford municipalities the protection of the $50,000/$100,000 limitations of liability for purposes of securing insurance coverage with those policy limits and protections. There is nothing to suggest that the Legislature was attempting, or even contemplating, the possibility of giving the state, its agencies and subdivisions the collective protection of a $100,000 cap to exposure in any one incident or occurrence in which two or more such governmental entities are involved.

As stated previously, a secondary goal in statutory interpretation is to reach a rational and sensible construction

and to avoid an absurd or unreasonable result. The trial court's interpretation does not achieve that goal for, in application, it encourages governmental entities, when co-defendants in tort litigation, to delay settlement efforts in hopes that the other entity will make the first move and thus create either partial or complete protection from direct liability. Such a situation is neither reasonable, rational, nor sensible, for it interjects an element of strategy and/or fortuity that has no place in tort litigation. It becomes not unlike a child's game, where the player who holds out the longest has the chance of being able to jump in the square and claim the privilege of "King's X".

The purpose of the partial waiver of sovereign immunity is to afford redress to an injured party while, as the trial court initially recognized, protecting the public coffers. Berek v. Metropolitan Dade County, 396 So.2d 756 (Fla. 3rd DCA, 1981). That purpose is no less served by interpreting Section 768.28(5) as requiring each governmental entity to be responsible to the full limits of the $50,000/$100,000 statutory provision. It is unreasonable and, in fact, absurd to allow the State, its agencies, or its subdivisions to have the monetary limitations of its liability for tortuous acts further diminished by the fortuity of a counterpart's involvement, and is in direct conflict with this Court's decision in Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981), at 387, that "sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner."

POINT II

MONIES PAID ON BEHALF OF A GOVERNMENTAL ENTITY BY ITS INSURER SHOULD NOT BE APPLIED TO THE $100,000 PER INCIDENT LIMIT OF LIABILITY OF ANOTHER SUCH ENTITY.

As stated previously and as recognized by the trial court, the purpose of the limited waiver of sovereign immunity is to protect the public treasury. As represented to the trial court and confirmed by the Affidavit of Lynn H. Groseclose, trial counsel for Lake Wales, no municipal funds were expended in the defense or settlement of the Polk County action. (A 28-29 and 56-57). When initially denying DOT's Motion for Summary Judgment, the trial court determined that monies paid on behalf of Lake Wales by its insurer did not apply towards the cap; however, in receding from its ruling, the trial court determined that payment by the insurer applied against the cap. (A 27-29 and 40).

Again, this is an issue which does not appear to have been directly addressed in any reported cases. However, as previously quoted from Cauley, supra, this Court has determined that sovereign immunity should apply to governmental entities in an equal, rather than a disparate, manner.

It then becomes necessary to interpret other statutes having an impact on governmental liability so that the intent and purpose of this equal application of sovereign immunity is given its full effect. Webb, supra, and Wakulla County, supra. As to

the present issue, Section 286.28, Florida Statutes (1979), provides that all political subdivisions of the state, with the exception of incorporated cities and towns, are authorized to purchase liability insurance and, to the extent that they do, sovereign immunity is waived. In this regard, it should be noted that this statute was adopted long before the 1973 enactment of Section 768.28 brought municipalities under sovereign immunity and the only legislative action on Section 286.28 since 1973 was its renumbering from Section 455.06 in 1979.

While the repeal of a statutory provision by implication is not favored, such is required where irreconcilable conflict between a later statute and an earlier statute reflect legislative intent to repeal. Town of Indian River Shores v. Richey, 348 So.2d 1 (Fla. 1977). While Section 768.28(10) may evidence a legislative intent not to repeal Section 286.28 in general, Burkett v. Calhoun County, 441 So.2d 1108, (Fla. 1st DCA 1983), that portion of Section 286.28 excepting municipalities must be considered as repealed by implication, for that is the only way to reconcile the statute with this Court's determination in Cauley, supra at 385 and 387, that "section 768.28 . . . furthers the philosophy of Florida's present constitution that all governmental entities be treated equally" and, that "sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner".

Accordingly, the City of Lake Wales waived the limits of sovereign immunity to the extent that liability insurance was

purchased, as was determined by the trial court in Polk County action. (A 54-55). Therefore, even if the $100,000 per incident cap applied to DOT and the City of Lake Wales collectively, the payment made by the city's insurer should not have been applied against the cap for the subsequent benefit of DOT.

POINT III

A PLAINTIFF HAS THE RIGHT TO PROCEED TO TRIAL AGAINST A GOVERNMENTAL ENTITY, NOTWITHSTANDING ANY INTERPRETATION OF SECTION 768.28(5) REGARDING THE COLLECTABILITY OF ANY JUDGMENT WHICH MIGHT BE THUS OBTAINED.

Article I, Section 21 of the Constitution of the State of Florida provides:

> Access to courts - The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Assuming, arguendo, that the trial court was correct in its interpretation of the per incident statutory limitation as well as the application of insurance payments thereto, the court nonetheless erred in removing the cause from the trial docket and not allowing GERARD to proceed to judgment against DOT.

It was on this very point that Chief Justice Ervin dissented in his separate opinion (A 49-53) and, rather than attempting to reiterate that which he has expressed so well, Plaintiff would simply adopt his opinion and the authorities cited therein as supportive of this point.

In Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982), this Court left little doubt as to the literal meaning and purpose of Section 768.28(5). Recognizing the limitations on the state's maximum liability, the Court stated:

> However, Section 768.28(5) authorized the rendition of judgment in excess of the maximum amount which the state can be required to pay. The purpose of this provision

> is so that the excess can be reported to the legislature and then paid in whole or in part by further act of the legislature. at 840.

Even if "the maximum amount the state can be required to pay" without "further act of the legislature" is zero, GERARD is nonetheless authorized by statute to proceed to trial against DOT and seek a judgment for "the full amount of actual damages, costs, and post-judgment interest," notwithstanding any limitations on DOT's liability to respond to judgment. Berek, supra, at 841.

CONCLUSION

An interpretation of Section 768.28(5), Florida Statute (1979), to provide a $100,000 per incident limit as to the collective liability of DOT and the City of Lake Wales is contrary to legislative intent and produces irrational and unreasonable consequences. For similar reasons, it is error to interpret the statute as requiring the application of those insurance proceeds paid on behalf of the City of Lake Wales against the limits of DOT's liability to pay. Additionally and notwithstanding the above, GERARD was denied his constitutional and statutory rights of access to court by not being allowed to proceed to trial against DOT.

For the foregoing reasons, Petitioner/Plaintiff requests this Court to reverse the Final Summary Judgment and remand the cause to the trial court with directions to allow the cause to proceed to trial and that DOT be liable for payment of up to $100,000, after any applicable set-offs, of any judgment entered in favor of Plaintiff.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to ALAN E. DeSERIO, ESQUIRE, Department of Transportation, Haydon Burns Building, MS 58, 605 Suwannee Street, Tallahassee, Florida 32301 this 5 day of October, 1984.

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