SUPREME COURT OF FLORIDA

PHILLIP S. GERARD, et al. Petitioner/Plaintiff, vs. STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, et al., Respondent/Defendant.	)	CASE NO: 65,855 DCA DOCKET NO. AV-327

FILED
SID J. WHITE
NOV 13 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

The main point of this appeal is whether the per incident liability cap provided by Subsection 768.28(5), Florida Statutes, is a collective, or cumulative, limitation of exposure for all governmental entities which may be joint tort-feasors to an incident and, if so, whether the recovery from one governmental entity of an amount equal to the per incident cap precludes further trial proceedings against any other such governmental joint tort-feasor.

Plaintiff believes that his initial brief and DOT's answer thereto fully examine the issues on appeal, and Plaintiff would simply urge this Court to give Subsection 768.28(5), Florida Statutes, a line by line review as to its literal meaning in making state governmental entities "liable for tort claims in the same manner and to the same extent as a private individual under like circumstances . . . ". If, under this subsection, the state and its agencies and subdivisions are to be so treated, then these entities must each be made to stand liable to the extent of the statutory per person/per incident limitation, without regard to the presence or absence of tortuous conduct by another governmental entity in a particular incident.

Plaintiff does feel compelled to briefly respond to those portions of DOT's Answer Brief which either misconstrue the cited authority or attempt to interject issues not pertinent to this appeal.

First, in reference to the amendment to Subsection 768.28(5) by Chapter Law 77-86, DOT recognizes that the Legislature was merely attempting to clarify that state agencies and subdivisions were intended to be protected by the per incident limitation of liability, just as those entities were expressly covered by the per person limitation in the statute. This is exactly the point recognized in the law review article cited by DOT. However, nothing supports DOT's proposition that the statute, or the amendment, was intended to create an "all-inclusive" umbrella of protection for all governmental entities involved in any one incident, and that certainly wasn't the issue of the Attorney General's opinion to which the Legislature was responding.

As further support of this "all-inclusive" contention, DOT cites the First District's opinion in Wilson v. Duval County School Board, 436 So.2d 261 (Fla. 1st DCA 1983), a case involving the question of a school board's liability for the actions of its employee. That particular issue has been dealt with extensively by both the Courts and the Legislature and is wholly unrelated to the facts and issues of this appeal.

DOT also cites Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981), in which the First District makes reference, (at footnote #11 on page 399), to the April 12, 1973 meeting tape of the House Judiciary Committee. The Florida State Archives, Series 19, Carton 447TA. On that

tape, testimony was given before the Committee by lobbyists for various groups interested in the then-pending legislation which would waive sovereign immunity and become Section 768.28, Florida Statutes. Plaintiff, prior to initiating this appeal, reviewed this tape and all other Archives material relating to the adoption or amendment of Section 768.28, and can affirmatively represent to this Court that there is nothing of record which even remotely suggests that the limitations of liability were intended to be "all-inclusive". In fact, the substance of the Archives' files suggests that no one involved in the legislative process even considered the possibility of there being more than one governmental entity involved as a defendant in any particular tort action, or contemplated the consequences of the statutory limitations in such situation.

DOT also makes the following argument at page 16 of its Answer Brief:

> "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."

The intended point of the above is unknown to Plaintiff, as it appears to address an issue which has not been previously raised in this cause. DOT's cited authorities deal with the requirement in Subsection 768.28(6) that a plaintiff give prior written notice of a claim and subsequently allege compliance with this requirement. Notice <u>was</u> given and subsequently alleged in

Plaintiff's complaint. See Paragraph #43, Amended Complaint. (R2).

As a final point, Plaintiff feels compelled to comment upon DOT's references to Plaintiff's opening statement from the Polk County Circuit Court action against the City of Lake Wales. An opening statement is not evidence. Even if it were, it would have no impact on the question of statutory interpretation presented on this appeal. Plaintiff is confident that this Court will afford that portion of DOT's brief its appropriate weight, and will see that, when placed in proper perspective with the series of events which have brought this case before this Court, DOT's inclusion of the opening statement only further serves to illustrate the inconsistency between its argument on appeal and its actions throughout this case.

For example, DOT responds to Plaintiff's assertion that the trial court's interpretation of Subsection 768.28(5) encourages governmental co-defendants to delay settlement efforts and otherwise prolong litigation as follows:

> . . .To the contrary, it promotes early negotiations between the various governmental co-defendants and will allow them each to contribute an equal amount to the "pot," in accordance with their degree of negligence, in order to reach the "per incident" amount. (DOT's Answer Brief, page 10).

Noble as that may sound, and as consistent as it should be with the longstanding public policy favoring settlement of claims, Florida East Coast Railway Co. v. Thompson, 111 So. 525

(Fla. 1927), it hardly reflects the course of DOT's actions in this case. As noted in Plaintiff's Statement of the Case and the Facts, DOT has successfully resisted every effort to have the claim against it litigated in the same proceeding as the claim against the City of Lake Wales. First, DOT invoked a then-existing venue privilege to have the case against it transferred to Leon County and then successfully resisted Plaintiff's effort to have the case returned to Polk County.

As a result of DOT's maneuvering, Plaintiff was placed in a posture of having to proceed to trial first in Polk County and then proceed against DOT in Leon County. Without DOT in the Polk County action, Plaintiff naturally concentrated the focus of his case on the City of Lake Wales and was able to settle that case during trial. In addition to garnering the benefit of the settlement made on behalf of the City of Lake Wales, DOT would now like to use Plaintiff's opening statement in that case to prejudice this Court in this action.

The actions of DOT are hardly consistent with the lofty spirit of cooperation among governmental co-defendants advanced in its brief. Nor are the actions of DOT in having fought so hard to have Plaintiff's case against it tried separately consistent with its present position that Plaintiff is now entitled to no trial at all against DOT. As noted by Justice Ervin in his separate opinion below, this is a case which "cried out" for a consolidated trial against all joint tort-feasors and

it is only due to the fortuity of an old venue privilege and a crowded court docket in Leon County that DOT has managed to avoid a jury's assessment of its liability.

Obviously, DOT would prefer to never face a jury on Plaintiff's allegations and would also like any subsequent claims bill to be unsupported by a judgment making an absolute determination of liability and damages. Rather, DOT would prefer to "try" this case in the hall of the Legislature, where it could again make issue over such matters as Plaintiff's opening statement and the amount of Plaintiff's recovery through settlement with other co-defendants, while avoiding a jury's predictable response to the fact that DOT had actual knowledge for several years prior to the accident that the trees in question were core-rotted and needed to be removed.
(A 11-12, 58).

Plaintiff deserves, as a practical matter and as a constitutional and statutory right, the opportunity to proceed to trial against DOT and, if successful, to recover his damages.

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 9th day of November, 1984.

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