IN THE SUPREME COURT OF THE STATE OF FLORIDA.

Case No. 67,074

GLORIA JEAN AVALLONE,

Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY and AETNA LIFE & CASUALTY, a foreign corporation jointly and severally,

Respondents.

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondents Board of County Commissioners of Citrus County (Board) and Aetna Life & Casualty Company (Aetna) were Defendants in the trial court and were Appellees/Cross-Appellants in the District Court of Appeal. The Petitioner was the Plaintiff/Appellant/Cross-Appellee. The parties will be referred to as Respondents and Petitioner and, alternatively, by name. Reference to the Record on Appeal will be indicated by ("R") and the appropriate page number. Reference to the Appendix attached to Petitioner's Brief in Support of Jurisdiction will be indicated by ("A") and the appropriate page number. Reference to the Appendix which accompanies this Brief will be indicated by ("AR") and the appropriate page number. All emphasis has been supplied by counsel unless indicated to the contrary.

STATEMENT OF THE CASE

Respondents take exception to Petitioner's Statement of the Case in three respects.

1. The trial court did not agree with "the Plaintiff's argument that there existed no immunity for the Defendant..." Rather, at the hearing on Motion for Summary Judgment, the trial court determined that --

> a. The Board's decision whether or not to provide lifeguards or other supervisory personnel was discretionary and, therefore, immune; and
>
> b. The Board's purchase of insurance constituted a waiver of sovereign immunity (R-512).

The trial court, then, determined that the decision of the Board

was immune because discretionary; there was no waiver of immunity pursuant to §768.28, Florida Statutes. However, there was, according to the trial court, a waiver of immunity by the purchase of insurance (R-512).

The trial court also determined that the acts or omissions of the Board were not the proximate cause of the Plaintiff's injuries and granted summary final judgment in favor of the Board (R-512, 513). From this adverse final summary judgment, the Plaintiff appealed (R-514, 515). The Respondents cross-appealed the adverse trial court ruling that the purchase of insurance constituted a waiver of sovereign immunity.

2. In its original opinion entered February 21, 1985 (since withdrawn), the Fifth District Court of Appeal did not decide the correctness of the trial court ruling that the failure to provide supervisory personnel was a planning level decision (A-15 n.1). It did, however, in its original opinion, determine that the purchase of liability insurance constituted "a waiver of the immunity defense" (A-16).

3. In its Opinion on Motion for Clarification or Rehearing, the District Court affirmed the trial court's entry of summary final judgment for Respondents. In so doing, it (a) accepted as correct the trial court ruling that the Board's decision was immune (A-25 n.1); and (b) held that nothing in §286.28, Florida Statutes, overcomes or alters the absolute immunity which attaches to discretionary, planning-level activities of governmental agencies (A-26).

STATEMENT OF THE FACTS

Respondents disagree with Petitioner's Statement of Facts as specifically set forth below.

1. The Board, on more than one occasion, considered whether to employ lifeguards at county owned and/or operated swimming facilities. However, because the prohibitive costs of employing lifeguards would likely result in the county closing its swimming facilities, the decision was made to not provide lifeguards (R-241, 253, 254, 255, 265, 266, 290).

2. At all material times, the Board employed a park supervisor whose duties included maintenance of all Citrus County parks and, in particular, the maintenance of the Blue Bird Springs facility, including the beach and dock (R-143, 145, 151). This employee was also responsible for identifying any unsafe conditions and reporting them (R-238, 239, 257, 258, 371).

3. The record is completely devoid of any evidence that the Board had any prior knowledge of any horseplay or roughhousing occurring at Blue Bird Springs. Moreover, the record affirmatively shows that the individual county commissioners and the employee in charge of maintaining Blue Bird Springs each denied having any knowledge of any roughhousing or prior injuries occurring at Blue Bird Springs (R-162, 235, 236, 260, 286, 287, 312, 313, 325, 329, 330, 353, 356).

4. The record does not indicate that roughhousing occurred

around the dock of the Blue Bird Springs facility approximately two to three years prior to Petitioner's injury. Rather, the record reflects that "king of the dock" was played some two to three years prior to December 22, 1982, the date of the depositions of the witnesses providing this information (R-376, 386, 423, 435), a period of no more than six months prior to Petitioner's injury.

5. Petitioner, in her Brief on the Merits, asserts that she either

> "(1) Walked out to the dock to call her friends and was, at that time, physically hoisted onto the shoulders of an individual by the name of 'Jeff'" (R-101, 102), or
>
> "(2) Was physically hoisted onto the shoulders of 'Jeff', who then carried the Plaintiff out to the dock" (R-391, 392) -- "when someone pushed Jeff from behind".

The statement in (1), above, does not accurately reflect the record. In her deposition, Petitioner testified that she

> "walked out to the edge of the beach -- was calling some people in...walked out there to the edge of the beach...and Jeff come up behind me (sic), picked me up, threw me over his shoulders, [and] walked with me to the dock...." (R-101, 102).

In her answers to Interrogatories Petitioner, under oath, stated that she

> "was picked up by a friend and carried from the shore out onto the dock, a distance of some 30 ft." (R-46).

The above represents the unvaried facts established from all the evidence in the record. There exists no evidence in the

record supporting the contention that Petitioner walked out to the dock. Rather, she walked out to the beach where she was picked up by a friend and carried from the shore out onto the dock, a distance of approximately thirty (30) feet.

6. The following facts are undisputed:

(a) Prior to the date of her injury, Petitioner had been to the Blue Bird Springs facility approximately one or two dozen times (R-90).

(b) She knew that there were no lifeguards on duty at the Blue Bird Springs facility (R-105).

(c) Petitioner knew that children played and roughhoused on the dock and had seen them doing so on the date of her injury up until the time of her injury (R-102, 104).

(d) As Petitioner was being carried on the shoulders of a companion, she was fighting and clowning with him as he attempted to throw her into the water (R-46).

The foregoing factual contentions accurately reflect the record and to the extent they are of further significance, they will be discussed in Respondent's argument to this Court.

SUMMARY OF ARGUMENT

In this Brief, Respondents demonstrate that the Fifth District Court of Appeal properly affirmed the trial court's summary judgment in their favor, albeit for reasons different than those given by the trial court. The District Court's holding that the purchase of insurance does nothing to alter the absolute immunity that attaches to discretionary, planning-level decisions can and should be affirmed on several grounds.

1. Petitioner's failure to brief or otherwise contest the

adverse trial court ruling that the Board's acts were discretionary precludes her from raising this issue upon writ of certiorari to this Court. Because Petitioner never briefed or contested this trial court ruling relating to the discretionary nature of the Board's acts, the District Court assumed as correct that ruling, as it is bound to do. In light of this uncontested trial court ruling, the District Court's determination that the purchase of insurance did not constitute a waiver of the Board's sovereign immunity is correct and should be affirmed.

2. Even though Respondents are precluded from arguing, to this Court, the discretionary nature of the Board's decision, the decisional law in Florida compels but one conclusion -- the decision whether or not to provide lifeguards is immune because discretionary! Because the decision of the Board is immune, it cannot be waived by the mere purchase of insurance. To hold otherwise would allow for the waiver of the absolute immunity attaching to discretionary activities in every instance where a governmental entity purchases insurance to provide coverage for operational activities for which it may be found liable.

3. Section 286.28(2) provides a means by which governmental entities may fund their potential liability for damage claims or enlarge the damage cap found in §768.28(5). In order to remain consistent with this Court's decisions which preserve the absolute immunity attaching to discretionary activities of government, §286.28(2) cannot be interpreted to waive that immunity by the mere purchase of insurance.

4. The absolute immunity which attaches to discretionary activities can only be waived when the governmental entity creates a known dangerous condition not readily apparent to persons who may be injured by that dangerous condition. In the instant case, the record reflects that if a dangerous condition existed, it was readily apparent to Petitioner and was not created by the Board. The exception to the waiver of absolute immunity has not been met.

4. As an alternative to its argument that §286.28(2) merely provides a means by which governmental entities may fund their potential liability for damage claims or enlarge the damage cap found in §768.28(5), Respondents argue that §286.28(2) has no continuing validity following the enactment of, and amendments to, §768.28. Specifically, the Legislature, by enacting the 1977 Amendments to §768.28, demonstrated their express intent not to waive sovereign immunity to the extent of liability limits purchased; an intent which directly contradicts §286.28(2).

Additionally, there exist numerous and significant disparities between §768.28 and §286.28(2). Because §768.28 represents the more recent expression of the legislative will, it represents the prevailing law and impliedly repeals §286.28(2). With the repeal of §286.28(2), there clearly can be no waiver of the absolute immunity which attaches to discretionary activities by the mere purchase of insurance.

6. The Board owed no common-law duty to the Petitioner. The decisional law relied upon by Petitioner in support of her

contention that a common-law duty was owed to her are decisions of this Court involving sovereign immunity as it applied to municipalities rather than the sovereign immunity applicable to the state, its agencies or political subdivisions, including counties.

Prior to the enactment of §768.28, there existed a partial waiver of immunity for municipalities for proprietary but not governmental functions. However, during this same time, the sovereign immunity applicable to the state, its agencies and subdivisions, including counties, was absolute. That is, the state, its agencies and political subdivisions, including counties, were immune whether the activity involved was considered governmental or proprietary.

As such, the decisions cited by Petitioner as supporting the contention that the Board owed a common law duty to her are inapplicable in that they involved the immunity applicable to municipalities prior to §768.28. Those decisions cited by Petitioner have no relevance to the determination of whether or not the Board's acts were discretionary and, therefore, immune. Moreover, because those decisions involved a different question of law (the immunity applicable to a municipality rather than the absolute immunity of a county), they cannot properly form the basis for conflict jurisdiction.

7. Respondents additionally contend that the Writ of Certiorari was improvidently granted on the basis that there is no decision by the District Court of Appeal with which to find

conflict. The District Court merely assumed as correct the trial court's ruling that the acts of the Board were discretionary in nature. The District Court then proceeded to determine that the purchase of insurance did not constitute a waiver of the absolute immunity which attaches to discretionary, planning-level decisions. This decision does not directly and expressly conflict with any decision of this Court or any District Court on the same question of law.

ARGUMENT

I. WHETHER PETITIONER'S FAILURE, AT THE DISTRICT COURT LEVEL, TO CONTEST THE TRIAL COURT'S FINDING RELATING TO THE DISCRETIONARY NATURE OF THE ALLEGED ACTS OR OMISSIONS OF THE BOARD CONSTITUTES WAIVER AND/OR ABANDONMENT OF PETITIONER'S RIGHT TO CHALLENGE THAT FINDING.

The Respondents submit that Petitioner's failure to raise, brief, argue or otherwise contest, in any fashion, the trial court's finding that the decision to provide or not provide supervisory personnel was a discretionary, planning-level decision, constitutes an irrevocable waiver of its right, and obligation, to challenge that finding. That Petitioner failed to contest this finding at the District Court level cannot be disputed (A-15 n.1, A-25, A-25 n.1, AR-1-17, 57-74); the effect of such failure on the petition before this Court is fatal! Duckham v. State, ____So.2d____ 10 F.L.W. 455, 456 (Fla. September 6, 1985)

> "It is incumbent on an appellant to present to an appellate court all issues of which review is sought. If an appellant fails to argue an issue, an appellate court can assume such issue has been abandoned. This promotes

> judicial economy and finality of judicial proceedings."[1]

* * *

The trial court, in its Order on Motion for Summary Judgment, made three significant rulings --

> "1. That the Board's decision whether to provide lifeguards or other supervisory personnel for the Blue Bird Springs facility was a discretionary, planning-level decision for which, under the doctrine of sovereign immunity, it is immune from tort liability.
>
> 2. That the Board's purchase of insurance pursuant to Fla. Stat. §286.28 constituted a waiver of sovereign immunity to the extent of the Board's liability insurance policy limits.
>
> 3. That the actions of Jeff Grubb in carrying the Plaintiff onto the dock at the Blue Bird Springs facility constituted a separate, efficient, independent, unforeseeable, intervening cause of the Plaintiff's injuries and damages and, as such, the acts or omissions of the Board did not constitute the proximate cause of the Plaintiff's injuries and damages." (R-512)

The Order on Motion for Summary Judgment further granted final summary judgment in favor of the Respondents and against the Petitioner (R-513). All of the above rulings, with the exception of the determination that the purchase of insurance constituted a waiver of sovereign immunity, were unfavorable to the Petitioner.

The Petitioner appealed this order (R-514, 515) and was put

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[1]Duckham, the petitioner, sought review, pursuant to this Court's conflict jurisdiction, of the First District Court of Appeal's affirmance of the trial court's granting of forfeiture of his vehicle. Upon petition to this Court, Duckham unsuccessfully sought to raise defenses presented to, but not addressed by, the trial court and not addressed, by him, to the District Court.

on notice of the Board's intention to cross-appeal the Order on Motion for Summary Judgment (R-516).

The sole ruling which was unfavorable to the Board, and appealable by it, was the determination that the Board's purchase of insurance constituted a waiver of its sovereign immunity. A reversal of this ruling, in combination with the trial court ruling that the Board's alleged acts or omissions were immune, would result in the very determination made by the District Court and of which Petitioner now seeks reversal.

Having knowledge of the Board's cross-appeal and presumably of the effect of a reversal of the issue cross-appealed, Petitioner chose not to address, in her Brief or Reply Brief to the District Court,[2] the trial court's determination that the decision to provide or not provide lifeguards was discretionary. Respondents made Petitioner aware of their intent to support this ruling by addressing its correctness in their Answer Brief (AR-42-43).

The District Court noted the Petitioner's failure to appeal this ruling in its first opinion (since withdrawn) and, notwithstanding, determined that the purchase of insurance constituted a waiver of the Board's immunity (A-15 n.1, 16).

In response to the District Court's first opinion, Respondents moved for clarification or rehearing with regard to that portion of the opinion concerning the cross-appeal. By failing to

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[2]Significantly, the Points Involved on Appeal and on Cross-Appeal raised by Petitioner in her Brief and Reply Brief to the District Court make no mention of the trial court ruling regarding the discretionary nature of the Board's activities (AR-2, 58).

respond to the Motion for Rehearing or Clarification, Petitioner again failed to contest the adverse trial court ruling, knowing full well that the Motion, if successful, would require affirmance of that ruling. Even if Petitioner had, in response to the Motion for Clarification or Rehearing, challenged the trial court's adverse ruling, Petitioner's challenge, even at that point, would have been untimely. See Shell Oil Company v. Department of Revenue, 461 So.2d 959, 963 (Fla. 1st D.C.A. 1984).

> "Since this issue was not raised by Appellant's Briefs on the hearing of this case, it...cannot be raised for the first time on motion for rehearing." Fiesta Fashions, Inc. v. Capin, 450 So.2d 1128, 1129 (Fla. 1st D.C.A. 1984); Sarmiento v. State, 371 So.2d 1047, 1052-53 (Fla. 3d D.C.A. 1979), approved, 397 So.2d 643 (Fla. 1981), and cases cited therein.

That Petitioner has, at her own peril, failed to contest the issue relating to the discretionary nature of the Board's decision at every possible juncture compels but one conclusion: THE RIGHT TO CONTEST THAT ISSUE HAS BEEN WAIVED![3]

Petitioner contends that, as to her, "the trial court reached the right result" (Petitioner's Brief on the Merits, p. 11). Petitioner overlooks the fact that the result reached by the trial court was that the Board was entitled to summary judgment as a matter of law; a result which she appealed.

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[3]There is no dispute that Petitioner argued the discretionary/ operational nature of the Board's alleged acts or omissions to the trial court at the hearing on Motion for Summary Judgment. However, the fact of such argument is of absolutely no legal significance in light of Plaintiff's failure to argue or contest the trial court's adverse ruling that the Board's alleged acts or omissions were discretionary.

Petitioner then argues that because the trial court ruled in her favor as to the issue of waiver of sovereign immunity, she was under no legal requirement to challenge the adverse ruling relating to the discretionary nature of the Board's decision.

In support of these contentions, Petitioner mistakenly relies upon the decisions of Hall v. Florida Board of Pharmacy, 177 So.2d 833 (Fla. 1965) and Cerniglia v. C & D Farms, Inc., 203 So.2d 1 (Fla. 1967). In order to come within the confines of the rule established in Hall and Cerniglia, Petitioner must meet three criteria: (1) she must have been the appellee before the District Court; (2) she must have suffered no adverse rulings at the trial level; and (3) she must, at the District Court level, seek to affirm the judgment of the trial court. Hall v. Florida Board of Pharmacy, supra, at 835; Cerniglia v. C & D Farms, Inc., supra, at 3. Petitioner meets none of these criteria. As such, Petitioner's reliance upon Hall and Cerniglia is misplaced. Rather, Hall and Cerniglia support Respondents' contention that Petitioner is precluded from raising to this Court issues she failed to argue to the District Court.

In Hall, the petitioner sought, and was granted, certiorari jurisdiction on the basis of conflict with other appellate decisions. This Court noted that the circuit court --

> "...ruled in favor of the appellee...and did not make any ruling adverse to the appellee on anything. Therefore, the only interest of the appellee was to affirm the judgment of the Circuit Court which, as stated, was favorable to him. Hall v. Florida Board of Pharmacy, supra at 835. (emphasis by the Court)

> "Assignments of error are required to be filed by the appellant or an appellee who seeks reversal of the lower court, but not by appellee who seeks no affirmative relief on appeal. Id.

The distinctions between Hall and the instant Petition are significant. First, in the instant Petition, the trial court ruled adversely to Petitioner both on the issue of the discretionary nature of the alleged acts or omissions of the Board and in granting final summary judgment in favor of the Board; in Hall the petitioner suffered no adverse rulings at the trial court level. Second, the Petitioner was the Appellant seeking affirmative relief at the District Court level, while in Hall the petitioner was appellee. The same distinctions are apparent in Cerniglia.

The basis for this Court's jurisdiction in Cerniglia was also grounded in conflict with prior appellate decisions. There, this Court acknowledged that, in Hall, it was held that the appellee may advance reasons to support a judgment under attack which differs from those given by the lower court, even in the absence of the filing of cross-assignments of error. Cerniglia v. C & D Farms, Inc., 203 So.2d at 3.

> "This, of course, is true only when the appellee seeks to support the judgment of the lower court. As we understand this cause, that is what the appellee below, petitioner here, was trying to do...." Id.

* * *

That the trial court ruled for Petitioner on the issue of waiver of immunity by the purchase of insurance is of no

consequence because Petitioner does not seek to support the judgment of the lower court, rather she seeks to reverse it. The petitioners in Hall and Cerniglia suffered no adverse rulings before the trial court. The instant Petitioner lost at the trial level. The petitioners in Hall and Cerniglia were appellees before the District Court; the instant Petitioner was Appellant seeking affirmative relief. Given these essential distinctions, Petitioner's reliance upon Hall and Cerniglia is unfounded.

Petitioner also cites the decisions of Firestone v. Firestone, 263 So.2d 223 (Fla. 1972) and In re Estate of Yohn, 238 So.2d 290 (Fla. 1970) in support of her mistaken contention that she need not have contested the trial court's adverse ruling in her appeal to the District Court. Firestone and Yohn merely stand for the proposition that "a trial court's judgment, even if insufficient in its findings should be affirmed if the record as a whole discloses any reasonable basis...on which the judgment can be supported." Firestone v. Firestone, supra, at 225. Like Hall and Cerniglia, these decisions do not advance Petitioner's contention because she does not seek to support the trial court judgment, she seeks to reverse it. Rather, these decisions support the contention that the Fifth District Court of Appeal properly affirmed the trial court's granting summary judgment in Respondents' favor, albeit for different reasons.[4]

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[4]See also, Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979), in which this Court stated that the judgment of a trial court will generally be affirmed if an alternative theory supports it.

Further supporting the contention that Petitioner was required to contest, at the District Court level, the unfavorable trial court ruling is the decision of Regero v. Daugherty, 69 So.2d 178 (Fla. 1953). Regero was distinguished by this Court in Hall v. Florida Board of Pharmacy, supra, on the grounds that it dealt with a situation in which the appellee had suffered adverse rulings by the court under review. The action in Regero involved a suit to set aside a deed on the ground that it was a deed to homestead property procured through fraud, deceit and without valid consideration. The Special Master, after taking extensive testimony, made several rulings including that the property in question was homestead but that notwithstanding the character of the property, the conveyance was valid; the deed had not been procured by deceit; and valid consideration was given for the conveyance. The Chancellor approved these rulings of the Special Master and dismissed the Complaint, resulting in an appeal by the plaintiff.

On appeal, this Court framed the issue to be decided as whether homestead property may be conveyed by the owner and, if so, the nature of the consideration required to support such a conveyance, noting that --

> "Inasmuch as the defendant has not questioned [the adjudication that the property involved was homestead in character] by appropriate cross-assignment of error the correctness of this finding is not open to inquiry as between the parties to this appeal." Id. at 180.

This Court then refused to consider an adverse ruling where the

appellee, who suffered the adverse ruling, failed to cross-assign error.

Petitioner, as Appellant, was required to brief, raise and argue all adverse trial court rulings which she contends constitute error. Where, as here, an appellant has failed to raise or brief issues to the appellate court, such failure constitutes an abandonment of those issues not raised. Duckham v. State, supra, at 456; Department of Health and Rehabilitative Services v. Petty-Eifert, 443 So.2d 266 (Fla. 1st D.C.A. 1983); Truxell v. Truxell, 259 So.2d 766, 768 (Fla. 1st D.C.A. 1972); Snead v. Lejeune Road Hospital, Inc., 196 So.2d 179, 179 (Fla. 3d D.C.A. 1967).

It is of no legal significance that formal assignments of error are no longer required by Florida Rules of Appellate Procedure because those same rules require that the brief of an appellant contain an argument with regard to each issue. Florida Rules of Appellate Procedure 9.210(b)(4).

> "Even in the absence of a rule requiring that errors be assigned, professional advocacy necessitates that errors relied on for reversal should be stated in the brief, with the points argued." Lynch v. Tennyson, 443 So.2d 1017 (Fla. 5th D.C.A. 1983). See Duckham v. State of Florida, supra, at 456.

* * *

Petitioner's failure to question, contest or otherwise argue the adverse ruling of the trial court relating to the discretionary nature of the Board's alleged acts or omissions leads to but one, compelling conclusion -- that she has unequivocally waived the

right to contest that issue. The District Court, noting the Petitioner's failure to contest the adverse trial court ruling, assumed that ruling as correct and then properly determined that the purchase of insurance did not constitute a waiver of the absolute immunity attaching to discretionary acts. The opinion of the Fifth District Court of Appeal affirming the trial court's grant of final summary judgment, albeit for different reasons, should be affirmed.

II. WHETHER THE DISTRICT COURT CORRECTLY DETERMINED THAT THE BOARD'S PURCHASE OF INSURANCE DID NOT CONSTITUTE A WAIVER OF THE ABSOLUTE SOVEREIGN IMMUNITY WHICH ATTACHES TO JUDGMENTAL, PLANNING-LEVEL DECISIONS.

"Article X, Section 13 of the Florida Constitution, provides absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment." Ingraham v. Dade County School Board, 450 So.2d 847, 848 (Fla. 1984). In 1973, the Legislature enacted §768.28, Florida Statutes, the Waiver of Sovereign Immunity Act. It became effective, as to all governmental entities, on January 1, 1975.

By this enactment, the Legislature exercised its authority under Article X, §13, to alter radically the concept of sovereign immunity. "Section 768.28...constitutes a limited waiver by a legislative enactment of the state's sovereign immunity." Ingraham v. Dade County School Board, supra, at 848. The result is a comprehensive and uniform treatment of sovereign immunity for all governmental entities. See, Ingraham v. Dade County

School Board, supra, at 848, 849; Department of Transportation v. Neilson, 419 So.2d 1071, 1076 (Fla. 1982); Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1016 (Fla. 1979).

A. The trial court correctly determined that the alleged acts or omissions of the Board were discretionary and, therefore, immune.

Respondents submit that the District Court properly affirmed summary judgment in their favor by reversing the trial court's ruling that the purchase of insurance constituted a waiver of sovereign immunity. Because implicit (and, in the instant case, explicit) in the trial court's finding that immunity was waived is the finding that immunity existed, Respondents briefly discuss the appropriateness of the finding of immunity, in light of recent Florida decisional law.

Even if Petitioner had contested, at the District Court level, the trial court's finding that the alleged acts or omissions of the Board were discretionary, that ruling would nonetheless have been affirmed. At the time of entry of the Final Summary Judgment, the status of the law in Florida was undisputed -- a governmental entity's decision whether or not to provide supervision is a planning, discretionary function for which there is no tort liability. Jenkins v. City of Miami Beach, 389 So.2d 1195, 1196 (Fla. 3d D.C.A. 1980); Relyea v. State, 385 So.2d 1378, 1381-1382 (Fla. 4th D.C.A. 1980).

Since the Fifth District Court of Appeal's decision in the instant case was rendered, the Second District Court of Appeal,

in a case involving almost identical allegations of negligence,[5] determined --

> "The presence or non-presence of warning signs or other devices, lifeguards or other type of protection, or rescue or safety equipment falls wholly within the concept of a 'judgmental, planning-level function,' immune from consequential liability, in contrast to an 'operational-level' activity which can result in the loss of such immunity." Sarasota County v. Butler, ___ So.2d_____, 10 F.L.W. 1819, 1820 (Fla. 2d D.C.A. August 2, 1985).

> "There is nothing before us to suggest, let alone establish, that Sarasota County failed to fulfill an operational-level duty." Id.

The Second District also determined that "it was equally plain that [the] County's decision to establish the beach through improvements and maintenance,...was no less within its 'judgmental, planning-level' function". Id. In light of these holdings, Petitioner's contention that the decision to operate a swimming facility was the "only judgmental decision made" must fail.

To the extent Petitioner seeks to impose liability upon the Board for failing to police the premises, to protect the general public and to enforce a county ordinance, she does so without foundation under the decisional law of Florida as espoused by this Court.

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[5]The plaintiff's claim arose from the drowning death of her nine-year-old son at South Lido Beach located in Sarasota County. The Complaint alleged that the county was negligent in failing to post warning signs or other warning devices to alert patrons of the dangerous conditions of the beach, failing to provide lifeguards or other protection and failing to provide safety or rescue equipment. Sarasota County v. Butler, ____So.2d_____, 10 F.L.W. 1819, 1820 (Fla. 2d D.C.A., August 2, 1985).

> "There is not now, nor has there ever been, any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals. In addition, there is no common law duty to prevent the misconduct of third persons." Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912, 918 (Fla. 1985)

"Governments must be able to enact and enforce laws without creating new duties of care and corresponding tort liabilities....Id. at 921.

> "How a governmental entity through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there never has been a common law duty of care." Id. at 919.

* * *

The decision to provide or not provide lifeguards or other supervisory personnel is embraced in the Board's discretionary decisions concerning whether and to what extent it should act.

> "Regardless of whether the decision...was unwise, the purpose of this Court's distinction between planning-level and operational-level functions is to prevent judicial intrusion into planning-level decisions. Payne v. Broward County, 461 So.2d 63, 65 (Fla. 1984).

The decision not to provide lifeguards, a strategic allocation-of-resources decision (R-253, 254), is cloaked with immunity and

cannot be the subject of tort liability.[6]

B. The trial court erred in determining that the purchase of insurance constituted a waiver of the immunity which attaches to discretionary, planning-level decisions.

Once the trial court determined that the alleged acts or omissions of the Board involved discretionary, planning-level decisions, it was error to determine that the purchase of insurance constituted waiver of that immunity. Those activities of a governmental entity which involve discretionary, planning-level functions enjoy absolute immunity from tort liability, Department of Transportation v. Neilson, supra, at 1073, and cannot be waived by the purchase of insurance.

After the enactment of §768.28, Florida Statutes (1973), this Court, in the landmark decision of Commercial Carrier Corp. v. Indian River County, supra, interpreted that statute as providing a limited waiver of sovereign immunity. This Court concluded that those functions of governmental authorities which involve certain policy-making, planning or judgmental governmental decisions, cannot be the subject of traditional tort liability. Id. at 1029. This concept of exemption from tort liability for the exercise of policy-making functions is grounded --

> "upon a concept of separation of powers which will not permit the substitution of the decision by a judge or jury for the decision

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[6]Additional argument supporting the contention that the Board's decision was immune is found in Section IV of this Brief where Respondents distinguish between the immunity applicable to municipalities and that applicable to the state, its agencies or political subdivisions prior to the enactment of §768.28. See Respondents' Answer Brief at pp. 37-42, infra.

> of a governmental body as to the reasonableness of planning activity conducted by that body." Id. at 1018.

In any organized society there exists a need for basic governmental policy decisions and the implementation thereof, unhampered by the threat of tort liability. Id. at 1019 (citation omitted)

This Court affirmed the Commercial Carrier decision in both Department of Transportation v. Neilson, supra, and Trianon Park Condominium Association, Inc. v. City of Hialeah, supra, and reiterated that absolute immunity attaches to discretionary, judgmental functions based on the underlying premise that it cannot be tortious conduct for a government to govern. Department of Transportation v. Neilson, supra, at 1075; Trianon Park Condominium Association, Inc. v. City of Hialeah, supra, at 918. This Court then, on at least three separate occasions, has interpreted §768.28 as providing for the continuing sovereign immunity of the governmental body where the act or conduct involved is characterized as discretionary.

Where, as here, the alleged act or omission is discretionary, the governmental entity is powerless to waive, by the purchase of insurance, the absolute immunity which attaches to that discretionary act. This is particularly so when the very statute which provides for a limited waiver of sovereign immunity also authorizes the purchase of liability insurance to provide coverage for those limited, operational activities for which immunity has been waived. §768.28(13), Florida Statutes (1977). Based on this Court's interpretation of §768.28 and the provision in that

statute authorizing the purchase of insurance, a determination that the purchase of insurance waives the absolute immunity which attaches to discretionary decisions is incongruous! Such a holding provides for a waiver of the absolute immunity attaching to discretionary acts in every instance where a governmental entity purchases insurance to provide coverage for operational acts. The purchase of insurance, authorized by §768.28(13), or by §286.28(1), cannot have such far-reaching effect.

Petitioner is simply wrong in her reliance upon Ingraham v. Dade County, supra, to support her contention that §286.28 provides the basis for a waiver of absolute sovereign immunity by the mere purchase of insurance. Based on this Court's continued endorsement of the absolute immunity which attaches to discretionary decisions, the only reasonable interpretation of §286.28(2) is that provided by the Fifth District Court of Appeal in the instant case.[7] That is, once there has been a determination that an activity is operational --

> "[W]e can only read [§286.28] as providing a means by which political subdivisions of the state may fund their potential liability for damage claims or may enlarge the damage cap found in §768.28(5)." (A-26)

This interpretation (1) provides internal consistency in this Court's opinion in Ingraham which recognized both a limited waiver of sovereign immunity and the continued existence of §286.28(2); and (2) keeps intact the decisions in Commercial

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[7]In a later portion of their Answer Brief, Respondents question the continued applicability of §286.28(2).

Carrier, Neilson and Trianon providing absolute immunity for discretionary, planning-level decisions of governmental entities.

Absolute immunity waivable by the purchase of insurance is no immunity! Any interpretation of Ingraham which subjects governmental entities to a waiver of sovereign immunity by the mere purchase of insurance presents an irreconcilable conflict with this Court's decisions in Commercial Carrier, Neilson and Trianon. The sole exception to this absolute immunity arises, not by the purchase of insurance, but by a governmental entity's creation of a known danger which is not readily apparent to persons who might be injured by the known danger.

C. There is an exception to the rule of absolute immunity for planning-level activities, but the exception does not apply in this case.

Although, as discussed above, there exists absolute immunity for discretionary, judgmental functions of governmental entities, there exists an exception to this absolute immunity. Where the governmental entity (1) creates a danger, and (2) knows of the danger caused by it, and where (3) that danger is not readily apparent and constitutes a trap to persons who might be harmed by it, liability may be imposed. Payne v. Broward County, 461 So.2d 63, 66 (Fla. 1984); Perez v. Department of Transportation, 435 So.2d 830, 832 (Fla. 1983); Harrison v. Escambia County School Board, 434 So.2d 316, 320-21 (Fla. 1983); City of St. Petersburg v. Collom, 419 So.2d 1082, 1083, 1086, 1087 (Fla. 1982); Department of Transportation v. Neilson, 419 So.2d 1071, 1078 (Fla. 1982).

The question raised in the application of this exception to

absolute immunity, therefore, is whether the governmental entity "created a known dangerous condition which may not be readily apparent to one who could be injured because of the condition." City of St. Petersburg v. Collom, supra, at 1087.

The burden clearly is upon the injured party to prove facts corresponding to, and identifying, each of the essential elements of this exception to absolute immunity. Harrison v. Escambia County School Board, supra, at 320-21. Once these elements are established, the activity is removed from the discretionary sphere and becomes operational, creating a duty at the operational level.

1. The Board Did Not Create a Known Dangerous Condition.

If, as alleged, a dangerous condition existed at the Blue Bird Springs facility on the date Petitioner suffered her injuries, the condition was not created by the Board. Rather, the condition was created by the horseplaying, rough-housing children. A governmental entity has no duty to warn of a known dangerous condition which it did not create. Sarasota County v. Butler, supra (plaintiff's decedent drowned at a beach having strong tides, currents and drop-offs. "It was neither the beach, nor the operation of it, but the water, which caused the child's death." Id. at 1820); Hill v. City of Lakeland, ____ So.2d ____, 10 F.L.W. 949 (Fla. 2d D.C.A., April 10, 1985) (In a wrongful death action brought against the City of Lakeland by the personal representative of a decedent who drowned in Lake Wire attempting to rescue a friend who had become entangled in submerged aquatic

weeds, the city had no duty to warn of a known, naturally occurring, potentially hazardous condition which it did not create); Hyde v. Florida Department of Transportation, 452 So.2d 1111 (Fla. 2d D.C.A. 1984) (The "decision to warn the public of, or protect the public from, conditions created by private landowners along the state's network of roads is a decision arising at the judgmental, planning level.").

Although there may have existed a dangerous condition at the Blue Bird Springs facility on the date of Petitioner's injury, the Board in no wise created the danger. The danger was the result, not of any affirmative act of the Board or of defects in the maintenance of the premises nor in any failure to repair the premises. Instead, the dangerous condition was affirmatively created by Petitioner's friend, Jeff Grubb, and the roughhousing, horseplaying children.

2. The Danger was Apparent and was not a Trap.

Ordinary dangers, which are open, obvious apparent and perceivable to those who encounter them, do not constitute the kind of trap for which a governmental body has a duty to warn or correct.

There is no question that the county created and had knowledge of the conditions existing which gave rise to the plaintiff's cause of action in Payne v. Broward County, 461 So.2d at 65.

> "The only question, then, [was] whether the conditions created a known danger not readily apparent to potential victims or constituted a hidden trap for pedestrians. We conclude that they did not." Id.

On the facts, apparent from the record, "whatever danger there was in crossing the street mid-block was open and obvious." Id. at 66.

> "Regardless of the circumstances which resulted in the intersection being in the state it was the day of the accident, no liability may be imposed if those circumstances fail to create a known danger not readily apparent to potential victims, or a trap, and there was no such hidden danger or trap." Id. at 66

* * *

The record before this Court is undisputed. Prior to the date of her injury, Petitioner had been to the Blue Bird Springs facility approximately one or two dozen times (R-90) and knew there were no lifeguards on duty at the facility (R-105). Petitioner also knew that children played and roughhoused on the dock and, in fact, had seen them doing so on the date of her injury, prior to her injury (R-102, 104). Based on these facts, there can be no question but that the alleged danger was readily apparent to Petitioner and did not constitute a hazard or trap.[8] Because the elements of the exception from immunity for a known dangerous condition cannot be met, the discretionary acts of the Board did not and cannot give rise to an operational duty. Payne

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[8]Although the Complaint does not properly allege sufficient facts to come within the operational-duty exception to absolute immunity (R-1-4), Petitioner should not be allowed to amend her Complaint because the record demonstrates that the elements of this exception cannot be met. See Paneque v. Metropolitan Dade County, ____So.2d____, 10 F.L.W. 1486 (Fla. 3d D.C.A. November 15, 1985), in which the Third District Court of Appeal held the question of immunity to be one of law where the danger complained of is readily apparent.

v. Broward County, supra; Barrera v. State of Florida, Department of Transportation, 470 So.2d 750 (Fla. 3d D.C.A. 1985)

The trial court ruling that the alleged acts or omissions of the Board involved discretionary decisions, combined with Petitioner's inability to fit within the operational-duty exception to sovereign immunity, compels but one conclusion -- the Board cannot be liable in tort for its discretionary decision. The purchase of insurance, whether authorized by §768.28 or §286.28, cannot overcome or alter "the absolute immunity which attaches to 'planning-level' activities of government" (A-26).

III. WHETHER §286.28(2), FLORIDA STATUTES, HAS ANY CONTINUING APPLICABILITY AFTER THE ENACTMENT OF AND AMENDMENTS TO §768.28.

If §286.28(2) is to have any continuing force and effect after the enactment of and amendments to §768.28, it should be to the limited extent described in the instant opinion of the Fifth District Court of Appeal. That opinion interpreted §286.28 as providing "a means by which political subdivisions of the state may fund their potential liability for damage claims or may enlarge the damage cap found in §768.28(5) (A-26).

In making this determination, the District Court relied upon Ingraham v. Dade County School Board, supra, in which this Court stated --

> "...[A]s a part of the overall revision of this area...the Legislature...specifically provided that the statutory provisions permitting the state to purchase insurance based upon §455.06 (since renumbered as

> 286.28) would continue in effect....Section 455.06 thus became a part of the overall scheme of the Legislature relating to the waiver of sovereign immunity." Id. at 849.

It is this language in Ingraham with which Respondents respectfully take exception.

As an alternative to the interpretation of §286.28(2) provided by the District Court in the instant decision, Respondents contend that §286.28(2) has no continuing validity in light of the Legislature's enactment of §768.28, an all-encompassing, comprehensive tort liability statute providing for a limited waiver of sovereign immunity for governmental entities. This specific argument was not briefed to this Court in Ingraham v. Dade County School Board, supra.[9] This Court, then, at the time of its decision in Ingraham, did not have available to it a detailed analysis of the history of and amendments to §768.28 and their concomitant effect upon §286.28(2). On this basis, Respondents request that this Court consider the effect of §768.28 on the continued vitality of §286.28(2).

Section 286.28 was originally enacted by Ch. 28220, §§1-3, Laws of Florida (1953), approximately 20 years before the enactment of §768.28. Arguably, during this 20-year period, §286.28 provided a valid basis for the contention that the purchase of insurance provided a waiver of sovereign immunity to the extent

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[9]Respondents note that the brief of the Dade County trial lawyers, as amicus curiae in Ingraham v. Dade County School Board, supra, discussed, somewhat, the legislative history of §768.28, Fla. Stat. (1973). However, that discussion did not include an analysis of the effect of the 1977 amendments to §768.28 or the disparities between §768.28 and §286.28. (AR-103-106)

of the liability limits of the policy purchased. Buffkin v. Board of County Commissioners of Brevard County, 320 So.2d 876 (Fla. 4th D.C.A. 1975) cert. denied 338 So.2d 841 (Fla. 1976); Baugher v. Alachua County, 305 So.2d 838 (Fla. 1st D.C.A. 1975). However --

> "[w]ith the adoption of Sec. 768.28-30, F.S.,...any question regarding the waiver of tort immunity will be moot and no longer determined by an interpretation of the language contained in Sec. 455.06." Surette v. Galiardo, 323 So.2d 53, 55 n.2 (Fla. 4th D.C.A. 1975), petition for cert. dismissed, 339 So.2d 194 (Fla. 1976).

This pronouncement is supported by a review and understanding of the legislative history of and amendments to §768.28.

Of particular significance are original subsections (10) and (11) of §768.28, Florida Statutes (1973). As originally enacted in 1973, §768.28(10) provided in part as follows --

> "If the state or its agency or subdivision is insured against liability for damages for any negligent or wrongful act, omission, or occurrence for which action may be brought pursuant to this section, then the limitations of this act shall not apply to actions brought to recover damages therefor to the extent such policy of insurance shall provide coverage...."[10]

The above-quoted portion of this subsection provided for an increase, by the purchase of insurance, of the damage cap found in §768.28(5), Ranger Insurance Company v. Travelers Indemnity Company, 389 So.2d 272, 276 (Fla. 1st D.C.A. 1980) and served the

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[10]This subsection also authorized political subdivisions presenting homogeneous risks to join together to purchase insurance protection. §768.28(10).

very same function as §286.28(2).

Subsection (11), as originally enacted provided that --

> "Laws allowing the state or its agencies or subdivisions to buy insurance are still in force and effect and are not restricted in any way by the terms of this act."

It is this latter subsection, since renumbered as subection (10), that provided the basis for this Court's determination, in Ingraham, that §286.28 remains a part of the overall scheme of the Legislature relating to the waiver of sovereign immunity.

In 1977, significant changes in §768.28 were effected. Chapter 77-86, Laws of Florida, provided (1) for the repeal of original subsection (10); (2) renumbered former subsections (11) through (13) as (10) through (12); and (3) added a new subsection (13). The significance of these modifications is twofold. First, with the repeal of original subsection (10), the Legislature (1) expressly demonstrated its disapproval with the waiver of sovereign immunity to the extent of insurance purchased; and (2) expressed its intent to impose the statutory caps provided in §768.28(5) in all instances, including those in which the governmental agency has purchased insurance. Second, with the enactment of new Subsection (13), the Legislature provided, in §768.28, authority for the purchase of insurance by governmental entities.

Section 768.28(13) has continued in existence through the present and 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 or laws to the contrary notwithstanding. Sheriffs may join together as self-insurers to provide coverage for police professional liability claims only."

Significantly, this subsection contains no language purporting to waive sovereign immunity to the extent of the limits of liability insurance purchased!

The contention that Subsection 768.28(10) (formerly subsection (11)) "evidences a legislative intent not to repeal §286.28" Burkett v. Calhoun County, 441 So.2d 1108, 1109 (Fla. 1st D.C.A. 1983), must be viewed in light of the 1977 amendments to §768.28. To the extent §286.28(2) provides for the waiver of immunity pursuant to the purchase of insurance, it is in direct conflict with the more recent expression of the Legislature demonstrating an intent not to waive sovereign immunity to the extent of liability insurance purchased.

This more recent expression of the legislative will is found in the Legislature's repeal of original §768.28(10) and its enactment of new §768.28(13). With the former, the Legislature repealed a statutory subsection which provided for a waiver of immunity to the extent of liability limits of insurance purchased. With the latter, the Legislature provided for the purchase of insurance and excluded any language relating to a waiver of

sovereign immunity to the extent of insurance purchased.

The repeal of original subsection (10), in combination with the enactment of new subsection (13), evidences the legislative intent not to waive sovereign immunity to the extent of insurance purchased; an expression of the Legislature which represents a clear contradiction of §286.28(2).

The rule to be followed in reconciling contradictory or conflicting statutory provisions is the same fundamental rule of statutory construction involved in the amendment or repeal of a statutory provision. That is, that the last expression of the legislative will is the law, and in the case of conflicting provisions in different statutes, the last in point of time prevails. Williams v. Hartford Accident & Indemnity Co., 382 So.2d 1216, 1220 (Fla. 1980); In re Sepe, 421 So.2d 27, 28 (Fla. 3d D.C.A. 1982). Because §768.28 and its amendments were enacted after §286.28(2), section 768.28 must prevail.

Additional support for Respondents' contention that the enactment of and amendments to §768.28 constitute an implied repeal of §286.28(2) arises from the numerous, significant disparities between the two statutes.

1. Section 286.28(2) does not apply to municipalities; §768.28 does.

2. Section 286.28(2) does not preclude liability of the governmental entity for officers, agents or employees of those governmental entities who act in bad faith or with malicious motive or in a manner exhibiting wanton,

willful disregard of human rights or safety; §768.28 does. §768.28(9)(a).

3. Section 286.28(2) does not restrict prejudgment interest; §768.28 does. §768.28(5).

4. Section 286.28(2) does not preclude punitive damages; §768.28 does. §768.28(5).

5. Section 286.28(2) does not preclude recovery of Court costs. This Court has construed the statutory cap found in §768.28(5) to include Court costs. City of Lake Worth v. Nicholas, 434 So.2d 315 (Fla. 1983); Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982).

6. Section 286.28(2) purports to provide for the waiver of immunity to the extent of insurance purchased; §768.28, does not. §768.28(5), (13).

The distinctions between the two statutes are significant and several. Section 768.28, being the more recent of the two statutes, therefore, must prevail.

There can be no question but that §768.28 conflicts with §286.28(2). Probably the most significant of these disparities is the fact that §286.28(2) does not apply to municipalities, while §768.28 does. In the situation in which a municipality is sued, all of the above-described disparities would come into play if §286.28(2) were to have continuing force and effect. Such a result (1) defeats "the philosophy of Florida's present Constitution that all local governmental entities be treated

equally" _Cauley v. City of Jacksonville_, _supra_, at 385; and (2) provides for the continued separate treatment of municipalities and the state, its agencies or political subdivisions in the area of sovereign immunity; a result which is in derogation of this Court's opinions in _Commercial Carrier Corp. v. Indian River County_, _supra_ and _Cauley v. City of Jacksonville_, _supra_.

Present sections §768.28(10) and (13) cannot be interpreted to allow for the continued existence of §286.28(2). If §286.28(2) continues in force and effect, it provides for disparate treatment of governmental entities in the area of sovereign immunity and contradicts the express legislative intent demonstrated by the repeal of original §768.28(10).

Based on the foregoing, Respondents request that this Court determine that §286.28(2) is impliedly repealed. Such a determination requires (1) a holding that the mere purchase of insurance does not provide for waiver of sovereign immunity to the extent of the limits of liability insurance purchased and (2) an affirmance of the instant opinion of the Fifth District Court of Appeal.

IV. WHETHER THE WRIT OF CERTIORARI FOR CONFLICT JURISDICTION WAS IMPROVIDENTLY GRANTED.

After reviewing the briefs on jurisdiction filed by Petitioner and Respondents, this Court determined that it had jurisdiction, grounded in conflict with other appellate decisions, to decide this petition on the merits. Respondents respectively submit that the Writ of Certiorari was improvidently granted.

A. The Board owed no common law duty to Petitioner.

In her brief in support of jurisdiction, Petitioner contends that the instant decision of the Fifth District Court of Appeal conflicts with the prior appellate decisions of Ingraham v. Dade County School Board, supra; City of Daytona Beach v. Palmer, 469 So.2d 121 (Fla. 1985); Trianon Park Condominium Association, Inc. v. City of Hialeah, supra; Department of Transportation v. Neilson, supra; Pickett v. City of Jacksonville, 20 So.2d 484 (Fla. 1945); Ide v. City of St. Cloud, 8 So.2d 924 (Fla. 1942) and Cruz v. Metropolitan Dade County, 350 So.2d 533 (Fla. 3d D.C.A. 1977). Petitioner's contention is unfounded.

Throughout her brief on jurisdiction and her brief on the merits, Petitioner relies on the decisions of Ide and Pickett to support the contention that the Board owed a common-law duty to the Petitioner. Petitioner's reliance upon Ide and Pickett, and her resultant contention, are erroneous.

Petitioner confuses the doctrine of municipal sovereign immunity with the sovereign immunity applicable to the state, its agencies and subdivisions, including counties, as these doctrines existed prior to the enactment of §768.28. The principles of law enunciated in both Ide and Pickett concern the doctrine of sovereign immunity as it applied to municipalities at the time of those decisions. There was, until the enactment of §768.28, no waiver of sovereign immunity for the state, its agencies and

subdivisions, including counties[11], even when the activity in question involved the ownership and maintenance of a swimming facility. Jackson v. Palm Beach County, 360 So.2d 1, 2-3 (Fla. 4th D.C.A. 1978), cert. denied, 364 So.2d 886 (Fla. 1978).

The distinction between the immunity applicable to counties and municipalities was recognized early in Florida decisional law.

> "While a county may, in some respects, resemble a municipality in that both organizations deal with public interests, their differences are so great that the cases discussing the latter's liability in damages for the negligent omission to perform a public duty are not analogous to those in which a liability is sought to be imposed upon a county. The one feature which sufficiently distinguishes them is that the counties are under the Constitution political divisions of the state, municipalities are not; the county, under our Constitution, being a mere governmental agency through which many of the functions and powers of the state are exercised....It therefore partakes of the immunity of the state from liability." Keggin v. Hillsborough County, 71 So. 372, 373 (Fla. 1916).

"A county is a political subdivision of the state." Id. at 372.

> "Counties, unlike municipalities, are organized as political subdivisions of the state and constitute a part of the machinery of the state government. Therefore,...they partake of the sovereign immunity from liability." Kaulakis v. Boyd, 138 So.2d 505, 507 (Fla. 1962).

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[11]The first statute generally waiving sovereign immunity in tort without regard to insurance appears to have been §768.15, Fla. Stat. (1969). This statute was initially repealed effective July 1, 1970 by Ch. 69-357, §1 Laws of Fla., and revived for causes of action accruing between July 1, 1969 and July 1, 1970 by §768.151, Fla. Stat. (1971).

Under the common law of England, a county could not be subject to a civil action for breach of its public duty. Keggin v. Hillsborough County, supra, at 373. "Upon principle and authority, therefore, an action [ex delicto] will not lie against the county in the absence of a statute expressly authorizing it." Id.

The people of the state of Florida vested the Legislature with the power to waive immunity at an early date. See Article IV, Section 19, Florida Constitution (1868) (now Article X, Section 13, Florida Constitution). However, the Florida Legislature chose not to exercise this authority until 1973 when it enacted §768.28. Until this enactment, "[c]ommon-law sovereign immunity for the state, its agencies and counties remained in full force." Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981).

Prior to the enactment of §768.28, the immunity of counties from suit was absolute. It made no difference whether the activity involved was classified as governmental or propriety; the immunity was unqualified. Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources, 339 So.2d 1113, 1115 (Fla. 1976); Collier v. Dade County, 417 So.2d 695, 696 (Fla. 3d D.C.A. 1982).

Prior to §768.28 the immunity of a county was fundamentally different from that of a municipality. While the state always enjoyed sovereign immunity with respect to the torts of its employees, municipalities did not enjoy this full derivative

immunity. Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources, supra, at 1115.

This Court first excepted certain municipal activities from the sovereign immunity rule in City of Tallahassee v. Fortune, 3 Fla. 19 (1850). The basis for this separate treatment for municipalities was that municipal corporations were the same as private corporations in some circumstances so that municipal activities could be bifurcated into governmental functions and proprietary or corporate functions. Cauley v. City of Jacksonville, supra, at 382. Subsequent decisions continued to erode municipal immunity by classifying increasing numbers of municipal functions as proprietary. However, this "governmental/proprietary distinction...has almost invariably been crucial only in the cases involving municipalities." Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources, supra, at 1115.

The distinction between the instant case and the decisions in Ide and Pickett is critical! Ide and Pickett involved the immunity applicable to municipalities prior to §768.28; the instant Petition involves the immunity of a county, a political subdivision of the state. Ide and Pickett, therefore, have no relevance to a determination of sovereign immunity when the entity in question is a county or other state agency. Moreover, because the rule of law applicable in the instant case differs from the rule of law applied in the decisions cited as creating conflict, there is a lack of jurisdictional conflict. Nielsen

v. City of Sarasota, 117 So.2d 731, 734-35 (Fla. 1960).

Ide and Pickett cannot and do not provide the basis for determining that the Board owed a common-law duty to the Petitioner herein. The sole basis for a determination of liability against the Board rests with the determination of whether its decisions were discretionary or operational. That determination, made by the trial court, and uncontested on appeal to the District Court, must stand. The District Court's assuming as correct, the determination that the alleged acts or omissions of the Board were discretionary, provides no conflict with this Court's decisions in Ide or Pickett.

Neither can it be said that the instant decision of the Fifth District Court of Appeal conflicts with Cruz v. Metropolitan Dade County, supra. In holding that "no duty existed to supervise swimming in a portion of the bay which was not designated as a public swimming area" id. at 534, the Third District Court of Appeal did not imply that a duty might exist had the injury occurred in a portion of the bay designated as a public swimming area. Rather, the Court relied upon Waite v. Dade County, 74 So.2d 681 (Fla. 1954), which it cited for the contention that the county's failure to perform a function concerned activities performed by the county in its governmental capacity for which the county, as a political subdivision of the State of Florida, is immune. Cruz supports Respondents' contention that, prior to the enactment of §768.28, counties, as political subdivisions of

the state, were immune from suit. Cruz v. Metropolitan Dade County, supra, at 534, n.1.

B. There is no decision by the Fifth District Court of Appeal with which to find conflict.

The District Court never determined, concluded or stated a belief that the decision not to provide lifeguards or other supervisory personnel was a discretionary, planning-level decision immune from tort liability. The District Court never even addressed that issue. Rather, it accepted as correct, as it is bound to do,[12] the trial court's uncontested ruling that the decision not to provide supervisory personnel was a discretionary, planning-level decision (A-25).

Petitioner acted at her own peril in failing to appeal or otherwise contest the trial court ruling that she argues provides the basis for conflict jurisdiction. Because the issue now contested was considered only by the trial court and not raised before the district court, there is no decision by the district court with which to find conflict. Winn-Dixie Stores, Inc. v. Goodman, 276 So.2d 465, 466 (Fla. 1972)

As in the instant case, the petitioner, Winn-Dixie, raised an issue in the trial court which was not raised on appeal to the district court. That issue, the failure to join an indispensable party, was decided adversely to Winn-Dixie at the

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[12]"In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979).

trial court level. Despite that ruling, the trial court found for Winn-Dixie, which finding was appealed by Goodman. In that appeal, Winn-Dixie, the appellee, failed to raise the issue of failure to join an indispensable party on cross-appeal or otherwise. When Winn-Dixie attempted to invoke conflict jurisdiction based on the issue of failure to join an indispensable party, this Court stated --

> "There is no decision by the district court of appeal as to joinder of indispensable parties with which to find conflict....This court is without jurisdiction under the Florida Constitution to consider the merits of the cause." Id. at 466.

Petitioner, in the instant case, failed to contest, both in her appeal and response to the Cross-Appeal, the trial court's finding that the decision of the Respondent Board was discretionary and not subject to tort liability.

The instant District Court decision never addressed or announced a rule of law relating to the operation of a swimming facility or to the discretionary nature of the Board's decision to provide supervision. The only decision made by the District Court was that the purchase of insurance does nothing to alter the absolute immunity which attaches to discretionary, planning-level activities of governmental entities. That decision does not conflict with any of the decisions cited by Petitioner.

C. The district court did not misapply precedent so as to create conflict jurisdiction.

The instant decision does not misapply the precedents set forth in Ingraham v. Dade County School Board, 450 So.2d 847

(Fla. 1984), Department of Transportation v. Neilson, 419 So.2d 1071 (1982), City of Daytona Beach v. Palmer, 10 F.L.W. 189 (Fla. April 4, 1985) or Trianon Park Condominium Association, Inc. v. City of Hialeah, 10 F.L.W. 210 (Fla. April 4, 1985). In each of those decisions, this Court recognized the continuing vitality of absolute sovereign immunity for judgmental, governmental functions. The instant trial court decision, accepted as correct by the District Court, comports with this Court's decisions in Ingraham, Neilson, City of Daytona Beach v. Palmer and Trianon.

The district court stated that §286.28, Florida Statutes (1983) "remains in effect as part of the overall scheme of the Legislature relating to the waiver of sovereign immunity." (A-25, 26). Based on the trial court's uncontested ruling that the decision whether or not to provide lifeguards was a discretionary, planning-level decision, the district court properly applied "sovereign immunity theories" and concluded that "nothing in §286.28...overcomes or alters the absolute immunity which attaches to 'planning-level' activities of government." A-26. The apparent basis for this proper conclusion is that §286.28 cannot provide for a greater waiver than §768.28, the statute which incorporates it.

This conclusion neither conflicts with nor misapplies the precedent set forth in the decisions of City of Daytona Beach v. Palmer, Trianon, Neilson or Ingraham. Rather, it comports with those decisions by allowing for the continued, absolute

immunity for discretionary, planning-level activities of government.

Based on the foregoing arguments, Respondents respectfully submit that (1) the instant decision does not directly and expressly conflict with any decision cited by Petitioner; and (2) this Court improperly granted certiorari jurisdiction to determine the merits of this cause.

CONCLUSION

Based upon the foregoing reasons and citations of authority, Respondents respectfully urge this Honorable Court to affirm the Fifth District Court of Appeal's decision that the purchase of insurance does nothing to alter the absolute immunity which attaches to discretionary, planning-level activities of government, thereby affirming the final summary judgment in Respondents' favor, albeit for different reasons.

Alternatively, Respondents respectively urge this Honorable Court to discharge the Writ of Certiorari as being improvidently granted and thereby leave intact the opinion of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of Respondents' Answer Brief on the Merits has been served by mail, this 6th day of December, 1985, upon:

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Daniel A. Amat

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