

SUPREME COURT OF FLORIDA

JOSEPH J. JOZWIAK,

Petitioner,

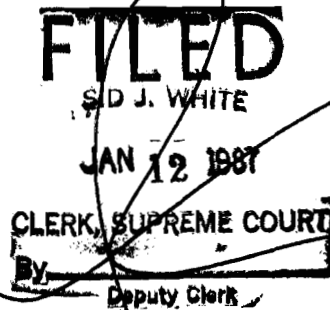
VS.

CASE NO. 69,745

ROBERT LEONARD, as Sheriff  
of Suwannee County, and  
SUWANNEE COUNTY, FLORIDA, a  
political subdivision of the  
State of Florida,

Respondents.

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PETITIONER'S BRIEF ON MERITS

MICHAEL H. LAMBERT, P.A.  
Tanner and Lambert  
630 North Wild Olive Avenue  
Suite A  
Daytona Beach, Florida 32018

Attorney for the Petitioner

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CITATION OF AUTHORITY

(CASES CITED)

<u>Avallone v. Board of County Commissioners of</u> <u>Citrus County, _____ So.2d _____ (Fla. 1986),</u> <u>Opinion filed July 10, 1986 {11 FLW 312}</u> . . . . .	3,5
<u>Burkett v. Calhoun County, 441 So.2d 1108 (Fla.</u> <u>1st DCA 1983)</u> . . . . .	3,4,6
<u>Ingraham v. Dade County School Board, 450 So.2d</u> <u>847 (Fla. 1984)</u> . . . . .	5,7
<u>Mrowczynski v. Vizenthal, 445 So.2d 1099 (Fla.</u> <u>4th DCA 1984)</u> . . . . .	4,6

(OTHER AUTHORITIES)

Florida Statute Section 30.55 . . . . .	3,4,6,7,8,9
Florida Statute Section 286.28 . . . . .	3,4,5,6,7,8
Florida Statutes Section 768.28(6) . . . . .	3,4,5,6,7,8,9
Florida Statute Section 455.06 . . . . .	4,5,7

STATEMENT OF FACTS AND CASE

Jozwiak sued Robert Leonard as Sheriff of Suwannee County and Suwannee County as his employer for false arrest and false imprisonment. The claim against Suwannee County was dismissed because Robert Leonard as Sheriff of Suwannee County is a separate, wholly independent, constitutional officer. The complaint against Leonard was dismissed because the Plaintiff failed to comply with the notice requirements of Chapter 768, Florida Statute Section 768.28(6). Jozwiak's appeal in the First District on November 13, 1986 affirmed the Trial Court's dismissal but certified the issue presented to this Court.

## SUMMARY OF ARGUMENT

When a Sheriff has purchased liability insurance for claims growing out of the performance of his duties pursuant to Florida Statute Section 30.55, the Sheriff waives the benefit defense of governmental immunity. The waiver of the benefit defense of governmental immunity includes the notice requirements as a condition precedent to the institution of litigation contained in Florida Statute Section 768.28(6).

## ARGUMENT

Florida Statute Section 30.55 has its origin in 1961 and remains identical today. In consideration for the payment of premiums for liability insurance for claims growing out of the performance of the duties of the Sheriff or his Deputies, e.g. False Arrest, False Imprisonment, a Sheriff waives the benefit defense of governmental immunity.

As a result of the purchase of liability insurance by the Sheriff for claims under the performance of his duties or his deputies, a Sheriff (LEONARD) has completely, totally, and without exception waived all the benefit defenses of governmental immunity.

The question certified by the First District in the case sub judice is, does the Supreme Court's holding in Avallone v. Board of County Commissioners of Citrus County, \_\_\_\_\_ So.2d \_\_\_\_ (Fla. 1986), Opinion filed July 10, 1986 {11 FLW 312}, that the purchase of liability insurance pursuant to Florida Statute Section 286.28 constitutes a waiver of sovereign immunity up to the limits of insurance coverage negate the necessity of the plaintiff to comply with the notice provisions of Florida Statutes Section 768.28(6) found by that Court in Burkett v. Calhoun County, 441 So.2d 1108 (Fla. 1st DCA 1983)?

Probably unintentionally the question certified by the First District contains two questions. The first of which deals

with the purchase of liability insurance by a governmental entity or subdivision pursuant Florida Statute Section 286.28, the second, the purchase of liability insurance by a Sheriff pursuant to Florida Statute 30.55. The difference in the two statutes may not, at first glance, appear, yet there are some subtle, very distinct dissimilarities that merit notation.

Section 286.28 does constitute a waiver of sovereign immunity up to the limits of the insurance coverage, whereas the waiver of immunity by a Sheriff under Section 30.55 annihilates "the benefit defense of government immunity in any suit resulting against the Sheriff, his Deputies or employees..." Though the question certified to this Court is technically bifurcated because the case sub judice deals with Section 30.55 and the question certified deals with Section 286.28 and the plain statutory language of each exhibit differences, the issue certified should be addressed and answered uniformly as it pertains to the issue of notice requirements under Section 768,28.

Though Mrowczynski v. Vizenthal, 445 So.2d 1099 (Fla. 4th DCA 1984) and Burkett v. Calhoun County held that there was a mandatory requirement of compliance with the notice provision under Section 768.28(6) prior to the institution of litigation against a State entity, neither case dealt with Section 30.55.

Both Section 30.55 and Section 286.28, its predecessor, Florida Statute Section 455.06 preexisted the limited waiver of liability enacted by the Florida Legislature in

1973. Prior to the creation of Section 768.28 all State agencies enjoyed governmental immunity for tortious acts unless they had purchased liability insurance to cover those acts. In establishing Section 768.28, the Florida Legislature acknowledged the fact that there were various statutes in existence waiving governmental immunity under certain circumstances. Section 768.28(10) states "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."

In Ingraham v. Dade County School Board, 450 So.2d 847 (Fla. 1984) this Court held that the twenty-five percent attorney's fee limitation provision of Section 768.28(8) "is the only portion of this unitary concept which deals with attorney's fees, its provisions govern a situation as in this case, where a State agency purchases supplemental and discretionary insurance." (Pg 849) Therefore, the mere fact that insurance has been purchased pursuant to the provisions of Section 455.06 or its predecessor Section 286.28, "the twenty-five percent limitation on attorney's fees relates to any judgment or settlement and therefore applies to all situations involving waiver of immunity regardless of the source of payment." (Pg 849)

In Avallone, this Court held that contingent waivers of sovereign immunity are "independent of the general waiver of immunity in Section 768.28." (Pg 313) The often abused, confused, misused distinction produced by the



contortionistic legal gymnastics distinction between a functional, operational, or discretionary act to determine liability by a governmental agency was held not to exist where insurance coverage has been provided under Section 286.28.

The notice provisions of Section 768.28(6)(a), require that a claim be presented in writing within three years after the claim accrued to the Department of Insurance and the agency, subdivision, etc., involved. This condition precedent to the institution of a law suit against a governmental agency is for the purpose of allowing the Department of Insurance, as well as the appropriate agency, time to investigate a claim that has been made against them prior to litigation. However, where independent insurance has been secured, how is the purpose behind notice to the Department of Insurance or the particular agency being serviced? As with any other individual who is protected by insurance for tortious acts, this Sheriff received his notice once litigation was instituted. If we allow independent outside insurance to be secured by governmental agencies and then afford unto these insurance companies the immunity given to the government, are we not creating governmental immunity in the private sector?

A close reading of Burkett and Mrowczynski show our Appellate Courts trying to limit liability, that was otherwise unlimited prior to the existence of Section 768.28. The limited waiver of liability created under Section 768.28 does not now limit what was before a complete waiver of liability under Section 30.55 and

Section 455.06, currently Section 286.28.

Prior to the existence of the limited waiver of liability under Section 768.28 what notice had to be provided to insurance carriers who provided coverage under Section 455.06 or Section 30.55? None. To now attempt to say that we have unleashed some of our governmental immunity and permit the institution of litigation against governmental agencies, and yet litigation be restricted by notice requirements, completely flies in the face of what previously existed to the creation of Section 768.28. Had the Legislature intended to obliterate those sections which completely vitiate governmental immunity, they could have very easily done so; however, it enacted subsection 10 of Section 768.28 acknowledging the existence of those other provisions. Section 30.55 and Section 286.28 did not become limited or restricted by the creation of Section 768.28.

Again to distinguish between now Section 286.28 and Section 30.55, Section 286.28 limits the waiver of immunity up to the insurance coverage provided; however, Section 30.55 contains no such provision, but does do away with the "benefit defense of governmental immunity."

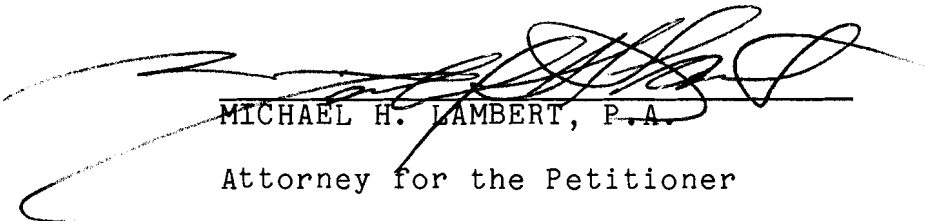
The notice requirement under Section 768.28(6) should apply to any litigation instituted against a governmental agency, subdivision, etc., except where there is another statute in existence that deals with that agency or that agency's waiver of immunity. This appears to have been answered in Ingraham where the only statute addressing attorney's fees

in cases against the government or its agencies was Section 768.28(8), and that fee was limited to 25 percent despite the purchase of supplemental and discretionary insurance. This is a clear illustration of the coexistence and unitary concept among these various statutes. Section 30.55 nor Section 286.28 create any right to a greater fee; however, each of those sections does create a greater waiver of immunity than that under Section 768.28.

CONCLUSION

The purchase of liability insurance by Sheriff Leonard under Section 30.55 constitute a complete waiver of the benefit defense of governmental immunity. The notice provisions of Section 768.28(6) pertain strictly to the limited waiver of sovereign immunity under that statute. A complete waiver of the defense of governmental immunity waives notice.

Respectfully Submitted,

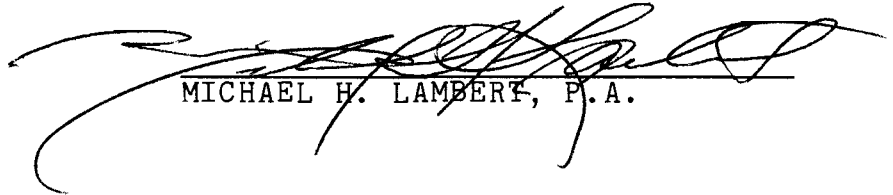


MICHAEL H. LAMBERT, P.A.

Attorney for the Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Mr. Julius F. Parker, Jr., Esquire, Forum Building, 318 North Monroe Street, Tallahassee, Florida 32302 this 9th day of January, A.D., 1987.

  
MICHAEL H. LAMBERT, P.A.