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IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,549

THIRD DISTRICT - CASE NO. 85-2796

FLETCHER SLEMP and
DORA SLEMP,

Petitioners,

vs.

CITY OF NORTH MIAMI,

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

BRIEF OF PETITIONERS

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INTRODUCTION

The Petitioners in their Brief shall refer to the parties as they stood in the trial court below. Therefore, the Petitioners, FLETCHER SLEMP and DORA SLEMP, shall be referred to as the "Appellants" or "SLEMPS"; and the Respondent, CITY OF NORTH MIAMI, shall be referred to as the "Appellee" or "CITY". Reference to the record on appeal from the trial court shall be indicated by the letter "R" followed by the pagination given to said record by the Clerk of the Circuit Court of Appeal. Reference to the Appendix shall be indicated by the letter "A".

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STATEMENT OF CASE AND FACTS

A Complaint was filed on March 26, 1984, alleging flood damage due to the CITY'S negligent maintenance of their drainage pumps (R. 1-8). The CITY denied essentially all of the allegations of the Complaint and asserted an Affirmative Defense of sovereign immunity as well as other defenses which are not at issue (R. 12-15). An Amended Complaint was filed on December 21, 1984, which merely changed the date of the flooding (R. 31-37). The Answer and the Affirmative Defenses to the Amended Complaint again raised the issue of sovereign immunity as well as the other defenses which are not in issue (R. 48-51). On October 4, 1985, the CITY filed its Motion for Summary Judgment (R. 70-76). The trial Court addressed the issues of sovereign immunity, proximate cause and notice. The court denied the motion as to proximate cause and notice and granted the Defendants's Motion for Summary Judgment on the issue of sovereign immunity. The court also invited judicial review of these issues (R. 89). The only issue that the SLEMPS raised in their appeal to the District Court of Appeal, Third District was that of sovereign immunity. The issue, then, as raised by the pleadings is whether the CITY, once they have taken on the responsibility of controlling rainwater with a sewer system (including a pumping station), owed a duty to the residents of those areas controlled by the CITY to use reasonable care in the maintenance of those pumps.

An appeal was timely taken to the District Court of Appeal, Third District, on December 11, 1985 (R. 88). The Third District rendered its Opinion reversing the trial court's summary judgment (A. 1-3). The CITY filed a Motion for Re-Hearing en Banc which was granted on November 10, 1987 (A. 4-9). The Third District en banc reversed the original panel's Opinion and affirmed the Summary Judgment against the SLEMPS. The Third District en banc Opinion certified this case to be of great public importance (A. 10-19). On December 4, 1987 a timely Notice of Appeal was filed.

SUMMARY OF ARGUMENT

The ownership and/or control of property by the CITY is not unique to a governmental entity. Therefore, the CITY has the same liability as an individual for the negligent maintenance of its property which results in harm to the Plaintiff. Under these circumstances the CITY'S traditional sovereign immunity has been waived by §768.28, Fla. Stat. (1975).

The trial court erred when it held that § 768.28, Fla. Stat. (1975) does not waive sovereign immunity under the foregoing circumstances.

ARGUMENT

POINT I

THE CITY IS NOT IMMUNE FROM SUIT FOR DAMAGES CAUSED BY THE CITY'S FAILURE TO MAINTAIN ITS STORM SEWER PUMPS.

In the case at bar, the CITY controls the storm sewer system and it is alleged that it negligently failed to maintain the drainage pumps causing flooding and damage to the SLEMPS' property (R. 1-8). Once the CITY builds or accepts the dedication of the storm sewer system and then controls that system with its pumps, it engages in activities that are not unique to a governmental body i. e., ownership and control of property. The ownership or control of a storm sewer is a proprietary or corporate as opposed to governmental function. Bray v. City of Winter Garden, 40 So.2d 459 (Fla. 1949); City of Tallahassee v. Elliott, 326 So.2d 256 (Fla. 1st DCA 1975); Mavernia Inv. Co. v. City of Trinidad, 123 Colo. 394, 229 P.2d 945 (1951); Green v. Town of West Springsfield, 323 Mass. 335, 81 N.E. 2d 819 (1948); Clay v. City of Jersey City, 84 N.J. Superior 9, 200 A. 2d 787 (App. Div. 1964); State of New Mexico ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961); Doud v. City of Cincinnati, 152 Ohio St. 132, 87 N.E. 2d 243 (1949); Oklahoma City v. Romano, 433 P.2d 924 (Okla. 1967); Rotella v. McGovern, 109 R.I. 529, 288 A.2d 258 (1972); Fuller v.

City of Rutland, 122 Vt. 284, 171 A.2d 58 (1961); Sigurdson v. City of Seattle, 48 Wash. 2d 155, 292 P.2d 214 (1956); and 59 ALR 2d 281.

Florida Statute § 768.28 waives the CITY'S sovereign immunity as to liability for common law torts. Thus, the CITY is liable for damages caused by its negligent ownership or control of property where the same negligent ownership and control would subject an individual to liability. Trianon Park Condominium v. City of Hialeah, 468 So.2d 912 (Fla. 1985) and Avallone v. Board of County Commissioners of Citrus County, 493 So.2d 1002 (Fla. 1986). Therefore, the trial court's entry of summary judgment on its finding of sovereign immunity as to this same activity i.e., negligent ownership or control of the sewer system, and the District Court's en banc Opinion affirming the judgment was error. The SLEMPS respectfully request that this Court quash the en banc Opinion of the Third District, reverse the Summary Judgment of the trial court and remand the case for trial.

The trial court in the case at bar has invited judicial review as a result of the confusion that has been caused by recent decisions in the area of sovereign immunity. The Third District certified the issue raised by this appeal to be of great public importance.

This Court's decision in Trianon Park Condominium v. City of Hialeah, 468 So.2d 912 (Fla. 1985), made it abundantly

clear that § 768.28, Fla. Stat. (1975) (Waiver of Sovereign Immunity Statute) did not enlarge the liability of governmental bodies but merely waived sovereign immunity as to those situations where there would be liability had the acts or omissions of the government been that of an individual. The Court found that there were certain functions or activities of a governmental body that are never performed by an individual and, thus, the statute does not waive sovereign immunity as to these functions or activities. In this regard, the Court divided governmental functions and activities into four (4) catagories: (1) "Legislative, Permitting, Licensing and Executive Officer Functions"; (2) "Enforcement of Laws and Protection of the Public Safety"; (3) "Capital Improvement and Property Control Operations"; and (4) "Providing Professional Education and General Services for the Health and Welfare of the Citizens". The Court held that the first two catagories are never performed by individuals and the government is immune from liability for injury that results from its act or omission with regard to these functions and activities. However, the Court also held that the last two catagories are functions or activities that are common to individuals and, thus, subject to government body to liability if its conduct is operational as opposed to being on the planning level. The Court specifically found that a governmental body has the same common law duty as a private person to properly maintain

and operate its property. The Court stated at Page 920-921:

> "As this court has made clear in prior case, there is no liability for the failure of a governmental entity to build, expand, or modernize capital improvements such as buildings and roads. [citations omitted] A governmental entity's decision not to build or modernize a particular improvement is a discretionary judgmental function with which we have held the court can not interfere. [citations omitted] On the other hand, once a governmental entity builds or takes control of property or an improvement, it has the same common law duty as a private person to properly maintain and operate the property. See Commercial Carrier (maintenance of traffic control devices); Department of Transportation v. Webb, 438 So.2d 780 (Fla. 1983) (maintenance of railroad crossings); Hodges v. City of Winter Park, 433 So.2d 1257 (Fla. 5th DCA 1983), review denied 444 So.2d 416 (Fla. 1984) (maintenance of roads); The Town of Belleair v. Taylor, 425 So.2d 669 (Fla. 2nd DCA 1983) (maintenance of foliage on median); City of Tallahassee v. Elliott, 326 So.2d 256 (Fla. 1st DCA 1975), cert. denied 344 So.2d 324 (Fla. 1977) (maintenance of drainage system)."

The CITY in the case at bar owned and controlled the streets and storm drainage system. It was the CITY'S pump that failed to work and allowed the CITY'S streets to overflow and to funnel rainwater onto the SLEMPS' property. The CITY has not appealed the trial court's ruling that there was a jury issue as to whether the CITY'S negligent maintenance of its pump was the proximate cause of the flooding. Therefore, the CITY has admitted, for the purposes of this appeal, that the flooding was the result of the CITY'S negligent maintenance of its drainage pumps.

The law concerning drainage systems was well settled even before the decision in Trianon Park. The operation of a drainage system has always been a corporate or proprietary function for which cities have never been immune from suit. City of Bray v. City of Winter Garden, 40 So.2d 459 (Fla. 1949); City of Tallahassee v. Elliott, 326 So.2d 256 (Fla. 1st DCA 1975) (involving maintenance of a drainage system and cited by Trianon Park as an example of capital improvement and property control functions for which a city is not immune from suit). City of Bray v. City of Winter Garden, 40 So.2d 459 (Fla. 1949); City of Tallahassee v. Elliott, 326 So.2d 256 (Fla. 1st DCA 1975); Mavernia Inv. Co. v. City of Trinidad, 123 Colo. 394, 229 P.2d 945 (1951); Green v. Town of West Springsfield, 323 Mass. 335, 81 N.E. 2d 819 (1948); Clay v. City of Jersey City, 84 N.J. Superior 9, 200 A. 2d 787 (App. Div. 1964); State of New Mexico ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961); Doud v. City of Cincinnati, 152 Ohio St. 132, 87 N.E. 2d 243 (1949); Oklahoma City v. Romano, 433 P.2d 924 (Okla. 1967); Rotella v. McGovern, 109 R.I. 529, 288 A.2d 258 (1972); Fuller v. City of Rutland, 122 Vt. 284, 171 A.2d 58 (1961); Sigurdson v. City of Seattle, 48 Wash. 2d 155, 292 P.2d 214 (1956); and 59 ALR 2d 281.

When a suit against a governmental body involves the ownership or control of property as in the present appeal, the

only issue for the trial court to decide is whether or not the acts or omissions are on the operational level or on the planning level. If the negligent maintenance of the pumps involved discretionary planning level activity, then the CITY was immune from suit.

There are numerous cases that have held that the maintenance of property or equipment owned by governmental bodies involves operational level acts or omissions. In Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), the Court found that the failure to maintain traffic control devices is operational conduct and negligent maintenance of these devices will subject the governmental entity to tort liability. The Court in Hardie v. City of Gainesville, 10 Fla. Law Weekly 2472, 11/8/85 (1st DCA No. BD-118 Opinion filed 11/5/85), found that the City's control of power lines was operational and therefore the City was liable for the negligent maintenance of those lines. In City of Tallahassee v. Elliott, 326 So.2d 256 (Fla. 1st DCA 1975), cert. denied 344 So.2d 324 (Fla. 1977), the Court found that the maintenance of the drainage system was conduct that is operational.

There does not appear to be any question that a City will be liable for an automobile accident caused by negligent maintenance of a traffic control device where the device fails to control the flow of traffic. In such cases it is not the traffic

control device that physically causes the accident. There is essentially no difference between a traffic control device that controls the flow of traffic and a drainage pump that controls the flow of water. The City's streets funnel traffic through traffic control devices in the same manner that the City's streets funnel rainwater to the lowest point in the roadway and then into the sewer system and the pumping station. Storm sewers and streets go hand-in-hand. There would be no need for storm sewers if the streets did not trap the water. Streets naturally prevent percolation of rainwater into the ground and funnel the water to the lowest level of the street. Contractors, architects and engineers recognize that the construction of roads changes the natural course of water and therefore construct storm sewers to prevent the flooding that is caused by the entrapment of water by the streets.

In the instant case, the flooding of the SLEMPS' property was not merely the result of a heavy rainfall. The flooding came from the CITY'S streets which trapped and funnelled the water to its lowest point in front of the SLEMPS' property. The CITY'S sewer system then failed to take away the accumulation of water created by the CITY'S streets. While, in a sense, it was the CITY'S streets that created the condition for flooding, it was the pumping portion of the system that failed to prevent the known danger of flooding. Clearly, the CITY knew that its

streets had the potential to cause flooding, otherwise they would not have invested in a pumping system to prevent such occurrence.

While a City has no obligation to engage in activities concerning the health and welfare of its citizens or to make capital improvements, once they become involved in these functions they owe a duty to their citizens to do it carefully. Trianon Park Condominium Assn., Inc. v. City of Hialeah, Supra.

Likewise, where a City engages in the operation of controlling rainwater, it has a common law duty to do so in a non-negligent manner. A governmental body will be liable for flooding where the flooding would not have occurred had it properly maintained its storm sewer system. City of Tucson v. Apache, 74 Ariz. 98, 245 P.2d 255 (1952); Mavernia Inv. Co. v. City of Trinidad, 123 Colo. 394, 229 P.2d 945 (1951); Scholbrock v. City of New Hampton, 368 N.W. 2d 195 (Iowa 1985); Kidson v. City of Bangor, 99 Me. 139, 58 A.900 (1904); Green v. Town of West Springsfield, 323 Mass. 335, 81 N.E. 2d 819 (1948); Clay v. City of Jersey City, 84 N.J. Superior 9, 200 A. 2d 787 (App. Div. 1964); State of New Mexico ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961); Doud v. City of Cincinnati, 152 Ohio St. 132, 87 N.E. 2d 243 (1949); Oklahoma City v. Romano, 433 P.2d 924 (Okla. 1967); Strauch v. City of Scranton, 353 Pa. 10, 44 A.2d 258 (1945); Rotella v. McGovern, 109 R.I. 529, 288 A.2d 258 (1972); Fuller v. City of Rutland, 122

Vt. 284, 171 A.2d 58 (1961); Sigurdson v. City of Seattle, 48 Wash. 2d 155, 292 P.2d 214 (1956).

CONCLUSION

BASED upon the cases, authorities and statutes cited herein, the Petitioners/Appellants, FLETCHER SLEMP and DORA SLEMP, request that this Honorable Court quash the Opinion of the District Court of Appeal, Third District, reverse the Trial Court's summary judgment and remand this case for trial.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONERS was mailed on this 4TH day of JANUARY, 1988, to:

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