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Abstract

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KEYWORDS: Jacksonville, statute, municipality

Constitutionality of Florida's Statute Limiting Tort Recovery Against a Municipality: *Cauley v. City of Jacksonville*

In *Cauley v. City of Jacksonville*[1] the Supreme Court of Florida recently faced a constitutional challenge to monetary limitations placed on tort recovery against a municipality. In its July, 1981, decision the court held Florida Statute Section 768.28(5),[2] which imposed those limitations, constitutionally valid.

In order to appreciate the impact of the *Cauley* decision, it must be reviewed in historical perspective. This comment sets forth that perspective by considering the origin of "sovereign immunity" and furnishing an overview of the case-made tests used to determine when immunity attached to insulate municipalities from liability. Lastly, the statute's provisions and *Commercial Carrier Corp. v. Indian River County*[3] will be examined, providing a context in which *Cauley* can be evaluated.

Sovereign Immunity

Sovereign immunity was based on the premise that the king could do no wrong.[4] Since the king was the supreme power, there could be neither jurisdiction over him nor redress against him. Rather than acknowledging a wrong without a remedy, the king was viewed as infallible and the doctrine of immunity was created.[5] This legal fiction was

1. 403 So. 2d 379 (Fla. 1981).

2. FLA. STAT. § 768.28(5) (1977) (this provision of the statute remains unchanged however the limits of recovery have been altered by ch. 81-317, 1981 Fla. Laws 1488).

3. 371 So. 2d 1010 (Fla. 1979).

4. 1 W. BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 236 (reprinted 1966).

5. *Id.*

later applied in the American states[6] based on "the idea that whatever the state does must be lawful. . . ."[7] Thus, absent its consent, a state could not be sued in tort.[8]

Municipalities, as subdivisions of the state, have also been afforded tort immunity for certain functions.[9] Identifying those functions was often a difficult task. Over time different tests have been employed to help make the determination. However, courts have experienced considerable difficulty and confusion when applying these tests.[10]

Case Development of Municipal Immunity

When the first test for municipal immunity was created, the major issue was the distinction between governmental and proprietary functions of a municipality. If the function was purely "governmental," immunity attached; a function that was "proprietary," "municipal" or "corporate" was not protected.[11] The question then became, how to identify into which category a function fell.

In 1931, in *Chardkoff Junk Co. v. City of Tampa*[12] the city was held liable for negligent operation of its incinerator. The Supreme Court of Florida discussed the distinction between governmental and proprietary functions. The court adopted the view that "[g]overnmental functions are those conferred on or imposed upon the municipality as the local agency of limited and prescribed jurisdiction, to be employed in administering the affairs of the state, and promoting the public welfare generally."[13] The court used the term "municipal functions" in-

6. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 975 (4th ed. 1971).
7. *Id.*
8. *Id.*
9. *Id.* at 977.
10. Budetti & Knight, *The Latest Event in the Confused History of Municipal Tort Liability*, 6 FLA. ST. L. REV. 927 (1978); Seligman & Beals, *The Sovereignty of Florida Municipalities: In-Again, Out-Again, When-Again*, 50 FLA. B.J. 338 (1976).
11. *See* Wood v. City of Palatka, 63 So. 2d 636 (1953); City of Tampa v. Easton, 145 Fla. 188, 198 So. 753 (1940); Chardkoff Junk Co. v. City of Tampa, 102 Fla. 501, 135 So. 457 (1931); Bryan v. City of West Palm Beach, 75 Fla. 19, 77 So. 627 (1918).
12. 102 Fla. 501, 135 So. 457 (1931).
13. *Id.* at 505, 135 So. at 459.

stead of "proprietary functions" or "corporate functions;" these terms were interchangeable.[14] It defined municipal functions as those "which specifically and particularly promote the comfort, convenience, safety and happiness of the citizens of the municipality . . . . Under this class of functions are included, in most jurisdictions, the *proper care of streets* and alleys . . . and [other] improvements generally."[15]

It appears the Florida Supreme Court has held consistently that street maintenance was a city duty, and has viewed it as a proprietary function.[16] Therefore, the city traditionally lacked tort immunity in this area. However, the line between governmental and municipal functions was not always so easily drawn. In *City of Tampa v. Easton,*[17] the court recognized that "[w]hat are governmental functions and what are corporate authority on duties of a municipality are not comprehensively defined in the law but are to be determined in each case upon a judicial interpretation and application of appropriate provisions or principles of law to the facts legally shown or omitted [sic] . . . ."[18] The results which have followed were often inconsistent and confusing.[19]

In 1957, after lower courts had wrestled with the "governmental-

14. *See, e.g.,* cases cited in note 11 *supra.*

15. 102 Fla. at 506, 135 So. at 459 (emphasis added).

16. City of Miami Beach v. Quinn, 149 Fla. 326, 5 So. 2d 593 (1942); City of Tampa v. Easton, 145 Fla. 188, 198 So. 753 (1940); Chardkoff Junk Co. v. City of Tampa, 102 Fla. 501, 135 So. 457 (1931); Bryan v. City of West Palm Beach, 75 Fla. 19, 77 So. 627 (1918); Keggin v. County of Hillsborough, 71 Fla. 356, 71 So. 372 (1916).

17. 145 Fla. 188, 198 So. 753 (1940).

18. *Id.* at 192, 198 So. at 755.

19. *See generally* authorities cited in note 10 *supra* and Avery v. City of West Palm Beach, 152 Fla. 717, 12 So. 2d 881 (1943). The city usually was held liable for failure to properly maintain the streets or give warning of a dangerous condition in the road. In *City of Tampa v. Easton,* the city was liable for injuries resulting from a collision between an automobile and a city owned truck. The court found the city responsible for keeping the streets safe for traffic as well as keeping the surface of the street in a safe condition. Since the city gave the truck driver consent to operate his vehicle, the city was liable for the negligent injuries caused by the driver; however, in *Avery v. City of West Palm Beach,* the Supreme Court of Florida affirmed a trial court's holding that maintenance of traffic signals was a governmental function and, therefore, immunity attached to the city. The court was unwilling to expand municipal liability for failure to keep the streets safe to include failure to maintain traffic signals.

See also Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132-33 (Fla. 1957).

proprietary" distinction, the Florida Supreme Court cast aside that theory and held municipalities could be liable for their employee's torts under the doctrine of *respondeat superior*.[20] *Hargrove v. Town of Cocoa Beach*[21] represents the court's attempt to clarify the confusion resulting from the earlier decisions. In *Hargrove* a municipal corporation was sued on the basis of a wrongful death claim. The plaintiff alleged the city was negligent because her husband, left unattended in a locked jail cell, died of smoke inhalation. The court ultimately found the city liable and recognized that up to this point the status of immunity was confusing to Florida courts because of "an effort to prune and pare the rule of immunity rather than to uproot it bodily and lay it aside . . . . This pruning approach ha[d] produced numerous strange and incongruous results."[22] Reasoning that the "modern city [is] in substantial measure a large business institution . . . [t]o continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism."[23]

The court in *Hargrove* expanded the municipality's liability by holding it liable for the torts of its policemen under the doctrine of *respondeat superior*. "[W]hen an individual suffers a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress for the wrong done."[24] The court expressly receded from its prior decisions immunizing municipalities from liability for torts committed by police officers acting within the scope of their employment.[25] However, immunity was expressly preserved for the municipality when acting in a legislative, judicial, quasi-legislative or quasi-judicial capacity.[26]

Hargrove was restricted by *Modlin v. City of Miami Beach*,[27] the next Florida Supreme Court decision to greatly impact on the munici-

20. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).
21. *Id.*
22. *Id.* at 132, 133.
23. *Id.* at 133.
24. *Id.* (footnote omitted).
25. *Id.*
26. *Id.*
27. 201 So. 2d 70 (Fla. 1967).

pal immunity issue. In *Modlin,* plaintiff's decedent was crushed to death when portions of a store mezzanine fell on her. Plaintiff brought a wrongful death action, alleging a city building code inspector negligently inspected the building during its construction. The court viewed the inspection as enforcement of the building code and, therefore, found it an "executive" function.

Since *Hargrove* had specifically reserved immunity only for judicial, legislative, quasi-judicial and quasi-legislative functions, the one remaining area of potential liability was for executive functions.[28] Adhering to the dictates of *Hargrove,* the *Modlin* court reasoned "that if the respondent city [was] to escape liability, it [would] have [had] to [do so] other than by the path of municipal immunity."[29]

The *Modlin* court was creative in acknowledging an alternative route for evading liability. *Hargrove* had held only that a city was liable for the torts of its employees under the doctrine of *respondeat superior,* but did not furnish a dispositive guide to determining conditions under which possible tort liability became absolute. While recognizing that actionable negligence must present some breach of a duty owed, the *Modlin* court also found "a doctrine of respectable lineage and compelling logic that holds that this duty must be *something more than the duty that a public officer owes to the public generally.*"[30] Armed with that principle, the court proceeded to restrict municipal liability for city employee negligence exclusively to those instances where a *special duty* was owed to the particular plaintiff. Since the building inspector's duty to Mrs. Modlin was no greater than that owed the general public, the court held the city was not liable.

In the wake of *Modlin,* it became apparent that municipal immu-

28. *Id.* The court proceeded to define the distinction between legislative, executive and judicial functions. It stated that, "legislative action prescribes a general rule for future operation, whereas judicial and executive action is typically concerned with applying the general rule to specific situations or persons." *Id.* A further distinction was made between executive and judicial or quasi-judicial functions. The court stated, "that a power authorized to be exercised on the personal judgment of the acting authority is purely executive, but that where notice and hearing are required and action is based upon the showing made at the hearing the action is judicial or quasi-judicial." *Id.* at 74.

29. *Id.*

30. *Id.* (emphasis added).

nity was problematic to those trying to isolate and identify it.[31] Eight years after *Modlin,* Florida's Fourth District Court of Appeal attempted to clarify the issue of municipal immunity in *Gordon v. City of West Palm Beach.*[32] The court in *Gordon* summarized the status of municipal tort liability:

> 1) as to those municipal activities which fall in the category of proprietary functions a municipality has the same tort liability as a private corporation;
> 2) as to those activities which fall in the category of governmental functions ". . . a municipality is liable in tort, under the doctrine of respondent [sic] superior, *only when such tort is committed against one with whom the agent or employee is in privity, or with whom he is dealing or is otherwise in contact in a direct transaction or confrontation.*" *City of Tampa v. Davis* . . . .
> 3) as to those activities which fall in the category of judicial, quasi-judicial, legislative, and quasi-legislative functions, a muncipality remains immune. *Hargrove v. Town of Cocoa Beach,* supra; *Modlin v. City of Miami Beach,* supra.[33]

Gordon involved a wrongful death action brought by a father whose son was killed when his motorcycle hit an automobile at an intersection. The complaint alleged negligence by the city in the "design, construction and maintenance of the streets and for . . . failure to warn of a known hazardous condition."[34] Since the plaintiff claimed negligent maintenance of the streets, which historically had exposed a city to liability,[35] this claim was actionable. However, the allegation of city negligence for failure to install and maintain traffic controls failed to present a viable cause of action because the court viewed these as

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31. Gordon v. City of West Palm Beach, 321 So. 2d 78, 79 (Fla. 4th Dist. Ct. App. 1975), *cert. dismissed,* 349 So. 2d 160 (Fla. 1977). The court in *Gordon* stated: "We are frank to admit that the current status of municipal tort liability is not at all clear since the advent of Hargrove v. Town of Cocoa Beach; Modlin v. City of Miami Beach, and subsequent cases attempting to interpret the breadth and scope of those two cases." *Id.* (citations omitted).

32. *Id.*

33. *Id.* at 80 (emphasis in original) (citations omitted).

34. *Id.*

35. *Id.*

immunized governmental functions.[36]

Statutory Waiver of Immunity and Judicial Determination of its Scope

The same year the *Gordon* case was decided, Florida Statute Section 768.28, waiving tort immunity for the state and all its subdivisions, became effective.[37] The statute affects the state and its agencies or subdivisions, expressly including municipalities.[38] Although the statute is a waiver of immunity, the legislature placed limitations on monetary recovery.

> (5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private

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36. *Id. See also* discussion in note 19 *supra.*

37. Ch. 73-313, § 1, 1973 Fla. Laws 711 which provided § 768.28 would be effective January 1, 1975; Ch. 74-235, § 3, 1974 Fla. Laws 664 amended the effective date of § 768.28 as applied only to the executive departments to be July 1, 1974. Gordon v. City of Miami Beach was decided October 10, 1975. FLA. STAT. § 768.28(1) (Supp. 1980) waives sovereign immunity for tort liability for the state, its agencies or subdivisions;

> (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

Id.

38. FLA. STAT. § 768.28(2) (Supp. 1980).

> (2) As used in this act, "State agencies or subdivisions" include the executive departments, the Legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.

Id.

> individual under like circumstances, but liability shall not include punitive damages or interest for the period prior to judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $50,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $100,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $50,000 or $100,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. *The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974.*[39]

Because municipalities had not shared the same immunities as the state and its other subdivisions prior to the enactment of section 768.28, the statute's applicability to municipalities was questioned. The Attorney General responded[40] by saying that "the state's waiver of sovereign immunity contained in § 768.28 does not operate to limit in any substantive way the tort liability of municipalities under the doctrine of *respondeat superior*."[41] In 1977,[42] responding to the Attorney General's opinion, the legislature added the last sentence of section 768.28(5) which is italicized above.[43] Thus the legislature mandated that municipalities were included not only in the waiver of immunity,[44]

39. FLA. STAT. § 768.28(5) (Supp. 1980) (emphasis added). The amount recoverable has been increased to $100,000 for a single claimant and $200,000 per occurrence. Ch. 81-317, 1981 Fla. Laws 1488.

40. Fla. Atty. Gen. Ann. Rep. 70-71 (1976).

41. *Id.* at 71 (emphasis in original).

42. Ch. 77-86, § 1, 1977 Fla. Laws 162.

43. In the preamble of chapter 77-86 of the Florida Laws, the legislature stated that "the Attorney General, in his opinion number 076-41, dated February 23, 1976, failed to recognize the basis for the limitation of liability set forth in subsection (5) of section 768.28, Fla. Statutes. . . ." Ch. 77-86, 1977 Fla. Laws at 161. Recognizing the need for clarification, the legislature amended § 768.28(5).

44. Ch. 77-86, 1977 Fla. Laws 161-62.

but also in the limitation of liability,[45] even though they had not enjoyed the same immunities as the state and other subdivisions prior to July 1, 1974.

Despite apparently broad statutory waiver of immunity in 1975 via Section 768.28, Florida's courts were unsure of its scope. Faced with this uncertainty, the Florida Supreme Court in *Commercial Carrier Corp. v. Indian River County,*[46] reconciled the statute with common law immunity. In this landmark decision the court articulated Florida's present test which affords immunity for acts involving planning or policy decisions since these were found to be beyond statutory waiver. In contrast, under *Commercial Carrier,* operational or implementing activities were found to be within the statute and not immune from tort liability. Although the case involved actions brought against a county, rather than a municipality, *Commercial Carrier* clarified the status of immunity as it pertained to the state and all its subdivisions.

The case, accepted on certiorari, was a consolidation of two separate cases out of Florida's Third District Court of Appeal: *Commercial Carrier Corp. v. Indian River County,*[47] and *Cheney v. Dade County.*[48] In *Commercial Carrier* the original plaintiff brought a wrongful death action based on a fatal collision at an unmarked intersection in Indian River County in which the Florida Department of Transportation (DOT) and Indian River County were named third party defendants. The complaint alleged the county was negligent for failing to maintain a stop sign and that DOT was negligent for failing to paint the word "STOP" at the intersection. At first blush it would appear that under the broad language of section 768.28 tort immunity had been waived. However, the trial court found failure to maintain a traffic signal not

45. *Id.*

46. 371 So. 2d 1010 (Fla. 1979). *See also* Drake & Oldham, *The King is Dead, Long Live the Emperor: Commercial Carrier Decision and the Status of Governmental Immunity in Florida,* 53 FLA. B.J. 504 (1979); Comment, *Torts — The Doctrine of Sovereign Immunity is Alive and Well — Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979),* 8 FLA. ST. L. REV. 377 (1980).

47. 342 So. 2d 1047 (Fla. 3d Dist. Ct. App. 1977), *rev'd and remanded,* 371 So. 2d 1010 (Fla. 1979).

48. 353 So. 2d 623 (Fla. 3d Dist. Ct. App. 1977), *rev'd and remanded,* 371 So. 2d 1010 (Fla. 1979).

actionable and dismissed the third party complaint.[49] The dismissal was upheld by the appellate court.

In *Cheney* the petitioner alleged Dade County negligently maintained a traffic signal which directly caused the accident and injury to the plaintiff in the original action. The city moved to dismiss the complaint on grounds of sovereign immunity and the trial court granted the motion. The appellate court upheld the dismissal, finding that Florida's statutory waiver of immunity would not create liability in this case under *Modlin* and that the duty owed Cheney was that owed to the public in general.[50]

In the consolidated action the Florida Supreme Court invalidated the special duty-general duty test of *Modlin,*[51] and then focused its attention on legislative intent for the scope of waiver under section 768.28. The court acknowledged the Federal Tort Claims Act[52] as the basis for section 768.28 but noted Florida's statute, unlike the federal act, did not expressly exempt discretionary acts from liability. However, the court found, despite the absence of express statutory language, other jurisdictions had recognized a discretionary exception. After looking at other jurisdictions for guidance, the court recognized a discretionary exception in Florida. The more difficult second step was to determine how "discretionary functions" could be identified.

Since the term appeared elusive of any universal definition, other jurisdictions developed tests to help identify a discretionary function. The Washington Supreme Court, in *Evangelical United Brethren Church v. State,*[53] developed a test consisting of four questions which *Commercial Carrier* adopted as its guide.

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision re-

49. 371 So. 2d at 1013; 342 So. 2d at 1049.
50. 371 So. 2d at 1014; 353 So. 2d at 626.
51. 371 So. 2d at 1016.
52. 28 U.S.C. § 2680(a) (1975).
53. 67 Wash. 2d 246, 407 P.2d 440 (1965).

> quire the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?[54]

The Florida Supreme Court commended case-by-case utilization of this test in Florida[55] and adopted "the analysis of *Johnson v. State* . . . which distinguishes between the 'planning' and 'operational' levels of decision-making by governmental agencies."[56] The discretionary

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54. 371 So. 2d at 1019 citing 67 Wash. 2d at __, 407 P.2d at 445. Instructing the lower courts on application of this guide, the Washington Supreme Court said if all questions could be answered affirmatively, then the questioned act could reasonably be classified as discretionary. If one or more could be answered negatively, further inquiry would be necessary to determine whether the act was in fact discretionary.

55. Many courts have not used the test adopted in *Commercial Carrier* and a possible reason for this may have been articulated in Wallace v. Nationwide Mut. Fire Ins. Co., 376 So. 2d 39 (Fla. 4th Dist. Ct. App. 1979). That court found "the new test substituted in *Commercial Carrier* . . . to be a complex four point test, which might with some judicial straining, be construed either to exempt each and every governmental action, or alternatively, exclude none of them." *Id.* at 40 (footnote omitted).

56. 371 So. 2d at 1022. The court was referring to Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). In *Johnson,* plaintiff's complaint alleged that plaintiff was requested by the state's employee Mr. Baer to provide a foster home for a particular youth. Further, defendant's employee negligently allowed a youth with homicidal tendencies and a history of violence and cruelty to be placed in plaintiff's home without notice of these propensities. Plaintiff allegedly suffered injuries as a result of this negligence. The state moved for summary judgment on the ground of immunity. The trial judge granted the motion and plaintiff appealed. *Id.*

Looking to a statute which expressly immunizes public employees for discretionary acts, the Supreme Court of California was faced with a determination of whether immunity would attach under the facts of this case. Recognizing that some discretion would be involved in any official act, the court acknowledged that further analysis would be necessary. The court articulated a distinction between "planning" and "operational" functions. Under this distinction, those planning functions which involved policymaking would be immunized while the implementation of that policy would not be immunized. *Id.*

In applying that distinction to this case, the court found that the decision to parole a youth would be a policy consideration deserving immunity. However, once the decision to parole is made, any action to place the parolee with a family is merely a ministerial act and not deserving of immunity. *Id.*

The court cited numerous cases which immunized policy decisions but not the acts

function exception would apply only to planning level functions but not to operational level functions: "planning level functions are generally interpreted to be those requiring basic policy decisions, while operational level functions are those that implement policy."[57] Thus, planning functions are generally equated with purely governmental functions, whereas operational functions are generally equated with proprietary or ministerial functions.

Having accepted these distinctions, the court found that maintenance of traffic signals and painting the word "STOP" were operational functions and consequently were not within the discretionary function exemption. Therefore, the county was not immunized from liability, and both *Cheney* and *Commercial Carrier* were remanded to the district court with instructions for remand to the respective trial courts for further proceedings.

Although *Commercial Carrier* provided guidelines for courts to identify discretionary functions, the guidelines appear susceptible to incongruous results. Illustrative of this incongruity is *Ferla v. Metropolitan Dade County*.[58] Concerning an accident on Rickenbacker Causeway, plaintiffs alleged the county was negligent in four areas: (1) the design of the median strip, (2) the determination of the speed limit, (3) the width of the lanes and (4) the failure to erect a barrier. Using the "planning" level/"operational" level distinction, the court found item (1) was an "operational" level decision; items (2) and (3) involved "planning" level decisions and item (4) would have to be factually developed before a determination could be made. In reaching this decision, the court stated,

> The distinction we feel compelled to draw between the median design and the lane width situations, the essential basis of which is difficult indeed to articulate, well illustrates the self-acknowledged "deficiencies" and "lack of certainty and predictability," *Commercial Carrier Corp. v. Indian River County,* . . . involved in the analysis contained in *Johnson v. State* . . ., which our court specif-

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which carried out the decision and stated that most of the cases involved a "failure to warn of foreseeable, latent dangers flowing from the basic immune decision." *Id.* at _, 447 P.2d at 362, 73 Cal. Rptr. at 250 (footnote omitted).

57. 371 So. 2d at 1021 (footnote omitted).

58. 374 So. 2d 64 (Fla. 3d Dist. Ct. App. 1979).

ically adopted in the Commercial Carrier case.[59]

Constitutionality of Recovery Limits as Applied to Municipalities

While *Commercial Carrier* ostensibly clarified the status of immunity and recognized a discretionary function exception, questions remained regarding the constitutionality of statutory limitations placed on recoveries against municipalities. Two years after *Commercial Carrier, Cauley v. City of Jacksonville,*[60] held constitutional that portion of section 768.28(5) providing monetary limitations on tort recoveries.

Cauley concerned an area in which municipalities had never been afforded immunity, the negligent maintenance of streets.[61] The facts of the case were undisputed. Mrs. Cauley alleged the existence of a dangerous condition in the road for a period of time and the city's negligence in not repairing the condition or giving adequate warning of it. Mrs. Cauley further alleged that she was injured as a result of the city's failure to repair or warn of the condition. The jury awarded her $400,000 in damages, and her husband $200,000 for loss of consortium. Because Mrs. Cauley was found seventy-five percent responsible for her injury, the judgment was accordingly reduced to a total of $150,000. The city motioned for reduction of the judgment to $100,000 as limited by section 768.28(5).[62] The trial court granted the motion and expressly held section 768.28(5) constitutional.

In *Cauley,* appellants challenged the constitutionality of section 768.28(5) which limited their recovery on a judgment against the City of Jacksonville. Prior to enactment of the state's waiver of immunity, together with its limitations on recovery, the Cauleys would have been entitled to an unlimited recovery. Florida's Supreme Court stated the issue in *Cauley* "concern[ed] the validity of that portion of Sec.

59. *Id.* at 68 n.1 (citations omitted).

60. 403 So. 2d 379 (Fla. 1981).

61. Since the maintenance of streets has been consistently held to be a duty of the city, the city traditionally did not have immunity for this proprietary function. *See* note 16 *supra.*

62. The limitations have since been increased to $100,000 for a single claimant and $200,000 per occurrence. *See* note 39 *supra.*

768.28(5) which limits compensatory damages against municipalities for negligent performance of operational-level or proprietary functions."[63] Admittedly the court narrowed the issue to deal exclusively with municipalities because it stated (without demonstrating) that *Commercial Carrier* found section 768.28(5) constitutional, as it related to the limitation on recoveries against the state and its counties.[64]

The majority in *Cauley* ultimately held the cap on recovery against municipalities as constitutional. The appellants had alleged several grounds of constitutional error: due process and equal protection rights had been violated; denial of access to the courts and jury trial; the statute violated the separation of powers; and circuit court deprivation of power to issue necessary writs. The majority considered these allegations of constitutional error and summarily stated, "[w]e reject all these contentions."[65]

Striking appellants' constitutional arguments, the *Cauley* majority relied on *Duke Power Co. v. Carolina Environmental Study Group, Inc.*[66] to justify legislative imposition of recovery limits. But the majority failed to explain why it relied on *Duke Power Co.*, a factually distinguishable North Carolina case holding constitutional a federal statute limiting recovery on nuclear reactor accidents. In addition, the

63. 403 So. 2d at 381. The court had jurisdiction to hear the issue under article V, § 3(b)(1) of the Florida Constitution which provides the supreme court "[s]hall hear appeals . . . from orders of trial courts . . . initially and directly passing on the validity of a state statute . . . ." Fla. Const. art. V, § 3(b)(1) (1972).

64. Chief Justice Sundberg, who wrote the majority opinion in *Commercial Carrier*, states in the dissent in *Cauley* that *Commercial Carrier* decided only the scope of the waiver under § 768.28. Therefore, it would appear to this writer that if *Commercial Carrier* held § 768.28(5) to be constitutional, it was by implication only. The court merely reversed the dismissals of Commercial Carrier's and Cheney's third party complaints. The respective trial courts had found immunity attached when a county failed to maintain traffic controls, but the supreme court found to the contrary. It determined the granting of immunity for decisions regarding traffic control maintenance in the past was no longer valid under the dictates of § 768.28, since immunity was found to exist only for discretionary functions at the planning level and not for operational or maintenance functions. By so doing, the court determined only the scope of the waiver under § 768.28 and not the constitutionality of any monetary limitations on recovery as provided in § 768.28(5).

65. *Id.* at 384.

66. 438 U.S. 59 (1978). The dissent questioned the application of this case. *See* notes 82 and 83 and accompanying text *infra*.

majority stated that it previously found legislation restricting recovery in the workmen's compensation and no-fault automobile insurance areas constitutional.[67] The arguments rejected in these earlier cases were "[s]ubstantially the same"[68] as the attacks rejected in *Cauley.*

The majority opinion considered and rejected appellants' argument that *Kluger v. White*[69] disposed of the case *sub judice.* In *Kluger,* Florida Statute Section 627.738[70] was held unconstitutional when challenged on the ground that it did not comply with the Florida Constitution, article I, section 21. Florida's Constitution provides "[t]he Courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[71] The issue in *Kluger* was whether this constitutional guarantee "bar[red] the statutory abolition of an existing remedy without providing an alternative protection to the injured party."[72] The *Kluger* court held

> that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[73]

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67. Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239 (Fla. 1977) (workmen's compensation); Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974) (no-fault automobile insurance). The dissent distinguishes both cases. *See* notes 84-86 and accompanying text *infra.*

68. 403 So. 2d at 384.

69. 281 So. 2d 1 (Fla. 1973).

70. The statute provided that an action for recovery of property damage resulting from an automobile collision could only be maintained if two conditions occurred: first, if the owner had chosen not to buy insurance protection against property damage and second, if the damage exceeded five hundred and fifty dollars. The imposed minimum dollar amount of the statute precluded the appellant from maintaining an action because the value of her car was only two hundred and fifty dollars.

71. Fla. Const. art. I, § 21.

72. 281 So. 2d at 3.

73. *Id.* at 4.

The *Cauley* majority, however, rejected *Kluger* as inapposite.[74] The court's rejection was based on the belief that no statutory right to recovery against a municipality for its negligence existed prior to Florida's adoption of the constitutional declaration of rights. In addition the court found no common law right pursuant to Florida Statute Section 2.01.[75]

The majority viewed section 768.28 as a way of bringing "fairness, equality and consistency to an area of the law which . . . has been beset with contradiction, inconsistency and confusion."[76] The court recognized that treating municipalities in parity with state and counties provided a benefit not outweighed by possible harm to individual plaintiffs who would no longer be entitled to unlimited recoveries. Municipalities, which had become more like other subdivisions of the state, and are governmental entities, should not be treated as "partial outcasts."[77] Further, treating municipalities equally eliminates the need to determine which rules apply when actions against city and county are consolidated as in *Cauley*. However, even-handed application of section 768.28(5) to *all* the state's subdivisions actually results in a *modified immunity* for municipalities. In areas where a municipality did not receive immunity prior to enactment of section 768.28, they will now be protected by monetary limitations on recovery. It is this capping of a previously unlimited recovery, without providing what is viewed as a reasonable alternative, which formed the basis of *Cauley*'s dissent.

Chief Justice Sundberg, writing for the dissent, stated that "the majority has misconstrued case law and blurred traditional distinctions between immunity for state, county and municipal governments."[78] He found the first such misapplication in the majority's reliance on *Commercial Carrier*[79] which Sundberg, its author, viewed as having decided only the *scope* of section 768.28 waiver for the state and counties.[80]

74. 403 So. 2d at 385.

75. *Id.* However, the dissent strenuously opposed this interpretation of *Kluger*. For a discussion of the basis for this opposition, *see* note 89 and accompanying text *infra*.

76. *Id.*

77. *Id.* at 386.

78. *Id.* at 387.

79. *Id.*

80. *Id.*

The Chief Justice asserted *Commercial Carrier* recognized municipal rules for determining immunity were not to be applied to the state and counties and that *Commercial Carrier* did not expressly discard the rules governing municipal liability.[81] The dissent viewed the imposition of a cap on recovery as an unjustified protection for municipalities in an area where protection had previously not been enjoyed, specifically, in disputes arising from allegations of negligent performance of proprietary or operational functions.

Sundberg buttressed his dissent by criticizing as well majority reliance on *Duke Power Co.*, a case dealing with a federal act providing no-fault recovery for injuries resulting from a nuclear accident.[82] A compelling interest in *Duke* necessitated change in traditional tort recoveries. Moreover, *Duke* was a federal decision and there is no analagous counterpart in the Florida constitutional provision for access to the courts.[83] Lastly, Chief Justice Sundberg found the majority misplaced reliance on *Halligan*[84] and *Lasky,*[85] which were distinguishable from *Cauley* since these cases dealt with providing a remedy without requiring proof of fault.[86]

Chief Justice Sundberg believed *Kluger* applicable[87] and controlling[88] of *Cauley*. He asserted that common law action against a municipality existed prior to adoption of Florida's Constitution[89] and that Florida embraced this cause of action via Florida Statute Section

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81. *Id.*

82. In support of the dissent's disagreement with the reliance placed on this case, let it be added that besides placing a limit on recovery at $560 million in the event of a nuclear accident, a fund was set up to make sure that amount was readily available. The fund protects prospective plaintiffs since any one nuclear reactor would not be able to raise $560 million on their own. Thus the statute presently provides potential plaintiffs with ready access to a guaranteed $560 million; Congress recognized that the amount can be increased should the need arise.

83. 403 So. 2d at 388-89.

84. 344 So. 2d 239 (Fla. 1977).

85. 296 So. 2d 9 (Fla. 1974).

86. 403 So. 2d at 388.

87. *Id.* at 387.

88. *Id.*

89. Chief Justice Sundberg found the common law cause of action espoused in a legal maxim which propounds that the law gives a remedy with full and just compensation for the negligent injuries caused by another. *Id.* at 388.

2.01.[90] Therefore, applying the strictures of *Kluger,* one of two conditions must be present for valid abolition of a cause of action: either the legislature must 1) provide a reasonable alternative for recompense or 2) show an overpowering public necessity and no other method of meeting the public need. The dissent found neither condition present and viewed "[t]he effect of Section 768.28(5) [as] . . . forc[ing] a plaintiff to give up a common law right and receive nothing in return."[91] Although the plaintiff is entitled to some monetary recovery under the statute, Chief Justice Sundberg evidently did not view this as a reasonable alternative within the purview of *Kluger.* Therefore, applying the holding of *Kluger* to the facts of *Cauley,* the dissent advised that the portion of section 768.28(5) limiting recoveries be held "unconstitutional as applied to municipalities."[92]

Conclusion

Municipalities may breathe easier knowing their financial exposure is limited. However, the court has explained little of the reasoning it used in determining that the ceiling on municipal tort recoveries was constitutional. The majority silenced the arguments presented under the access to courts mandate of article I, section 21 of the Florida Constitution by declaring *Kluger* inapplicable. Consequently, the majority deftly avoided having to determine whether section 768.28(5) provided the alternative right to recompense necessary for the valid abolition of an existing remedy.

By its action, the Florida Supreme Court has made it clear that a plaintiff suing a municipality must look to the legislature for any amount awarded exceeding the statutory limitations.[93] It may be a hollow victory, for the plaintiff who is awarded a large verdict must

90. *Id.*
91. *Id.*
92. *Id.*
93. Ch. 73-317, § 1, 1973 Fla. Laws 711, as originally enacted, provided that insurance coverage above the statutory limitations of § 768.28(5) served to expand recovery to the extent of coverage. *Id.* at 712. *See* § 768.28(10). However, that provision was repealed by ch. 77-86, 1977 Fla. Laws 161. Thus at present, a plaintiff may only recover more than the limitations of § 768.28(5) through further act of the legislature.

then expend more time and energy trying to convince the legislature it is deserved.[94] The Florida Supreme Court may one day be forced to address a separation of powers issue because the legislature has, in essence, set itself up as the last judge and jury.

Mary Ava Bobko

94. While claims bills have been very successful, there are a series of procedures which must be followed before the plaintiff may be able to recover the full amount of their judgment. First, the claims bill must be prepared and submitted. Next, a hearing is conducted by a Special Master, who in turn prepares a final report and recommendation for the Committee on Judiciary. If the claim is reported favorably by the committee, it must then pass in the House, the Senate, and finally reach the Governor. *See* M. ROBINSON, INTRODUCTION OF CLAIMS BILLS, POLICIES, PROCEDURES AND INFORMATION (January 1982) (Prepared for Representative Hamilton Upchurch, Chairman, Committee on Judiciary).