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Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979)

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Torts—THE DOCTRINE OF SOVEREIGN IMMUNITY IS ALIVE AND WELL— *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979).

The doctrine of sovereign immunity, invoked as a complete defense in tort actions against the state and its subdivisions, was broadly waived by the Florida Legislature in 1975.[1] Although the waiver of sovereign immunity statute appears to render the state at least partially liable for negligent action,[2] the Florida Supreme Court has recently held that governmental actions which are discretionary, *i.e.*, carried out at the "planning" rather than the "operational" level of government, are not subject to liability in tort.[3]

In *Commercial Carrier Corp. v. Indian River County*,[4] the Third District Court of Appeal was presented with a wrongful death action naming Indian River County and the Florida Department of Transportation (DOT) as third party defendants. The third party complaint of Commercial Carrier and its liability insurer alleged that the county and DOT were negligent in failing to maintain stop signals at the fatal intersection.[5] The court relied on prior decisions to hold that such negligent maintenance on the part of a governmental authority is not actionable.[6]

In *Cheney v. Dade County*,[7] the plaintiffs alleged negligence on

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1. "In accordance with § 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 . . . ." Ch. 73-313, § 1, 1973 Fla. Laws 711 (effective Jan. 1, 1975) (codified at FLA. STAT. § 768.28(1) (1979)).

2. The statute provides:

> 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 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.

FLA. STAT. § 768.28(5) (1979).

3. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1022 (Fla. 1979).

4. 342 So. 2d 1047 (Fla. 3d Dist. Ct. App. 1977), *rev'd and remanded*, 371 So. 2d 1010 (Fla. 1979).

5. 342 So. 2d at 1048.

6. *Id.* at 1049.

7. 353 So. 2d 623, 624 (Fla. 3d Dist. Ct. App. 1977), *rev'd and remanded*, 371 So. 2d 1010 (Fla. 1979).

the part of Dade County for failure to properly maintain a traffic light. The third district again found no liability, holding that since the duty was one owed to the public and not to a particular individual, governmental immunity was not waived.[8]

On writ of certiorari to the Florida Supreme Court, *Commercial Carrier* and *Cheney* were consolidated.[9] Respondents in both cases argued that the waiver of immunity in section 768.28, Florida Statutes[10] did not reach governmental acts such as negligent maintenance.[11] Respondents also argued that because liability under the statute was coextensive with private liability and since "private persons" did not govern, immunity was not waived for such purely governmental functions as road maintenance. Therefore, respondents asserted, the statute was merely a codification of the common law theory of municipal sovereign immunity.[12]

These two cases raise the issue of whether the differentiation between governmental and proprietary functions remains useful in the wake of section 768.28. In the past, sovereign immunity applied to all state activity and extended to all state agencies and counties.[13] A waiver of immunity occurred only when the state agency purchased liability insurance and then only up to the extent of policy coverage and only for certain activities.[14] Municipalities, on the other hand, did not enjoy absolute immunity from tort liability. Their immunity was limited to those activities considered "governmental" as opposed to those considered "proprietary."[15] Proprie-

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8. *Id.* at 626.

9. 371 So. 2d at 1012.

10. (1979).

11. 371 So. 2d at 1013.

12. *Id.* at 1014.

13. *See, e.g.*, Davis v. Watson, 318 So. 2d 169 (Fla. 4th Dist. Ct. App. 1975); Buck v. McLean, 115 So. 2d 764 (Fla. 1st Dist. Ct. App. 1959). In *Davis*, plaintiff alleged negligence on the part of the Game and Fresh Water Fish Commission for a gunshot wound inflicted by an officer. The court held that the Commission had no power to waive its immunity to suit. 318 So. 2d at 170. In *Buck*, suit was brought against the County Board of Public Instruction for negligently permitting a screen between a baseball field and a grandstand to deteriorate. The plaintiff had been struck in the eye when a foul ball penetrated the screen. 115 So. 2d at 765. The court found the school board to be an agency of the state and thus absolutely and unqualifiedly immune from suit. *Id.*

14. Davis v. Watson, 318 So. 2d 169, 170 (Fla. 4th Dist. Ct. App. 1975). *See* FLA. STAT. § 286.28(1) (1979), which authorizes political subdivisions to secure liability insurance.

15. *See* Gordon v. City of West Palm Beach, 321 So. 2d 78 (Fla. 4th Dist. Ct. App. 1975). Suit was brought by the father of a motorcyclist killed in a collision at an intersection. The court found the city to be immune from suit for failing to install and maintain traffic control devices, which the court characterized as governmental functions, but liable for the proprietary function of designing, constructing, and maintaining the streets and for failure to warn of known hazardous conditions. *Id.* at 80. *See also* Woods v. City of Palatka, 63 So. 2d 636

tary functions were those defined as promoting the public "comfort, convenience, safety and happiness."[16] Governmental functions were those which promoted the public "welfare."[17]

A judicial attempt was made to discard the governmental-proprietary dichotomy and to impose liability for the nondiscretionary negligent actions of municipalities,[18] but another distinction soon appeared. In *Modlin v. City of Miami Beach*[19] the supreme court reinstated municipal immunity for governmental functions to the extent that the duty owed was to the public generally. Only when a duty was owed to a particular individual or when its activity was "proprietary" was the municipality liable for tortious breach of duty.

In *Commercial Carrier,* the supreme court rejected the distinction between governmental and proprietary functions.[20] But if these familiar municipal distinctions were not applicable, did any governmental action remain immune from liability under section 768.28? The court first looked to the Federal Tort Claims Act (FTCA), the language of which the Florida statute tracked.[21] The court adopted federal constructions of the FTCA insofar as they rejected the governmental-proprietary distinction and the associated "private persons do not govern" argument.[22]

Petitioners argued that since the FTCA explicitly exempted dis-

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(Fla. 1953) (repairing defects in sidewalk is a proprietary rather than governmental function); Kaufman v. City of Tallahassee, 94 So. 697 (Fla. 1922) (maintenance of fire truck is a proprietary function).

16. City of Lakeland v. State, 197 So. 470, 472 (Fla. 1940).

17. *Id.*

18. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957). The court stated:

> [T]he law is not static. The great body of our laws is the product of progressive thinking which attunes traditional concepts to the needs and demands of changing times. The modern city is in substantial measure a large business institution. . . . To 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. Judicial consistency loses its virtue when it is degraded by the vice of injustice.

Id. at 133.

19. 201 So. 2d 70, 75 (Fla. 1970).

20. 371 So. 2d at 1016.

21. *Id.* at 1016 n.9. The federal act provides: "[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . caused by the negligent or wrongful act or omission of any employee of the Government . . . under circumstances where the United States, if a private person, would be liable . . . ." 28 U.S.C. § 1346(b) (1976). The act goes on to provide that, "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." *Id.* at § 2674.

22. 371 So. 2d at 1016-17.

cretionary acts from the waiver of immunity and the Florida act did not, the legislature intended liability to attach even to discretionary acts.[23] The supreme court, however, was not willing to abrogate sovereign immunity entirely. The court analyzed the decisions of courts in other states which have waiver of sovereign immunity statutes. The Florida Supreme Court found that other state courts had read limitations into such statutes, reserving immunity for discretionary government activity.[24]

In the face of a constitutional provision which grants power to waive immunity to the legislature,[25] and a concomitant legislative enactment exercising that power, on what grounds can the judiciary read a broad discretionary limitation into the statute? The *Commercial Carrier* court did so on the basis of the doctrine of separation of powers. Constitutional theory provides the fundamental rationale of *Commercial Carrier:* "[C]ertain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance."[26] The court claimed to abstain from the temptation to attach semantic labels,[27] but then proceeded "[i]n order to identify" these functions to invoke distinctions between "planning level" and "operational level" functioning of government.[28]

To determine what is a discretionary, "planning level" function, the court adopted the criteria articulated in *Evangelical United Brethren Church v. State,*[29] a 1965 Washington case:

> (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 require 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? If these prelimi-

23. 371 So. 2d at 1017.
24. *Id.*
25. FLA. CONST. art. X, § 13.
26. 371 So. 2d at 1022.
27. *Id.* at 1020.
28. *Id.* at 1022.
29. 407 P.2d 440 (Wash. 1965).

> nary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.[30]

Thus, in the wake of *Commercial Carrier*, courts construing section 768.28 must be able to identify policy decisions: those decisions which involve a conscious balancing of risks and advantages. Only in the performance of quasi-legislative functions does the separation of powers doctrine prevent a court from judging the propriety of a decision of a coordinate branch of government and from imposing liability for alleged tortious wrongs.

Since *Commercial Carrier*, the Third District Court of Appeal in *Ferla v. Metropolitan Dade County*,[31] decided that the design of a median strip was "operational" and that the setting of a speed limit was "planning." What is distressing is the court's conclusion that lane-width decisions were planning activities because massive expense would be required to alter the lane width.[32] The notion that an activity which might otherwise be characterized as operational becomes a planning activity when it involves appropriation of funds was embraced only by the dissent in *Commercial Carrier*.[33]

The ruling of the Second District Court of Appeal in *Ellmer v. St. Petersburg*,[34] is not dissimilar. The court construed the test of *Commercial Carrier* to mean that failure to warn of riot conditions was a planning level activity and hence immune.[35] The court also stated that it found "comfort" in a similar holding involving similar facts in Iowa, and in other Florida decisions holding that a municipality is not liable for failure to supply police protection.[36] In *Weston v. State*,[37] the court sanctioned the defense of sovereign

30. 371 So. 2d at 1019 (quoting Evangelical United Brethren Church v. State, 407 P.2d 440, 445 (Wash. 1965)).

31. 374 So. 2d 64, 66-67 (Fla. 3d Dist. Ct. App. 1979).

32. *Id.* at 68.

33. 371 So. 2d at 1024 (Overton, J., dissenting).

34. 378 So. 2d 825 (Fla. 2d Dist. Ct. App. 1979).

35. *Id.* at 827.

36. *Id.*

37. 373 So. 2d 701, 702 (Fla. 1st Dist. Ct. App. 1979).

immunity when a state attorney was sued for malicious prosecution. This court, unlike the *Ferla* and *Ellmer* courts, responded affirmatively to each of the four inquiries of the Washington test adopted by *Commercial Carrier*.[38] It found that the decision to seek an indictment involved the weighing of risks and advantages and hence constituted a planning level activity.[39]

The *Commercial Carrier* court held that the maintenance of traffic signals and signs did not represent discretionary policymaking or planning activity and remanded the consolidated cases to the district court with directions to remand to the trial court.[40] Due to the supreme court's interpretation of section 768.28 in the *Commercial Carrier* case, it is evident that the doctrine of sovereign immunity is still alive in Florida, at least with regard to "discretionary" governmental actions giving rise to tort claims.

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38. *Id.* at 703.
39. *Id.*
40. 371 So. 2d at 1022-23.