Florida State University Law Review

Volume 15 | Issue 1 Article 6

Spring 1987

Avallone v. Board of County Commissioners, 493 So. 2d 1002 (Fla. 1986)

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Recommended Citation

Avallone v. Board of County Commissioners, 493 So. 2d 1002 (Fla. 1986), 15 Fla. St. U. L. Rev. 123 (1987)

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Torts—SOVEREIGN IMMUNITY—SUPREME COURT OF FLORIDA RULES THAT PLANNING/OPERATIONAL DICHOTOMY NOT APPLICABLE UNDER LIABILITY INSURANCE STATUTE—*Avallone v. Board of County Commissioners*, 493 So. 2d 1002 (Fla. 1986)

IN 1953 the Florida Legislature enacted a statute partially waiving sovereign immunity.[1] Currently, the statute allows political subdivisions of the state to purchase liability insurance for damages caused by certain activities.[2] Once purchased, the liability insurer cannot assert the defense of sovereign immunity; it is waived to the extent of policy coverage.[3] For over thirty years, however, the statute's importance "has been generally overlooked."[4] Since the enactment in 1973 of a statute broadly waiving sovereign immunity,[5] Florida courts have had the opportunity to reexamine the policy underlying the sovereign immunity doctrine.[6] This led inevitably to a review of the old limited-waiver statute through the courts' newly refined sovereign immunity lens. The confrontation finally occurred when *Avallone v. Board of County Commissioners*[7] came before the Fifth District Court of Appeal, and later, the Florida Supreme Court. Yet it is not clear whether the most recent judicial vision of sovereign immunity provides a more lucid view than the old statute's blurry construction.

In this Note, the author follows the *Avallone* case through the appellate and supreme courts. The author then reviews the historical construction of section 286.28, Florida Statutes as well as the role given to the broad waiver of sovereign immunity statute, section 768.28, Florida Statutes. Finally, the author discusses the impact of the new statute on the old and reexamines the *Avallone* decision to assess the old statute's role in the overall sovereign immunity scheme.

I. AVALLONE V. BOARD OF COUNTY COMMISSIONERS

The plaintiff, Gloria Jean Avallone, brought a tort action against Citrus County for injuries she sustained when she was pushed off a dock at a county-owned and operated park.[8] She contended that

1. Ch. 53-28220, 1953 Fla. Laws 791 (codified at FLA. STAT. § 286.28 (1985)).
2. *See* FLA. STAT. § 286.28 (1985).
3. *Id.*
4. Everton v. Willard, 468 So. 2d 936, 952 n.16. (Fla. 1985) (Shaw, J., dissenting).
5. Ch. 73-313, 1973 Fla. Laws 711 (codified at FLA. STAT. § 768.28 (1985).
6. *See infra* notes 54-67 and accompanying text.
7. 467 So. 2d 826 (Fla. 5th DCA 1985), *rev'd*, 493 So. 2d 1002 (Fla. 1986).
8. *Avallone*, 467 So. 2d 826 (Fla. 5th DCA 1985).

the county had a duty to provide supervisory personnel but failed to do so. The trial court granted a summary judgment for the Board of County Commissioners, finding the injury was the result of an independent intervening cause.[9] Avallone appealed, and the Board cross-appealed, claiming that whether to provide supervisory personnel at the park was a "discretionary, planning-level decision"[10] and "absolute immunity attaches for planning-level activities of government . . . . [T]he immunity for such . . . activity is not altered or affected by the fact that the Board has purchased liability insurance."[11]

The Fifth District Court of Appeal agreed with the Board, noting that its decision in *Commercial Carrier Corp. v. Indian River County*[12] required a distinction between two aspects of the sovereign immunity doctrine:

> [*Commercial Carrier*] distinguished between that part of the sovereign immunity doctrine involving negligent tortious conduct waived by section 768.28, Florida Statutes (1977), and that part of the sovereign immunity doctrine identified at times as official or governmental immunity not waived by the statute. In the latter, *absolute immunity attaches to "policymaking, planning, or judgmental governmental functions."* The underlying premise for this immunity is that it cannot be tortious conduct for government to govern. Our decision recognized that there are areas inherent in the act of governing which cannot be subject to suit and scrutiny by judge or jury without violating the separation of powers doctrine.[13]

The court then noted that section 286.28, Florida Statutes, authorizing political subdivisions to purchase liability insurance and providing for a waiver of sovereign immunity to the extent of coverage, had been in existence long before section 768.28, the more expansive waiver statute construed in *Commercial Carrier*. The court stated that while the older statute had been held to remain in effect as part of the overall statutory scheme waiving sovereign immunity,[14] it contained no language eliminating absolute immu-

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9. *Id.* at 827.

10. *Id.* The appellants did not contest this finding on appeal. *Id.*

11. *Id.*

12. 371 So. 2d 1010 (Fla. 1979).

13. *Avallone*, 467 So. 2d at 827 (quoting *Commerical Carrier*, 371 So. 2d at 1020) (emphasis added by the court) (citations omitted).

14. The court cited Ingraham v. Dade County School Bd., 450 So. 2d 847 (Fla. 1984), for that proposition.

nity where "planning level" activities are concerned: "As does section 768.28 now, before its adoption section 286.28 merely eliminated the immunity which prevented recovery for existing common law torts committed by the government. If section 768.28 does not alter this absolute immunity, neither does section 286.28."[15]

Avallone was reviewed by the Florida Supreme Court,[16] which found it in "direct and express" conflict with *Ingraham v. Dade County School Board*.[17] The court explicitly disagreed with the lower court's holding that section 286.28 did not waive sovereign immunity in the area of planning-level activities.[18] Unfortunately, the majority failed to provide a clear explanation for that disagreement. The court first cited the *Ingraham* case, in which it held that section 286.28 functions as part of the overall legislative scheme abrogating sovereign immunity. Then the court said that the "thrust" of the statute is to "prohibit the assertion of sovereign immunity to the extent of the coverage, even if it is otherwise a valid defense."[19] The court then merely reiterated its conclusions.[20]

The decision was clearly controversial; Justices Shaw[21] and Ehrlich[22] filed concurring opinions while both Chief Justice McDonald[23] and Justice Boyd[24] dissented. Of the separate opinions filed, perhaps the most instructive on the analytical conflicts involved was Chief Justice McDonald's dissent. McDonald essentially agreed with the court of appeal; section 286.28, like section 768.28, waives immunity only for operational-level decisions and not planning-level functions.[25] He argued that the planning/operational dichotomy "has become settled law throughout the state," and that "the majority's ruling creates chaos out of relative order."[26] Also,

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15. *Avallone*, 467 So. 2d at 827 (citations omitted). The court pointed out two functions retained by the statute under such an analysis. It could act as a means by which political subdivisions could pay liability claims and could increase the liability ceiling of section 768.28(5). *Id.* at 828.

16. Avallone v. Board of County Comm'rs, 493 So. 2d 1002 (Fla. 1986).

17. 450 So. 2d 847 (Fla. 1984).

18. *Avallone*, 493 So. 2d at 1003.

19. *Id.* at 1004. The court's policy argument was that the public should benefit from a public expenditure. *Id.*

20. *Id.* The remainder of the majority opinion disposed of the argument for waiver of sovereign immunity under section 768.28, Florida Statutes as applied to the facts of the case.

21. *Id.* at 1005 (Shaw, J., concurring specially).

22. *Id.* at 1006 (Ehrlich, J., concurring in result only).

23. *Id.* at 1007 (McDonald, C.J., dissenting).

24. *Id.* at 1011 (Boyd, J., dissenting).

25. *Id.* at 1008 (McDonald, C.J., dissenting).

26. *Id.*

the majority interpretation penalizes entities for obtaining liability coverage and thus discourages them from doing so. The Chief Justice contended that the legislative history of section 768.28 warrants interpreting section 286.28 as waiving immunity only for operational-level decisions. Section 768.28 originally contained a provision waiving all limitations to the extent of preexisting coverage that was subsequently deleted.[27] This deletion, the Chief Justice argued, illustrates the legislature's intent to avoid waiving sovereign immunity to the extent of liability coverage for planning level functions.[28] Chief Justice McDonald's dissent, the Fifth District Court's opinion, as well as earlier constructions of the statute argue strongly against the majority view.

II. SECTION 286.28, FLORIDA STATUTES

Section 286.28 was enacted in 1953 and was originally codified at section 455.06, Florida Statutes.[29] The statute has not changed substantially since its enactment but has become less restrictive.[30] Nevertheless, that courts generally construe it very narrowly is evident in *Arnold v. Shumpert*.[31] This case involved an action against Orange County arising out of a malfunctioning traffic signal. The Florida Supreme Court held that the county could assert sovereign immunity as a defense, even though it had liability insurance pursuant to section 455.06, Florida Statutes. Citing the principle that " 'waiver[s of sovereign immunity] must be clear and unequivocal,' "[32] the court stated that section 455.06 was not broad enough to cover the maintenance of traffic signals. Although the court reviewed amendments to section 455.06 and noted its widening scope,[33] it held that traffic lights were simply not the kind of property covered by the current statute.

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27. *Id.*

28. *Id.* The rest of the dissent is dedicated to a discussion of whether the placement of supervisory personnel in a park is a planning or operational level decision. *Id.* at 1008-11.

29. FLA. STAT. § 455.06 (1953); *See supra* note 1.

30. *Compare* FLA. STAT. § 455.06(1)(1953)(restricting coverage to political subdivisions that "own or lease and operate motor vehicles") *with* FLA. STAT. § 286.28(1)(1985)(including leasing and operation of watercraft or aircraft, owning and leasing of buildings or properties, and the performance of "operations" in the state or elsewhere).

31. 217 So. 2d 116 (Fla. 1968).

32. *Id.* at 120 (quoting Spangler v. Florida State Turnpike Auth., 106 So. 2d 421, 424 (Fla. 1958)).

33. *Arnold*, 217 So. 2d at 118-19. *Cf.* Buffkin v. Board of County Comm'rs, 320 So. 2d 876 (Fla. 4th DCA 1975) (holding that the statutory language was broad enough to encompass negligent maintenance of a county-owned drainage ditch and distinguishing *Arnold* on its facts).

In *Valdez v. State Road Department*,[34] the Second District Court of Appeal held that the statute would not allow an action against the state by a prisoner injured by a state-owned and insured motor vehicle. Taking an extremely narrow view of section 455.06, the court stated that unless the legislature specifically authorized such an action it was not available[35] as the general waiver in section 455.06 was not sufficient to do so. The court relied in part upon *Jones v. Scofield Bros. Inc.*,[36] in which a Maryland statute very similar to section 455.06 was construed:

> The effect of indemnifying insurance taken out by State agencies or eleemosynary corporations not otherwise liable in tort suits, has been discussed in some cases. The generally prevailing view seems to be that its mere existence is not sufficient to create liability . . . unless the legislative enactments creat[ing] the agency or corporation considered as a whole, lead[s] to the conclusion that it was the intention of the Legislature to impose such liability on the agency or corporation.[37]

The court went on to note Florida state decisions supporting its position.

The statute was also strictly construed in *Spaulding v. Florida Gas Co.*[38] In *Spaulding*, the First District Court of Appeal held that where the Department of Transportation incorporated a provision for indemnity in its standard contract specifications, and the contractor charged with constructing a road procured insurance to cover its liability for indemnification, the Department did not waive its immunity.[39] The court also reiterated the principles stated in *Valdez* concerning the strict construction of sovereign immunity waiver statutes.

Baugher v. Alachua County[40] is a case that arguably strictly construes the statute. The plaintiff's decedent was murdered by a fellow prisoner in the county jail. Although the county had liability insurance pursuant to section 455.06, the court refused to find it liable, reasoning that while "the defendant county has a duty to

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34. 189 So. 2d 823 (Fla. 2d DCA 1966).
35. *Id.* at 824.
36. 73 F. Supp. 395 (D. Md. 1947).
37. *Valdez*, 189 So. 2d at 824 (quoting *Jones*, 73 F. Supp. at 398).
38. 249 So. 2d 695 (Fla. 1st DCA 1971).
39. *Id.* at 696. The opinion emphasized that the indemnity agreement was a "minor provision of a contract concerned with the singular purpose of constructing a road." *Id.*
40. 305 So. 2d 838 (Fla. 1st DCA 1975).

construct and provide funds for the operation of the jail" it is the duty of the sheriff to decide where to put prisoners.[41] In so holding the court noted: "The mere procurement of insurance under Section 455.06(2), Florida Statutes, while serving as a waiver of sovereign immunity does not have the effect of establishing liability. The commission of a tort must first be shown."[42]

Surette v. Galiardo[43] has been called "[p]erhaps the most liberal reading of the statute."[44] In *Surette*, a youngster was struck and killed by a car while waiting at a school bus stop. The child's mother brought an action against the school board alleging that it was negligent for establishing a bus stop site in a dangerous location.[45] The trial court granted a directed verdict for the defendant holding the statute inapplicable. On appeal, the Fourth District Court of Appeal focused on the specific language of the statute. The court distinguished *Arnold v. Shumpert* because it involved "property" (a traffic light) to which the more restrictive statutory language applied,[46] while *Surette* concerned a "necessary function": the school board's statutory duty to provide transportation for children receiving public instruction. Consequently, a negligent breach of that duty could give rise to liability to the extent of policy coverage.[47]

This "necessary function" analysis was transformed into a seemingly illogical test by the Third District Court of Appeal in *McPhee v. Dade County*.[48] In *McPhee*, a woman drowned at a county park. The court held that the drowning was caused by the decedent's own negligence, and thus affirmed the trial court's summary judgment for the defendant. The court followed its affirmation with a discussion in dicta of the applicability of section 455.06.[49] After citing *Arnold* and *Valdez* for the proposition that the statute should be strictly construed, the court concentrated on the "necessary function" analysis. According to the *McPhee* court, "[a] *governmental* function is necessary; a *proprietary* function,

41. *Id.* at 839.
42. *Id.*
43. 323 So. 2d 53 (Fla. 4th DCA 1975).
44. Ostrow & Lowe, *Sovereign Immunity*, 33 U. MIAMI L. REV. 1297, 1310 (1979).
45. 323 So. 2d at 54. The plaintiff also alleged that the site was not properly marked and that the child did not have a safe place to stand while awaiting the bus. *Id.*
46. *Id.* at 56.
47. *Id.* at 57.
48. 362 So. 2d 74 (Fla. 3d DCA 1978).
49. *Id.* at 76.

such as maintaining a recreation area, is not."[50] The court buttressed this analysis by pointing out that the statute uses the term "governmental immunity" rather than "sovereign immunity": "governmental immunity must be construed to mean immunity for governmental functions. Such a reading of the statute would be in harmony with the 'necessary function' language of the statute."[51] The court concluded that because the maintenance of a recreation area is neither necessary nor governmental, section 455.06 was inapplicable to waive immunity.

This is a questionable construction of the statute. As Judge Hubbart reminded the court in his concurrence, the governmental/proprietary dichotomy as originally developed would produce the opposite result from that reached in this case.[52] Traditionally municipalities were exposed to liability when performing proprietary, and not governmental functions. Thus, section 455.06 never was applicable to proprietary functions since the sovereign never had any immunity to waive in the first place. He also pointed out that "contrary to the court's conclusion herein, the term 'governmental immunity' as used in the statute has no special meaning apart from the term 'sovereign immunity' because both such terms have long been used interchangeably in this field of law."[53]

Though the *McPhee* court's interpretation was unique, it did follow the tradition of strict construction. However, the enactment in 1973 of section 768.28, Florida Statutes, broadly waiving sovereign immunity, quite naturally affected future construction of section 286.28. A brief look at several major cases interpreting section 768.28 provides background for an analysis of more recent section 286.28 cases.

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50. *Id.* at 80 (emphasis added). Earlier in the opinion the court discussed at length the differences between "governmental" and "proprietary" functions, and the difference between county and municipal functions. The court concluded that a county is immune from suit whether its actions are governmental or proprietary in nature. *Id.* at 76-78. In Florida, municipalities historically had sovereign immunity only when performing governmental and not proprietary functions. *See generally* Ostrow & Lowe, *supra* note 44, at 1304-06 (1979).

51. *McPhee*, 362 So. 2d at 80. Two years earlier, the court held that operation of the Florida Keys Aquaduct Authority is a governmental function and could be liable under section 455.06 for negligence resulting in damage to the plaintiff's property. Jolly v. Insurance Co. of North America, 331 So. 2d 368 (Fla. 3d DCA 1976).

52. *McPhee*, 362 So. 2d at 81 (Hubbart, J., concurring). *See also* Ostrow & Lowe, *supra* note 44, at 1304-06.

53. *McPhee*, 362 So. 2d at 81 (Hubbart, J., concurring) (citations omitted). Judge Hubbart would reach the same result by a strict reading of the Florida Supreme Court's decision in *Arnold*. He contended that the statute allows insurance coverage only for property "specifically enumerated in the statute." *Id.*

III. SECTION 768.28 AND THE *Commecial Carrier* DOCTRINE

The seminal case construing the scope of the waiver of sovereign immunity in section 768.28, Florida Statutes, is *Commercial Carrier Corp. v. Indian River County*.[54] Section 768.28(1) provides that sovereign immunity is waived "for liability for torts, but only to the extent specified in this act."[55] It includes:

> [a]ctions 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.[56]

Subsection 5 of the statute puts a monetary cap on the amount of damages recoverable.

The language of the statute is obviously very broad. Nevertheless, in *Commercial Carrier*, the Florida Supreme Court decided, despite evidence of legislative intent to the contrary, that certain governmental functions would remain immune.[57] The court, referring to decisions from other jurisdictions, adopted the distinction between "planning" and "operational" functions of government.[58] Its intention was to adopt portions of two foreign decisions: the analysis in the California decision of *Johnson v. State*,[59] and "the preliminary test iterated in [the Washington Supreme Court case of] *Evangelical United Brethren Church v. State*."[60] The California Supreme Court in *Johnson* reached the planning/operational distinction in an attempt to identify certain "discretionary" functions of government that should not be considered tortious.[61] The Florida Supreme Court then stated that discretionary acts should

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54. 371 So. 2d 1010 (Fla. 1979).
55. FLA. STAT. § 768.28(1) (1985).
56. *Id.*
57. *Commercial Carrier*, 371 So. 2d at 1022.
58. *Id.*
59. 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (Cal. 1968).
60. 67 Wash. 2d 246, 407 P.2d 440 (1965).
61. *Commerical Carrier*, 371 So. 2d at 1022.

be insulated from liability for public policy reasons and quoted *Evangelical United*:[62]

> The reason most frequently assigned is that in any organized society there must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability, or, as stated by one writer "Liability cannot be imposed when condemnation of the acts or omissions relied upon *necessarily* brings into question the propriety of governmental objectives or programs or the decision of one who, with the authority to do so, determined that the acts or omissions involved should occur or that the risk which eventuated should be encountered for the advancement of governmental objectives."[63]

Thus, the planning/operational dichotomy was adopted in Florida. Subsequently in *Department of Transportation v. Neilson*,[64] the court explained its holding in *Commercial Carrier*:

> Justice Sundberg, in a thorough analysis of the law in this area, distinguished between that part of the sovereign immunity doctrine involving negligent tortious conduct waived by section 768.28, Florida Statutes (1977), and that part of the sovereign immunity doctrine identified at times as official or governmental immunity not waived by the statute. In the latter, absolute immunity attaches to "policy-making, planning, or judgmental governmental functions." The underlying premise for this immunity is that it cannot be tortious conduct for a government to govern. Our decision recognized that there are areas inherent in the act of governing which cannot be subject to suit and scrutiny by judge or jury without violating the separation of powers doctrine.[65]

The theory behind this judicially-created restriction is that when government is governing it cannot commit a tort. Otherwise, the courts would be omnipotent overseers of all governmental decisions, including those uniquely within the province of the other branches.

However, government often does more than just govern, stepping out of "planning" and moving into "operations." Then the judici-

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62. *Id.* at 1019.

63. *Evangelical United*, 67 Wash. 2d at 254, 407 P.2d at 444 (quoting Peck, *The Federal Tort Claims Act*, 31 WASH. L. REV. 207 (1956)).

64. 419 So. 2d 1071 (Fla. 1982).

65. *Id.* at 1075 (citation omitted).

ary is charged with addressing any tortious conduct attributable to the government. When the legislature authorized tort actions against the government, it did so for "operational-level" conduct. Thus section 768.28 "created no new causes of action, but merely eliminated the immunity which prevented recovery for existing common law torts committed by the government."[66]

Section 768.28, when combined with its unique judicial interpretation, mandated a reconsideration of section 286.28. The following section details the supreme court's interpretation of the two statutes together.

IV. An Overall Statutory Scheme

In reaching its decision in *Avallone v. Board of County Commissioners*,[67] the Florida Supreme Court said it relied on *Ingraham v. Dade County School Board*.[68] In *Ingraham*, an action was brought on behalf of a student injured during a physical education class. A $1,000,000 settlement was reached representing the extent of the school board's liability coverage.[69] The school board argued that attorney's fees should be limited to twenty-five percent of the award, as provided in section 768.28(8), Florida Statutes.[70] The trial court held that this limitation applied only to the first $50,000 of the settlement since that amount represented the statutory cap restriction on the waiver of sovereign immunity in section 768.28.[71]

On appeal, the Third District Court of Appeal held that the fee limitation applied to the entire settlement.[72] Upon certification, the Florida Supreme Court agreed. While section 768.28 "totally revised the area of sovereign immunity," it specifically left the provisions of section 286.28 intact.[73] The court pointed to the language of section 768.28(10) which states that, "[l]aws 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

66. Trianon Park Condominium Assoc. v. City of Hialeah, 468 So. 2d 912, 914 (Fla. 1985).

67. 493 So. 2d 1002 (Fla. 1986).

68. *Ingraham*, 450 So. 2d 847 (Fla. 1984).

69. *Id.* at 848.

70. Fla. Stat. § 768.28(8)(1981) provides: "No attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement."

71. The statute was subsequently amended, increasing the cap to $100,000. *See* 1981 Fla. Laws 81-317.

72. Dade County School Bd. v. Ingraham, 428 So. 2d 283 (Fla. 3d DCA 1983), *aff'd*, 450 So. 2d 847 (Fla. 1984).

73. *Ingraham*, 450 So. 2d at 849.

this act."[74] This language, it reasoned, brought section 286.28 into the overall legislative scheme regarding the waiver of sovereign immunity.[75] Since the only language in this unitary scheme concerning attorney's fees is found in section 768.28(8), its provisions controlled in situations where a political subdivision purchases insurance as provided in section 286.28. Furthermore, "[t]he [twenty-five percent] limitation on attorney's fees relates to *any* judgment or settlement and therefore applies to all situations involving waiver of sovereign immunity regardless of the source of payment."[76]

Although decided prior to the supreme court's ruling in *Ingraham*, two district court decisions used similar reasoning. In *Burkett v. Calhoun County*,[77] the First District Court of Appeal held that the notice requirement of section 768.28(6)[78] applied to an action against a political subdivision regardless of whether liability insurance had been purchased pursuant to section 286.28. The court relied in part upon the Third District's finding in *Ingraham* that section 768.28 was intended to be a "complete overhaul" of sovereign immunity law.[79] The Fourth District Court of Appeal cited both of these cases in reaching an identical holding in *Mrowczynski v. Vizenthal*.[80]

The *Ingraham* decision seemed to affirm what three of the district courts already viewed as the role of section 286.28. It was not repealed, but because section 768.28 "totally revised the area of sovereign immunity," the old section simply became part of a unitary scheme.[81] The same scheme applies irrespective of the subject matter of the litigation. This gives Florida a consistent and unified body of law on sovereign immunity.

An earlier Florida Supreme Court decision, *Harrison v. Escambia County School Board*,[82] is somewhat troubling. *Harrison* involved a damages action against a school board for the death of a

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74. FLA. STAT. § 768.28(10) (1985).
75. *Ingraham*, 450 So. 2d at 849.
76. *Id.* (emphasis in original).
77. 441 So. 2d 1108 (Fla. 1st DCA 1983).
78. FLA. STAT. § 768.28(6) (1985) requires, as a prerequisite for bringing an action against a political subdivision, that the claimant give notice "in writing to the appropriate agency, and also, except as to any claim against a municipality, [present] such claim in writing to the Department of Insurance, within [three] years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing."
79. *Burkett*, 441 So. 2d at 1109.
80. 445 So. 2d 1099 (Fla. 4th DCA 1984).
81. *Ingraham*, 450 So. 2d at 849.
82. 434 So. 2d 316 (Fla. 1983).

child run down by a motorist while walking to a bus stop.[83] The amended complaint alleged that, "Defendant, ESCAMBIA COUNTY SCHOOL BOARD, is a political subdivision of the State of Florida and has waived sovereign immunity pursuant to Sec. 455.06 and Sec. 768.28, Fla. Stat. (1977)."[84] The trial court dismissed the complaint for failure to state a cause of action, and the First District affirmed.[85]

On certification to the Florida Supreme Court, petitioner argued that the school board had violated section 234.112, Florida Statutes (1977), which required the "establish[ment of] school bus stops as necessary at the most reasonably safe location available."[86] The supreme court agreed with the First District Court that determining locations for school bus stops is a planning-level decision, immune from liability under *Commercial Carrier*.[87] The court did not address whether immunity was waived pursuant to section 455.06, even though it was charged in the petitioner's amended complaint. After *Harrison*, the planning/operational dichotomy appeared still firmly implanted in the overall legislative scheme of sovereign immunity waiver.

So assumed the Third District Court when, a year after the supreme court's decision in *Ingraham*, it was presented with *Avallone*. The planning/operational dichotomy outlined in *Commercial Carrier Corp. v. Indian River County*, although not specifically addressed in either statute, was now well-established. The court noted: "[W]e find nothing in section 286.28 that overcomes or alters the absolute immunity which attaches to 'planning level' activities of government."[88] Thus, the supreme court's reversal and express reliance on *Ingraham* appears incongruous on its face.

V. CONCLUSION

In *Avallone*, the Florida Supreme Court answered an important question with regard to governmental liability in Florida. In so doing, however, it appeared to be questioning its own credibility. Where the legislature, in section 768.28, Florida Statutes, said "the

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83. *Id.* at 317.

84. *Id.* at 318 n.2.

85 Harrison v. Escambia County School Bd., 419 So. 2d 640 (Fla. 1st DCA 1982), *aff'd*, 434 So. 2d 316 (Fla. 1983).

86. FLA. STAT. § 234.112 (1977).

87. *Harrison*, 434 So. 2d at 320.

88. Avallone v. Board of County Comm'rs, 467 So. 2d 826, 827 (Fla. 5th DCA 1985), *rev'd*, 493 So. 2d 1002 (Fla. 1986).

state . . . hereby waives sovereign immunity for liability for torts,"[89] the court in *Commercial Carrier* found that it waived immunity only for operational activity and not for planning activity. As the court explained in *Department of Transportation v. Neilson*,[90] "it cannot be tortious activity for a government to govern,"[91] and governing is "planning-level" activity.

Despite this, in *Avallone* the court took a statute with similar "waiver" language[92] and interpreted it to abolish immunity for all levels of governmental activity. Furthermore, this was a statute the court had historically strictly construed. If the commission of a tort is required to trigger its waiver, and planning-level activity is not tortious, how does the statute come into play?

The essence of *Commercial Carrier* was not judicial legislation but a recognition of the separation of powers element in the grand old scheme of sovereign immunity. The court in *Commercial Carrier* pointed out that when sovereign immunity is abolished, the separation of powers element remains. Yet, with regard to section 286.28, the court in *Avallone* tells us this element was also abolished.

However, *Commercial Carrier* has been criticized for producing confusion and uncertainty when applied to new and varied fact situations.[93] Perhaps the court's refusal to cast section 286.28 into the planning/operational morass was wise. Indeed, with all due deference to Chief Justice McDonald, from a practical standpoint, the court's ruling created order out of relative chaos.[94]

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89. FLA. STAT. § 768.28(1) (1985).

90. *Neilson*, 419 So. 2d 1071 (Fla. 1982).

91. *Id.* at 1075.

92. *Compare* FLA. STAT. § 768.28(1) (1985) ("the state . . . hereby waives sovereign immunity for liability for torts") *with* FLA. STAT. § 286.28(2) (1985) ("the insurer shall not be entitled to the benefit of the defense of governmental immunity").

93. *See, e.g.*, Comment, *The Florida Supreme Court's View of State Sovereign Immunity: An Exercise in Confusion Producing Restrictive Results*, 15 STETSON L. REV. 831 (1986); Note, *Sovereign Immunity Trilogy: Commercial Carrier Revisted But Not Refined*, 10 FLA. ST. U.L. REV. 702 (1983).

94. *Cf.* Avallone v. Board of County Comm'rs, 493 So. 2d 1002, 1008 (Fla. 1986) (McDonald, C.J., dissenting) ("the majority's ruling creates chaos out of relative order").

FLORIDA STYLE MANUAL

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