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INTRODUCTION

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INTRODUCTION

Historically, the doctrine of sovereign immunity has prohibited or restricted tort suits against the State of Florida, its agencies, counties, and municipalities.[1] Sovereign immunity is a significant doctrine of ancient vintage in English and American law which provides that the government cannot be sued in tort without its consent.[2] Many justifications have been cited in support of sovereign immunity. However, some of its paramount justifications are the principles of separation

1. *See, e.g.*, Circuit Court of the Twelfth Judicial Circuit v. Department of Natural Resources, 339 So. 2d 1113, 1116-17 (Fla. 1976) (upholding dismissal of a tort claim against the Department of Natural Resources because of an absence of "legislation waiving the state's sovereign immunity"); Kaulakis v. Boyd, 138 So. 2d 505, 507 (Fla. 1962) (holding that a "county is immune from tort liability, in the absence of a general statute enacted by the Legislature"); Akin v. City of Miami, 65 So. 2d 54, 56 (Fla. 1953) (finding that "the common law rule . . . gives immunity to a municipality for the torts of its agents or servants engaged in the exercise of a purely governmental function"); State *ex rel.* Davis v. Love, 126 So. 374, 377 (Fla. 1930) ("It is to the interest of the state that its immunity from suit shall be maintained and protected until the state itself, through its Legislature, by the methods pointed out in the Constitution, consents to waive or withdraw such immunity."); Keggin v. Hillsborough County, 71 So. 372, 372 (Fla. 1916) (holding that "[c]ounties . . . partake of the state's immunity from liability, and may not be sued except in such transactions as the statute designates").

2. *See Davis*, 126 So. at 377.

of powers,[3] the need for discretion in governmental decisionmaking,[4] and the need to regulate the fiscal impact of tort damage awards on the public treasury.[5]

The State of Florida did not authorize a comprehensive, long-term, waiver of sovereign immunity, as permitted by Article X, section 13 of the Florida Constitution, until 1973, when the Florida Legislature enacted Florida Statutes § 768.28.[6] Prior to this time, however, Florida courts had developed a substantial body of common law conferring governmental tort immunity on municipal corporations.[7] In developing this law, Florida courts struggled to balance the need for freedom in governmental decisionmaking against the competing need to compensate persons injured by tortious acts of municipal employees.[8] In many instances, the Florida common law of municipal immunity achieved the same balance between these competing interests as Florida courts more recently have reached under section 768.28. Consequently, the pre-waiver law of municipal immunity remains a highly relevant source of sovereign immunity law.[9]

This article discusses both the procedural and substantive elements of the law of sovereign immunity in Florida as governed by section 768.28, and related constitutional and statutory provisions. The authors attempt to identify comprehensively those governmental acts that have been held definitively immune or subject to liability and to provide an analytical framework for determining whether a given governmental act qualifies for sovereign immunity under Florida law.

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3. *See* Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1019 (Fla. 1979).

4. *See id.*

5. *See* Spangler v. Florida State Turnpike Auth., 106 So. 2d 421, 424 (Fla. 1958).

6. Act of June 26, 1973, 1973 Fla. Laws ch. 313 (codified as amended at FLA. STAT. § 768.28 (1991)). Section 768.15 (1969), the predecessor to § 768.28, waived sovereign immunity on an experimental basis for a one year period. Act of June 22, 1969, 1969 Fla. Laws ch. 116, § 1, *repealed by* Act of July 5, 1969, 1969 Fla. Laws ch. 357, § 1.

7. *See, e.g.*, *Akin*, 65 So. 2d at 56. *But see* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957) (receding from prior decisions and holding that a municipal corporation may be liable for the torts of police officers).

8. *See, e.g.*, *Hargrove*, 96 So. 2d at 132-34.

9. *See, e.g.*, Department of Health & Rehab. Servs. v. Whaley, 574 So. 2d. 100, 103-04 (Fla. 1991) (relying on the pre-waiver municipal immunity case of *Hargrove* to support the holding that the assignment of a juvenile to a particular room or location in a detention facility is an operational function not protected by sovereign immunity); Carter v. City of Stuart, 468 So. 2d 955, 956-57 (Fla. 1985) (relying upon Wong v. City of Miami, 237 So. 2d 132, 134 (Fla. 1970), for the proposition that a city is immune from tort liability for strategic, discretionary enforcement).

I. SOVEREIGN IMMUNITY GENERALLY

A. *Definitions and Scope*

An immunity is a freedom from suit or liability.[10] Under the doctrine of "sovereign immunity,"[11] state and federal governments are deemed immune from tort liability unless a statute or constitutional amendment has waived immunity.[12] However, the fact that an agency of the sovereign is immune from liability in damages for its tortious acts does not destroy the tortious character of its acts. The sovereign immunity doctrine merely shields the state agency from being forced to respond in damages for such actions.[13] This immunity from liability extends to immunity from process as well.[14]

1. Jurisdictional Nature

Sovereign immunity deprives courts of jurisdiction over the subject matter of the tort action.[15] Therefore, the plaintiff must establish a waiver of sovereign immunity to sue a governmental entity.[16]

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10. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1032-33 (5th ed. 1984) [hereinafter PROSSER & KEETON].

11. *See* Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 458 n.1 (1961) (providing a brief history of the roots of sovereign immunity). While the doctrine of sovereign immunity as developed at common law was rooted in the principle that the king or sovereign ruled by divine right and was wholly incapable of doing wrong, in modern times, it is based on other policy considerations discussed herein. *See id.* For an expansive history of the sovereign immunity doctrine in both England and the United States, see generally 1 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD 1, 511 (2d ed. 1903); Herbert Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349, 350 (1925); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2 (1924); Louis J. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963); Fleming James, Jr., *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 611 (1955); Osmond C. Howe, Jr., *Legislation: A Statutory Approach to Governmental Liability in Florida*, 18 U. FLA. L. REV. 653, 653 (1966).

12. *See* FLA. CONST. art. X, § 13.

13. Proser v. Berger, 132 So. 2d 439, 442 (Fla. 3d DCA 1961).

14. Hampton v. Board of Educ., 105 So. 323, 326 (Fla. 1925); Southern Drainage Dist. v. State, 112 So. 561, 566 (Fla. 1921).

15. *See, e.g.*, Sebring Utils. Comm'n v. Sicher, 509 So. 2d 968, 969 (Fla. 2d DCA 1987); Schmauss v. Snoll, 245 So. 2d 112, 113 (Fla. 3d DCA 1971).

16. *Schmauss*, 245 So. 2d at 113. In suing a governmental entity, a plaintiff's complaint must set forth the specific methods by which the governmental entity waives its sovereign immunity, and must allege that the waiver was clear and unequivocal. Arnold v. Shumpert, 217 So. 2d 116, 120 (Fla. 1968).

2. Justification and Policy Rationale

Sovereign immunity protects state government affairs from interference by plaintiffs and state courts. Among the principal public policy considerations cited in support of the doctrine of sovereign immunity are the following:

> 1. the public treasury must be protected from excessive encroachments;[17]
> 2. orderly government administration would be disrupted if the state could be sued at the instance of every citizen;[18]
> 3. governmental decisionmaking requires flexibility and discretion;[19] and,
> 4. separation of powers concerns[20] prohibit the judicial branch from interfering with the discretionary functions of the legislative or executive branches absent a violation of a constitutional or statutory right.[21]

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17. *See Spangler*, 106 So. 2d at 424; Vargas v. Glades Gen. Hosp., 566 So. 2d 283, 284 (Fla. 4th DCA 1990); Southern Roadbuilders, Inc. v. Lee County, 495 So. 2d 189, 190 n.1 (Fla. 2d DCA 1986); Jaar v. University of Miami, 474 So. 2d 239, 245 (Fla. 3d DCA 1985).

18. *See* State Rd. Dep't v. Tharp, 1 So. 2d 868, 869 (Fla. 1941) ("If the state could be sued at the instance of every citizen, the public service would be disrupted and the administration of government would be bottlenecked."); *Davis*, 126 So. at 378 ("[T]he public service would be hindered and the public safety endangered if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government."); *see also* United States v. Lee, 106 U.S. 196, 206 (1882):

> [I]t would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on [the] government in war and in peace, and the money in his treasury.

Id. at 206 (quoting Briggs v. Light-Boat Upper Cedar Point, 93 Mass. (11 Allen) 157, 162-63 (1865)).

19. *See, e.g., Carter*, 468 So. 2d at 957 ("A government must have the flexibility to set enforcement priorities on its police power ordinances in line with its budgetary constraints."); *Wong*, 237 So. 2d at 134 ("The sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence.").

20. Article II, section 3 of the Florida Constitution provides as follows:

> SECTION 3. Branches of government.-- The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

FLA. CONST. art. II, § 3.

21. Kaisner v. Kolb, 543 So. 2d 732, 737 (Fla. 1989) ("[G]overnmental immunity derives entirely from the doctrine of separation of powers, not from a duty of care or from any statutory

B. *Entities Entitled to Sovereign Immunity*

1. Federal Government

The United States may not be sued absent its consent.[22] This sovereign immunity extends to suits brought by both states and individuals.[23] By adopting the Federal Tort Claims Act in 1946,[24] Congress gave its consent for the United States to be sued for money damages in federal district courts in some instances. Specifically, Congress waived sovereign immunity for damage or injury

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[25]

2. State Governments

Most states have embraced fully the sovereign immunity doctrine.[26] State tort immunity has been extended to all subordinate bodies of the state such as the executive departments, boards, commissions, committees, and authorities that perform state functions.[27]

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basis."); Trianon Park Condo. Ass'n v. City of Hialeah, 468 So. 2d 912, 918 (Fla. 1985) ("[U]nder the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights."); *Commercial Carrier*, 371 So. 2d at 1019 ("This concept of exemption from tort liability for the exercise of certain governmental functions [is] bottomed on the concept of separation of powers. . . .").

22. 14 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3654 (2d ed. 1985); 12 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 300.03[6] (2d ed. 1990) and cases cited therein. While relief for private individuals, injured by the acts of a governmental entity, was available through private compensation bills passed by Congress, the private bill system proved cumbersome, expensive, and time consuming for the legislature whose duty it was to evaluate each claim. RESTATEMENT (SECOND) OF TORTS § 895A cmt. a (1977).

23. 12 MOORE, *supra* note 22, § 300.03[6].

24. Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified at 28 U.S.C. §§ 1346, 1402, 2401-2402, 2671-2672, 2674-2680 (1988)).

25. 28 U.S.C. § 1346(b) (1988).

26. Cauley v. City of Jacksonville, 403 So. 2d 379, 381 (Fla. 1981) (citing RESTATEMENT (SECOND) OF TORTS § 895B cmt. a (1977)).

27. *See Spangler*, 106 So. 2d at 422 (holding that the Turnpike Authority is an agency of the state and as a state agency it shares, absent a specific waiver, sovereign immunity to suit); Pereira v. State Rd. Dep't, 178 So. 2d 626, 626-27 (Fla. 1st DCA 1965) (holding the State Road Department immune from suit because "a suit against the State Road Department is in effect a suit against the State of Florida."); RESTATEMENT (SECOND) OF TORTS § 895B cmt. g (1977)

Since the passage of the Federal Tort Claims Act, governmental immunity at the state level has gradually eroded.[28] Following the federal government, many state legislatures enacted statutes expressly waiving governmental immunity for the tortious conduct of state governmental entities and their employees.[29] This voluntary abrogation of governmental immunity also was influenced by significant judicial decisions modifying sovereign immunity and questioning its justification in certain areas.[30]

3. Counties

A county is a political subdivision of the state and is deemed a governmental agency through which the state exercises many of its functions and powers.[31] Because a county is a subdivision of state government, it enjoys state sovereign immunity.[32]

4. Quasi-Municipal Corporations[33]

Absent statutory provisions to the contrary, public institutions created, owned, and controlled by the state or its subdivisions are

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("The tort immunity of a state extends to all subordinate bodies of the state, such as boards, commissions, corporations and other agencies, so long as the immunity has been retained by the state.").

28. *See* RESTATEMENT (SECOND) OF TORTS § 895B cmt. b (1977).

29. *See, e.g.*, FLA. STAT. § 768.28 (1991). The great majority of states have now consented to at least some liability for torts, usually retaining immunity for basic policy or discretionary decisions, whereby the state and its agencies are protected from liability for the decisions of executive branch employees and officers when there is "room for policy judgment and decision." For a comprehensive analysis of the waiver of immunity in all fifty states, see RESTATEMENT (SECOND) OF TORTS § 895B app. (1977); PROSSER & KEETON, *supra* note 10, § 131, at 1044-46.

30. *See, e.g.*, *Hargrove*, 96 So. 2d at 130.

31. *See, e.g.*, FLA. CONST. art. VIII, § 1(a) ("The state shall be divided by law into political subdivisions called counties."). *See also* 1 EUGENE MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS §§ 1.23-.25, 2.46 (3d ed. 1987) (discussing the historical development of county governments in the United States).

32. *See, e.g.*, *Kaulakis*, 138 So. 2d at 505; *Keggin*, 71 So. at 372. The immunity of a county from tort liability was established in the case of Russel v. The Men of Devon, 100 Eng. Rep. 359 (1788). In 1850, the Florida Supreme Court distinguished *Devon* and its applicability to municipalities in City of Tallahassee v. Fortune, 3 Fla. 19 (1850).

33. *See* 1 MCQUILLEN, *supra* note 31, § 2.13 ("As the term is used here, what is meant is a corporation created or authorized by the legislature that is merely a public agency endowed with such of the attributes of a municipality as may be necessary in the performance of its limited objective. In other words, a quasi-municipal corporation is a public agency created or authorized by the legislature to aid the state in, or to take charge of, some public or state work, other than community government, for the general welfare. 'Quasi-municipal' corporations are public in nature, but not, strictly speaking, municipal corporations.").

protected by sovereign immunity. Therefore, school boards,[34] county welfare boards,[35] drainage districts,[36] and the like are immune from liability in tort unless a statute provides otherwise.[37]

5. Municipal Corporations

The absolute sovereign immunity of the state and its agencies contrasts with the limited common-law immunity granted by the courts to municipalities.[38] Municipalities do not enjoy absolute state sovereign immunity because they have not been characterized as subdivisions of the state.[39] Rather, the Florida Supreme Court defined a municipality as "a legal entity consisting of population and defined area, with such governmental functions and also corporate public improvement authority as may be conferred by law in a charter or other constitution."[40]

Under the "governmental-proprietary" doctrine, courts granted immunity to municipalities for torts committed in the performance of

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34. Bragg v. Board of Pub. Instruc., 36 So. 2d 222, 223 (Fla. 1948).

35. Smith v. Duval County Welfare Bd., 118 So. 2d 98, 99 (Fla. 1st DCA 1960).

36. Rabin v. Lake Worth Drainage Dist., 82 So. 2d 353, 355 (Fla. 1955), *cert. denied*, 350 U.S. 958 (1956); *see also* Forbes Pioneer Boat Line v. Board of County Comm'rs, 82 So. 346, 350 (Fla. 1919) (holding that Everglades drainage district "is a public quasi corporation and, as such, a governmental agency of the state for certain definite purposes"); Dade County v. Little, 115 So. 2d 19, 21 (Fla. 3d DCA 1959) (finding that the Everglades Drainage District is "an arm or instrumentality of the sovereign state");

37. *See* 18 MCQUILLEN, *supra* note 31, § 53.056.

38. *See* Owen v. City of Independence, 445 U.S. 622, 657 (1980) (holding that "municipalities have no immunity from damages liability flowing from their constitutional violations"); 4 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §§ 1610-1747 (5th ed. 1911) (describing the extent of municipal liability in great detail); Edwin M. Borchard, *State and Municipal Liability in Tort-Proposed Statutory Reform*, 20 A.B.A. J. 747, 747-48 (1934) (noting that municipalities' "halo of sovereignty proved vulnerable to juristic persuasion" because of the corporate and commercial nature of the municipality); Leon T. David, *Municipal Liability in Tort in California*, 6 S. CAL. L. REV. 269, 280 (1933) (noting that "[j]urists are pruning the brambles away" from the "towering thorn" of governmental immunity by limiting municipal immunity); *see also* James D. Barnett, *The Distinction Between Public and Private Functions in Tort Liability of Municipal Corporations in Oregon*, 11 OR. L. REV. 123, 160 (1932) (grouping municipal immunity together "with other related ancient and discredited doctrines"); John St. Francis Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROBS. 214 (1942) (providing a sampling of scholarly criticism of municipal immunity concepts); Charles W. Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97, 119-20 (1932) (noting conflicts in the law of municipal immunity and advocating legislation to "wipe out the glaring inconsistencies in the American law of public liability in tort").

39. City of Tampa v. Easton, 198 So. 753, 754 (Fla. 1940).

40. *Id.*

governmental functions conferred on them by the state. However, the same courts held municipalities liable for torts committed in the performance of non-governmental proprietary functions such as owning and managing property.[41]

C. *Eleventh Amendment Immunity Distinguished*

The common law doctrine of sovereign immunity is different from the immunity provided to state governments under the Eleventh Amendment to the United States Constitution. The Eleventh Amendment was adopted in response to the outcry against the United States Supreme Court's decision in *Chisholm v. Georgia*,[42] which held that the Constitution permitted a citizen of one state to sue another state *in assumpsit*.[43] The Eleventh Amendment provides that federal judicial power shall not extend to any suit at law or in equity against any state by citizens of another state or of any foreign country.[44]

Eleventh Amendment immunity is sometimes confused with the related, but distinct, concept of state sovereign immunity. The Eleventh Amendment, however, is related solely to federal jurisdiction over suits against states, "not with the state's immunity from suit in any forum."[45] State sovereign immunity, on the other hand, insulates states from lawsuits in their own courts.[46]

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41. *Owen*, 445 U.S. at 645-50. For an excellent discussion of the "governmental/proprietary" doctrine issue, see Delmar W. Dodridge, *Distinction Between Governmental and Proprietary Functions*, 23 MICH. L. REV. 325, 334 (1935); Barnett, *supra* note 38, at 135, 149.

42. 2 U.S. 419 (2 Dall. 419) (1793); *see* 13 WRIGHT, *supra* note 22, § 3524.

43. *Chisolm*, 2 U.S. at 420.

44. U.S. CONST. amend. XI. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*; *see* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (construing the Eleventh Amendment to "establish that 'an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.'" (quoting Employees v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279, 280 (1973))).

45. Hufford v. Rodgers, 912 F.2d 1338, 1340-41 (11th Cir. 1990) (quoting Bartlett v. Bowen, 816 F.2d 695, 710 (D.C. Cir. 1987), and Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945), respectively). *But cf.* Edelman v. Jordan, 451 U.S. 651, 665, 677-78 (1974) (finding that under the Eleventh Amendment an injunction may run against officers of the state, though the effect will be to compel state action; an injunction may not, however, be used to compel payment of state funds).

46. *See, e.g.*, Hill v. Department of Corrections, 513 So. 2d 129, 131-33 (Fla. 1987), *cert. denied*, 484 U.S. 1064 (1988).

A state does not waive its Eleventh Amendment immunity by consenting to suit in its own courts.[47] Indeed, although Florida Statutes § 768.28(15) waives the state's sovereign immunity, it expressly retains Florida's Eleventh Amendment immunity from suit in federal court by stating:

> No provision of this section, or of any other section of the Florida Statutes . . . shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States. . . ."[48]

II. COMMON LAW PRINCIPLES OF MUNICIPAL SOVEREIGN IMMUNITY

A. *Applicability of Common Law Principles*

As previously stated, the common law of municipal sovereign immunity developed prior to the general waiver of sovereign immunity contained in Florida Statutes § 768.28.[49] This common law predicate continues to be an important source of sovereign immunity law.[50] Therefore, it is necessary to examine this body of law carefully.

B. *Governmental-Proprietary Function Test*

Authorities have stated that "[t]here was a time when all municipal functions were governmental and therefore municipal corporations were wholly free" from tort liability under the common law.[51] However,

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47. Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990); Schopler v. Bliss, 903 F.2d 1373 (11th Cir. 1990).

48. FLA. STAT. § 768.28(16) (1991).

49. *Id.* § 768.28. Municipal sovereign immunity in Florida has spawned much comment. *See, e.g.*, Hugh D. Price & J. Allen Smith, *Municipal Tort Liability: A Continuing Enigma*, 6 U. FLA. L. REV. 330 (1953); Stanley L. Seligman & Robert L. Beals, *The Sovereignty of Florida Municipalities: In-Again, Out-Again, When-Again*, 50 FLA. B.J. 338 (1976); Sylvia J. Hardaway, Note, *The Tort Liability of Florida Municipal Corporations*, 16 U. FLA. L. REV. 90 (1963); Howe, *supra* note 11, at 653; Judith G. Korchin, Note, *An Insurance Program to Effectuate Waiver of Sovereign Tort Immunity*, 26 U. FLA. L. REV. 89 (1973); Stephanie A. Vaughan, Note, *Municipal Immunity: A Historical and Modern Perspective*, 19 STETSON L. REV. 997 (1990).

50. *See Commercial Carrier*, 371 So. 2d at 1019 (citing *Wong*, 237 So. 2d at 132, a pre-waiver case, for the proposition that municipal immunity concepts are bottomed on the separation of powers doctrine). Ironically, the *Commercial Carrier* court also concluded that Florida municipal immunity cases decided prior to the § 768.28 waiver "have no continuing vitality subsequent to the effective date of section 768.28." *Id.* at 1016.

51. Lewis v. City of Miami, 173 So. 150, 152 (Fla. 1937).

this view has long been replaced by the view that municipal corporations are the same as private corporations in some respects.[52] Accordingly, Florida courts bifurcated municipal activities into governmental functions and proprietary or corporate functions. Courts held cities immune from suit when performing governmental functions, but liable for torts committed in performing proprietary acts.[53]

Common law courts classified particular municipal functions as "governmental" or "proprietary" primarily on a case-by-case basis.[54] For example, courts held municipal activities such as operating playgrounds and recreational areas,[55] repairing and maintaining streets, and erecting and operating water supply systems, lighting, and power plants, to be corporate or proprietary in character.[56] Therefore, municipalities could be held liable for torts committed in the performance of these activities.[57] On the other hand, courts held municipal activities such as preserving the public peace, enforcing the laws, protecting the community from fire and disease, maintaining jails, and issuing building permits or licenses to be governmental in character.[58] Accordingly, these activities could not be the basis of municipal tort liability.

1. Proprietary Functions and Other Areas of Municipal Liability

In general terms, Florida common law courts defined proprietary functions giving rise to municipal tort liability as those which might be provided by private corporations as well as municipalities.

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52. *See, e.g.*, Ide v. City of St. Cloud, 8 So. 2d 924, 925 (Fla. 1942) ("[W]here a city, pursuant to charter power, performs a local function for its people it is held to the same degree of care as private persons."); Williams v. City of Jacksonville, 160 So. 15, 21 (Fla. 1935) (noting that "the weight of authority seems to be that a municipality, like a private corporation or a natural person, may be sued for tort"). *City of Tallahassee v. Fortune* is the first of a line of Florida decisions which began to except certain municipal activities from the sovereign immunity rule. 3 Fla. 19, 25 (1850).

53. *See, e.g.*, City of Miami v. Oates, 10 So. 2d 721 (Fla. 1943); Barth v. City of Miami, 1 So. 2d 574 (Fla. 1941); City of Tampa v. Easton, 198 So. 753 (Fla. 1940); Kennedy v. City of Daytona Beach, 182 So. 228 (Fla. 1938). The governmental-proprietary distinction has been severely criticized. *See* 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 29.6 (2d ed. 1986). "Little wonder that courts and commentators have despaired of finding a rational and consistent key to the [governmental-proprietary] distinction, which has been aptly called a 'quagmire,' 'one of the most unsatisfactory known to the law.'" *Id.* at 629-30 (citations omitted).

54. *Barth*, 1 So. 2d at 577.

55. Woodford v. City of St. Petersburg, 84 So. 2d 25, 26 (Fla. 1955).

56. *Keggin*, 71 So. at 373.

57. *Id.*

58. 18 MCQUILLEN, *supra* note 31, § 53.30.

Moreover, courts were particularly likely to find those functions from which a municipality collected revenue to be proprietary.[59] Accordingly, once a governmental entity built or took control of property, it had the same common law duty as a private person to properly maintain and operate the property.[60] Consequently, Florida courts established municipal liability for injuries caused by defects in streets and sidewalks,[61] negligent maintenance and operation of public utilities and improvements,[62] failure to warn of known dangerous conditions,[63] and failure to maintain parks and bathing facilities in a reasonably safe condition for public use.[64] In addition, Florida courts have held

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59. Chardkoff Junk Co. v. City of Tampa, 135 So. 457 (Fla. 1931) ("'Municipal functions are those . . . which specially and peculiarly promote the comfort, convenience, safety, and happiness of the citizens of the municipality, rather than the welfare of the general public . . . [and] lead[] to profit, which is the object of the private corporation.'" (quoting 43 C.J., *Municipal Corporations* § 180 (1927)); Shealor v. Ruud, 221 So. 2d 765 (Fla. 4th DCA 1969).

60. City of Jacksonville v. Smith, 78 F. 292 (5th Cir. 1896) (holding that a municipal corporation may be liable in damages for its negligent failure to maintain streets, even in the absence of a statute authorizing such an action); Woodford v. City of St. Petersburg, 84 So. 2d 25, 27 (Fla. 1955) ("In general, a municipal corporation owning property as a private owner is chargeable with the same duties and obligations, and is liable in the same way for injuries arising from neglect, as a private owner.") (quoting 38 AM. JUR., *Municipal Corporations* § 607 (1941)); *Easton*, 198 So. at 755 ("When a municipality owns a motor truck . . . the municipality may be liable for injuries to persons or property proximately caused by negligence of the truck driver in operating the truck. . . .").

61. *See, e.g.*, Woods v. City of Palatka, 63 So. 2d 636, 637 (Fla. 1953); Mullis v. City of Miami, 60 So. 2d 174, 176 (Fla. 1952); City of Daytona Beach v. Humphreys, 53 So. 2d 871, 872 (Fla. 1951); City of Miami Beach v. Quinn, 5 So. 2d 593, 593 (Fla. 1942); City of St. Petersburg v. Roach, 4 So. 2d 367, 368 (Fla. 1941); *Barth*, 1 So. 2d at 577; Bryan v. City of West Palm Beach, 77 So. 627, 627 (Fla. 1918); City of Key West v. Baldwin, 67 So. 808, 810 (Fla. 1915); Janes v. City of Tampa, 42 So. 729, 730 (Fla. 1907); City of Tallahassee v. Fortune, 3 Fla. 19, 25 (1850). While a municipality was not an insurer of the motorist or pedestrian traveled on its streets and sidewalks, *Roach*, 4 So. 2d at 368, the sovereign immunity doctrine did not operate to immunize a municipality from liability for negligence in respect to the "proprietary" duty, *Woods*, 63 So. 2d at 637, to keep its streets in a reasonably safe condition and to warn persons using those streets of known dangerous conditions. *Janes*, 42 So. at 730.

62. Peavey v. City of Miami, 1 So. 2d 614, 617 (Fla. 1941) (holding that city may be liable for negligence in operation of airport); City of Lakeland v. Douglass, 197 So. 467, 469 (Fla. 1940) (holding city liable for negligent operation of sewerage disposal or garbage plant); Chardkoff Junk Co. v. City of Tampa, 135 So. 457, 461 (Fla. 1931) (holding city liable for negligence in operation of incinerator).

63. Town of Palm Beach v. Hovey, 155 So. 808, 809-10 (Fla. 1934) (holding that when a dead end has become a public menace, a municipality has a duty to warn travelers of the danger).

64. *See Woodford*, 84 So. 2d at 27 (cause of action against city for damage caused by major league baseball spring training in city park); Pickett v. City of Jacksonville, 20 So. 2d 484, 487 (Fla. 1945) (imposing liability for failure to provide lifeguard at city swimming pool); Ide v. City of St. Cloud, 8 So. 2d 924, 925 (Fla. 1942) (city could be liable for allowing a deep hole in a park lake to remain hidden and unguarded).

municipalities liable in damages for creating, maintaining, or failing to abate nuisances involving such varied situations as: (1) failing to repair a ditch in a street into which plaintiff's horse fell and suffered fatal injuries;[65] (2) negligently operating fire-fighting equipment used on public streets;[66] and (3) maintaining a sewage treatment plant which dumped filth into a lake adjoining plaintiff's home, causing him to contract malaria from mosquitoes whose natural aquatic predators had been destroyed by the treatment facility's deleterious product.[67]

However, courts occasionally imposed liability without apparent regard for whether the municipal activity causing injury ordinarily was classified as governmental or proprietary in nature.[68] Additionally, common law courts imposed tort liability on municipalities for injuries caused by the negligent operation of police cars[69] or fire equipment.[70] The courts also found municipalities liable in tort for injuries negligently inflicted on prisoners working on city streets,[71] or confined in city jails.[72] Finally, one Florida court held a municipality liable for injuries caused by a prisoner's negligent operation of a city vehicle.[73]

2. Legislative, Judicial, and Other Purely Governmental Functions Subject to Immunity

In contrast to decisions imposing tort liability on municipalities when performing proprietary functions, Florida courts granted common law immunity to municipalities when performing legislative, judicial, and other strictly governmental functions. Courts held that municipalities acted as an "arm of" the state and shared the state's immunity when performing these functions.[74] Generally, municipal

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65. *Fortune*, 3 Fla. 19, 21 (1850).

66. Maxwell v. City of Miami, 100 So. 147, 148 (Fla. 1924).

67. *Douglass*, 197 So. at 468.

68. *See, e.g.*, *Maxwell*, 100 So. at 148.

69. *See* City of Avon Park v. Giddens, 27 So. 2d 825, 826 (Fla. 1946) (holding city liable to pedestrian injured by police vehicle with defective brakes); City of W. Palm Beach v. Grimmett, 137 So. 385, 386 (Fla. 1931) (holding city liable to pedestrian who was injured when struck by police motorcycle).

70. *Barth*, 1 So. 2d at 578; City of Miami v. McCorkle, 199 So. 575, 577 (Fla. 1940); Swindal v. City of Jacksonville, 161 So. 383, 384 (Fla. 1935); City of Tallahassee v. Kaufman, 100 So. 150, 152-53 (Fla. 1924); *Maxwell*, 100 So. at 149; Kaufman v. City of Tallahassee, 94 So. 697, 699 (Fla. 1922).

71. Ballard v. City of Tampa., 168 So. 654, 657 (Fla. 1936).

72. Lewis v. City of Miami, 173 So. 150, 153 (Fla. 1937).

73. Wolfe v. City of Miami, 134 So. 539, 541 (Fla. 1931).

74. Charlton v. City of Hialeah, 188 F.2d 421, 422-23 (5th Cir. 1951) ("Under the laws of Florida, a municipality acting in its sovereign or governmental capacity is not liable for its

functions qualifying for immunity involved exercising judgment and discretion related to the state's sovereignty.[75]

Florida courts followed the principle that municipal tort liability could not be predicated on the exercise of discretion in the performance of legislative, judicial, or purely governmental functions. Therefore, courts held municipalities immune from tort liability for damages resulting from acts such as issuing or denying a building permit,[76] enacting or refusing to enact a law,[77] maintaining a traffic control device,[78] deciding whether or not to provide a city service,[79] or determining whether or not to call out the police.[80]

Finally, Florida common law held municipalities immune from liability for the acts or omissions of their police officers when performing the governmental function of law enforcement.[81] Courts have stated that a municipal corporation exercising its police power for the protection of the public should not be held liable in damages for every mistake of judgment by its officers.[82] Therefore, courts held municipalities not liable for damages resulting from failing to call into

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ordinary torts unless committed in violation of an express statutory duty."); Lewis v. City of Miami, 173 So. 150, 152 (Fla. 1937) ("[The] rule of municipal nonliability for torts is still recognized as to all functions whereby the municipality acts simply as an agency of the state for governmental purposes, unless of course a contrary rule be provided by statute.").

75. *See* Daly v. Stokell, 63 So. 2d 644, 645 (Fla. 1953) ("[A] governmental function . . . has to do with . . . dispensing or exercising some element of sovereignty."); Smoak v. City of Tampa, 167 So. 528, 529 (Fla. 1936) ("Generally the governmental or public duties of a municipality for which it can claim exemption from damages for tort have reference to some part or element of the state's sovereignty granted it to be exercised for the benefit of the public whether residing within or without the corporate limits of the city.").

76. Akin v. City of Miami, 65 So. 2d 54, 55 (Fla. 1953).

77. Elrod v. City of Daytona Beach, 180 So. 378, 380 (Fla. 1938).

78. Holton v. City of Bartow, 68 So. 2d 385, 385 (Fla. 1953); Avey v. City of W. Palm Beach, 12 So. 2d 881, 882 (Fla. 1943).

79. City of Daytona v. Edson, 34 So. 954, 955 (Fla. 1903) ("[W]here the charter of a city gives it power to provide for lighting its streets, but does not require it to exercise this power, there is no general duty devolved upon the city to light the streets that would make its failure to do so actionable negligence.").

80. Woodford v. City of St. Petersburg, 84 So. 2d 25, 27 (Fla. 1955).

81. City of Miami v. Bethel, 65 So. 2d 34, 35 (Fla. 1953) ("'The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city is not liable therefore for the acts of its officers in attempting to enforce such regulations. . . .'") (quoting 43 C.J., *Municipal Corporations* § 1745 (1927)); Kennedy v. City of Daytona Beach, 182 So. 228, 229 (Fla. 1938) (holding that a change in the law of municipal immunity for the acts or omissions of the police in enforcing the law "would be a matter for legislative determination").

82. City of Miami v. Albro, 120 So. 2d 23, 26 (Fla. 3d DCA 1960).

service a sufficient number of police officers;[83] negligence of those whom it engaged in such services;[84] or intentional torts committed by police officers, such as assault and battery of an arrestee.[85]

C. *Areas of Immunity and Liability Under* Hargrove

In *Hargrove v. Town of Cocoa Beach*,[86] the Florida Supreme Court receded from its prior holdings that a municipal corporation was immune from liability for the tortious acts of its police officers committed incident to the exercise of a purely governmental function.[87] The *Hargrove* court held that a widow could sue the city for the alleged wrongful death of her husband, who had died of smoke suffocation after being locked unattended in a city jail cell.[88] The court was careful, however, to advise against interpreting its decision to impose liability on a municipality for performing legislative, judicial, quasi-legislative, or quasi-judicial functions.[89] The *Hargrove* court limited its decision "merely [to] hold that when 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."[90]

In cases after *Hargrove*, courts held municipalities liable for affirmative acts of negligence or intentional torts[91] committed by police

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83. *See* Woodford v. City of St. Petersburg, 84 So. 2d 25, 26 (Fla. 1955) ("[A] municipality should not be liable for the negligent failure of its police force to act when action would appear to be indicated"); *see also* City of Green Cove Springs v. Donaldson, 348 F.2d 197, 200 (5th Cir. 1965) ("[W]hether to employ additional police personnel . . . [calls] for the exercise of legislative or quasi-legislative discretion, and the city is immune from negligence liability for injuries resulting from that decision.").

84. Brown v. Town of Eustis, 110 So. 873 (Fla. 1926) ("[P]olice officers appointed by a city are not its agents or servants in such sense as to render it responsible for unlawful or negligent acts in the discharge of their public duties as policemen.").

85. City of Miami v. Bethel, 65 So. 2d 34 (Fla. 1953); Kennedy v. City of Daytona Beach, 182 So. 228 (Fla. 1938).

86. 96 So. 2d 130 (Fla. 1957). The significance of *Hargrove* lies in its acceptance by other courts, *see, e.g.*, Pruett v. City of Rosedale, 421 So. 2d 1046, 1048 (Miss. 1982), and its endorsement by the legal writers. *See, e.g.*, Marshall S. Shapo, *Municipal Liability for Police Torts: An Analysis of a Strand of American Legal History*, 17 U. MIAMI L. REV. 475, 500 (1963).

87. *See, e.g.*, Williams v. City of Green Cove Springs, 65 So. 2d 56, 57 (Fla. 1953).

88. *Hargrove*, 96 So. 2d at 131, 133.

89. *Id.* at 133.

90. *Id.* at 133-34 (citations omitted).

91. *See* Fisher v. City of Miami, 172 So. 2d 455, 456 (Fla. 1965) (holding that although a city is liable for its employees' torts, it is free from liability for punitive damages); City of Miami v. Simpson, 172 So. 2d 435, 436 (Fla. 1965) (holding that a municipality may be held

officers or other executive employees in a direct transaction[92] with the person injured. For example, municipalities were held liable for their officers using excessive force in making an arrest or quelling a disturbance,[93] negligently breaking into and searching premises,[94] assaulting and battering an arrestee,[95] making a false arrest,[96] or otherwise depriving a person of such constitutional rights as privacy or integrity of person.[97] Courts also imposed liability for negligently performing specific law enforcement functions such as manually operating a traffic control device,[98] failing to activate a police car's siren during a high speed chase,[99] or shooting a bystander while defending against sniper fire.[100]

1. Judicial, Quasi-Judicial Legislative, and Quasi-Legislative Functions

Hargrove has been recognized as partially abrogating the rule of municipal immunity for some torts arising out of governmental functions. However, *Hargrove* expressly retained immunity from tort liability for injuries arising from municipal exercise of legislative, judicial, quasi-judicial, or quasi-legislative functions.[101] Accordingly, post-*Har-*

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liable for an employee's intentional tort committed while acting within the scope of his employment). *See* John Roscow, Comment, *Municipal Corporations: Liability for Intentional Torts and Punitive Damages*, 18 U. FLA. L. REV. 173 (1965).

92. To determine whether a public officer's duty extends to only the general public as opposed to a particular citizen, the court must examine whether the governmental agency deals directly with the injured party on an individual basis. In other words, some direct contact between the public employee and the injured party must have occurred.

93. *See* City of Miami v. Jiminez, 266 So. 2d 46 (Fla. 3d DCA 1972); City of Miami v. Albro, 120 So. 2d 23, 26 (Fla. 3d DCA 1960).

94. *See* Thompson v. City of Jacksonville, 130 So. 2d 105 (1st DCA 1961), *cert. denied*, 147 So. 2d 530 (Fla. 1962).

95. *See* City of Hialeah v. Hutchins, 166 So. 2d 607 (Fla. 3d DCA 1964).

96. Shipp v. City of Miami, 172 So. 2d 618 (3d DCA 1963), *cert. dismissed*, 172 So. 2d 439 (Fla. 1965); *Albro*, 120 So. 2d at 26.

97. *See* Modlin v. City of Miami Beach, 201 So. 2d 70, 76 (Fla. 1967).

98. Hewitt v. Venable, 109 So. 2d 185, 186 (Fla. 3d DCA 1959) (holding city liable in tort for the negligent operation of a manually controlled railroad signal).

99. *See, e.g.*, Reed v. City of Winter Park, 253 So. 2d 475, 477 (Fla. 4th DCA 1971). *See also* Town of Mount Dora v. Bryant, 128 So. 2d 4 (Fla. 2d DCA 1961) (holding that town can be liable for a police officer's negligent driving), *overruled by* Everton v. Willard, 426 So. 2d 996 (Fla. 2d DCA 1983).

100. *See* Cleveland v. City of Miami, 263 So. 2d 573, 578 (Fla. 1972) (holding that city can be liable for a police officer negligently firing a gun and killing an innocent bystander); Annot., *Liability of Municipal Corporation for Shooting of Bystander by Law Enforcement Officer Attempting to Enforce Law*, 76 A.L.R.3d 1176 (1977).

101. *See supra* text accompanying note 89.

grove courts have refused to predicate municipal liability on such acts as making an arrest pursuant to an invalid warrant,[102] enacting an ordinance without public notice and hearing,[103] amending a zoning ordinance,[104] revoking probation,[105] failing to provide a governmental service,[106] wrongfully discharging an employee,[107] or deciding whether to hire additional personnel.[108] Interestingly, some of these courts expressly based immunity on the separation of powers doctrine.[109]

2. Judgmental Decisionmaking

Several post-*Hargrove* courts determined that certain judgmental decisions of governmental authorities were not actionable in tort because they were inherent in the act of governing.[110] These courts reasoned that municipal authorities must be free to exercise discretion in many situations without concern for possible allegations of negligence.

a. Discretionary Exercise of Police Power

Florida courts have held that a municipality's "discretionary exercise" of its police powers could not give rise to tort liability because

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102. *See* Calbeck v. Town of S. Pasadena, 128 So. 2d 138 (Fla. 2d DCA 1961); Middleton v. City of Ft. Walton Beach, 113 So. 2d 431 (Fla. 1st DCA 1959) (holding that a city is free from liability for an arrest pursuant to a warrant because it is a quasi-judicial act, which falls outside of the doctrine of *respondeat superior*).

103. *See* Allen v. Secor, 195 So. 2d 586, 587 (2d DCA) (holding that a mayor and city council who restrict the location of mobile homes are free from liability to a mobile home owner for passing ordinance without public notice and hearing), *cert. denied*, 201 So. 2d 556 (Fla. 1967).

104. *See* Schauer v. City of Miami Beach, 112 So. 2d 838, 839 (Fla. 1959) (holding that amending zoning ordinance is a legislative function so the court should defer to the zoning authority's decision, regardless of motive).

105. *See* Rivello v. Cooper City, 322 So. 2d 602, 607 (Fla. 4th DCA 1975) (holding that a judge was immune from liability for revoking probation even if he was acting *ultra vires*).

106. *See* Steinhardt v. Town of N. Bay Village, 132 So. 2d 764, 768 (3d DCA 1961), *cert. dismissed*, 141 So. 2d 737 (Fla. 1962).

107. *See* Bauer v. City of Gulfport, 195 So. 2d 571, 572 (2d DCA), *cert. denied*, 201 So. 2d 556 (Fla. 1967).

108. *See* City of Green Cove Springs v. Donaldson, 348 F.2d 197, 200 (5th Cir. 1965) (holding that a city is immune from liability for its decision of whether to employ additional police personnel).

109. Schauer, 112 So. 2d at 841 ("It would not be seemly for either of the three departments [of the government] to be instituting an inquiry as to whether another acted wisely, intelligently, or *corruptly*.") (quoting Angle v. Chicago, 151 U.S. 1, 19 (1894)) (emphasis added by *Schauer* court).

110. *See, e.g.*, *Wong*, 237 So. 2d at 134; Shealor v. Ruud, 221 So. 2d 765, 768 (Fla. 4th DCA 1969); 18 MCQUILLEN, *supra* note 31, § 53.22a, at 242-45.

a municipality's police powers necessarily include the right to determine the strategy for deployment of those powers.[111] Therefore, municipal decisions regarding whether to pursue and attempt to apprehend a law breaker,[112] or to take an individual into protective custody[113] were held immune from liability. However, courts continued to hold municipalities liable for affirmative acts of negligence in performing executive functions, such as negligent operation of a police vehicle,[114] or negligent handling of firearms.[115]

b. Tactical Deployment of Law Enforcement Resources

In the leading case of *Wong v. City of Miami*, the court held strategic decisionmaking concerning tactical deployment of law enforcement resources and manpower immune from tort liability.[116] *Wong* involved a tort damages action instituted by merchants whose property was damaged during a rally.[117] The rally had disintegrated unexpectedly into civil disorder and plundering after the mayor ordered police forces removed from the area.[118] The city was held not liable since the mayor's conscious decision to remove police officers and reduce police visibility was a "tactical tool" for relaxing tensions.[119] Therefore, the *Wong* court considered the removal of the officers to be within the realm of immune governmental discretion.[120]

Similarly, other courts held municipalities immune for failure to dispatch a traffic patrolman to an allegedly dangerous street intersection[121] or to hire a matron at the city jail to insure against assault.[122]

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111. *Wong*, 237 So. 2d at 134.

112. City of Miami v. Albro, 120 So. 2d 23, 26 (Fla. 3d DCA 1960). A police officer's standard of care in the pursuit of a law breaker is judged by a more liberal standard than a private individual's standard. "It is unthinkable that a municipal corporation exercising its police powers should be liable in damages for every mistake of judgment by its officers." *Id.*

113. Nelson v. Traer, 188 So. 2d 65, 66 (3d DCA 1966), *cert. denied*, 200 So. 2d 813 (Fla. 1967).

114. *Reed*, 253 So. 2d at 477.

115. *Cleveland*, 263 So. 2d at 576.

116. *Wong*, 237 So. 2d at 133-34.

117. *Id.* at 133.

118. *Id.*

119. *Id.* at 134.

120. *Id.*

121. Hernandez v. City of Miami, 305 So. 2d 277, 278 (Fla. 3d DCA 1974) ("[t]he dispatching of a traffic patrolman to the subject intersection . . . was simply a matter of judgment on the part of the defendant City"); *see also* Raven v. Coates, 125 So. 2d 770 (3d DCA) ("The placing of a policeman or a traffic control device at a particular intersection is a matter of judgment by city officers."), *cert. denied*, 138 So. 2d 339 (Fla. 1961).

122. *Donaldson*, 348 F.2d at 200.

Like the *Wong* court, these courts reasoned that the municipal actions involved matters of discretionary governmental judgment, the exercise of which could not result in tort liability.

D. *Areas of Immunity Under* Modlin

The next major case after *Hargrove* was *Modlin v. City of Miami Beach.*[123] The *Modlin* court held that a municipality was not liable under the doctrine of *respondeat superior*[124] for its building inspector's alleged negligent inspection of a store mezzanine which fell on and killed a patron.[125]

The *Modlin* holding was based expressly on the tort law doctrine that actionable negligence required the existence of a duty owed by the defendant to the person injured.[126] Further, this duty must be something more than the duty that a public officer owes to the public generally.[127] This tort law doctrine adopted in *Modlin* is generally called the public duty doctrine.[128] The public duty doctrine requires a plaintiff suing a municipal corporation for negligence to show that the duty breached was owed to the injured person as an individual and not merely as a member of the public.[129] The public duty doctrine is

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123. 201 So. 2d 70 (Fla. 1967). The *Modlin* case, which represents the Florida common law of sovereign immunity, was superseded by FLA. STAT. § 768.28. *E.g.*, Everton v. Willard, 426 So. 2d 996 (Fla. 2d DCA 1983).

124. *Modlin*, 201 So. 2d at 76. The *Modlin* court held that a building inspector could not be held individually liable. The court reasoned that a public officer acting within the scope of his official duties is not personally liable unless he owes a special duty to the injured person different from that owed to every other member of the general public. *Id.*

125. *Id.* at 72. The *Modlin* court was careful to note that both the issuance of building permits *and* the subsequent inspection of construction in progress constituted enforcement of the building code. "Since enforcement is typically the task of the executive, it can hardly be viewed as falling within the area of municipal tort immunity reserved by the *Hargrove* caveat, i.e., judicial, quasi-judicial, legislative and quasi-legislative functions." *Id.* at 73.

126. *Id.* at 76.

127. *Id.* at 75.

128. The public duty doctrine may have its origin in the early United States Supreme Court case of South v. Maryland, 59 U.S. 396 (1856). In *South*, the plaintiff sued the sheriff alleging the sheriff negligently failed to protect him from a mob. The Court held that no cause of action existed for a breach of the sheriff's duties as conservator of the peace. Concerning such duty, the Court stated, "[i]t is a public duty, for neglect of which he is amenable to the public, and punishable by indictment only." *Id.* at 403.

129. 18 MCQUILLEN, *supra* note 31, § 53-046, at 165; *see also* 14 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS § 60, at 144 (1930) ("In order that a public officer shall be liable to an individual in tort, it is necessary that the officer shall have violated some legal duty owing by him to such individual, as a result of which violation the individual has suffered damage. For the mere failure of an officer to perform a public duty owing by him to the public

designed to limit governmental liability and to avoid interference with governmental decisionmaking and action.[130] To some extent, this doctrine also is based on the common law distinction between active misconduct which causes positive injury and passive inaction or failure to protect others from harm.[131]

As a general rule, a municipality could not incur tort liability for damages or injuries allegedly caused by a failure to supply general police[132] or fire[133] protection, except when the municipality was under a special duty to protect a particular individual.[134] This rule was based partially on principles of the public duty doctrine. Moreover, courts specifically regarded a municipality's provision of police protection to its citizenry as a resource allocating function best left to policymakers.[135] Finally, courts also cited the common law rule against liability

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at large, as for example, the duty of a legislator to act honestly, or of an executive officer to enforce the laws, no action lies by an individual.") (quoting State v. Harris, 89 Ind. 363 (1883)).

130. *See generally* John C. McMillan, Jr., Note, *Government Liability and the Public Duty Doctrine*, 32 VILL. L. REV. 505 (1987); David S. Bowers, Note, *The Public Duty Doctrine: Should it Apply in the Face of Legislative Abrogation of Sovereign Immunity*, 12 CAMPBELL L. REV. 503 (1990); J. & B. Development Co. v. King County, 669 P.2d 468, 472 (1983).

131. *See* Repko, *supra* note 38, at 223-24; *see also* PROSSER & KEETON, *supra* note 10, § 56, at 373; RESTATEMENT (SECOND) OF TORTS § 314 cmt. a (1977).

132. Henderson v. City of St. Petersburg, 247 So. 2d 23, 25 (2d DCA) (holding that city lacks liability for citizen's personal injury when unknown assailants accosted and shot him when he was making business deliveries in a dark and secluded area of town, notwithstanding that the citizen had previously made special arrangements with local police for special protection and had been assured that police officers would be present at the delivery location involved), *cert. denied*, 250 So. 2d 643 (Fla. 1971); *see also Wong*, 237 So. 2d at 132 (holding that Miami police lacked a special duty to merchants who had requested protection during the 1968 Republican Convention); Sapp v. City of Tallahassee, 348 So. 2d 363 (1st DCA) (holding that city lacks liability for its police officers failing to act when they had noticed suspicious men loitering in the parking area of a motel), *cert. denied*, 354 So. 2d 985 (Fla. 1977); *Nelson*, 188 So. 2d at 65 (holding that where deputy sheriff arrested plaintiff's wife for soliciting a ride, he failed to breach a duty by leaving her alone on a heavily traveled highway at night, where plaintiff was unable to show that his wife's ability to fend for herself was impaired); Note, *A Governmental Duty to Protect the Citizen — The* Schuster *Case*, 33 ST. JOHNS L. REV. 289 (1959); Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821 (1981); Comment, *Municipal Liability for Failure to Provide Police Protection*, 28 FORDHAM L. REV. 316 (1959); Joseph T. Bockrath, Annot., *Liability of Municipality for Failure to Provide Police Protection*, 46 A.L.R.3d 1084 (1972).

133. *Steinhardt*, 132 So. 2d at 767. However, Florida courts have refused to apply the doctrine of immunity to protect a city from liability for the negligent operation of its fire equipment. *Id.*

134. *Henderson*, 247 So. 2d at 25.

135. Riss v. City of New York, 240 N.E.2d 860 (App. Div. 1968); *see also* National Bd. of Y.M.C.A. v. United States, 395 U.S. 85, 95-96 (1969) (Harlan, J., concurring) ("If courts were required to consider whether the . . . police protection afforded a particular property owner

for passive failure to prevent harm to support the rule insulating municipalities from liability for failure to provide general police or fire protection.[136]

Applying this rule, courts rejected claims of governmental tort liability for failing to arrest a drunk driver who later injured a third party,[137] to dispatch a police officer to an intersection to regulate traffic,[138] or to provide rescue services.[139] However, courts held municipalities liable when a municipal police officer's negligent manual operations of a traffic control device affirmatively created a risk which caused injury.[140]

However, courts created exceptions to the rule of nonliability for failing to provide police protection when a municipality was under a special duty to a particular individual because of a "special relationship" between that person and the municipality.[141] For example, courts have found such a relationship when the government entered into a custodial relationship with the plaintiff[142] on which the plaintiff relied.[143] In addition, a special relationship giving rise to a duty to protect may be statutorily created.[144]

Notwithstanding criticism of the public duty doctrine adopted in *Modlin*,[145] the policy reasons underlying the *Modlin* analysis have been

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was 'adequate,' they would be required to make judgments which are best left to officials directly responsible to the electorate . . . the Government cannot protect all property all of the time.").

136. In Adamczyk v. Zambelli, 166 N.E.2d 93 (Ill. App. Ct. 1960), the plaintiff charged that the city's policemen were negligent in failing to suppress the unlawful explosion of fireworks by participants in a church parade. *Id.* at 95. In denying liability, the court reasoned that the "wrong was not in the City but in those who improperly and unlawfully used the street." *Id.* at 97.

137. Evett v. City of Inverness, 224 So. 2d 365, 366-67 (2d DCA 1969), *cert. dismissed*, 232 So. 2d 18 (Fla. 1970), *and superseded by* FLA. STAT. § 768.28 (1979).

138. *Hernandez*, 305 So. 2d at 278.

139. Lacey v. United States, 98 F. Supp. 219, 220 (D. Mass. 1951).

140. *Hewitt*, 109 So. 2d at 186.

141. *Henderson*, 247 So. 2d at 25. The special relationship requirement has been described as a tool for focusing upon whether a duty is actually owed to an individual claimant rather than to the public at large. *Id.*

142. *See, e.g.*, *Hargrove*, 96 So. 2d at 130, where the city owed Hargrove, as their prisoner, a "special duty" different from that owed the public generally.

143. *See, e.g.*, Florida Nat'l Bank v. City of Jacksonville, 310 So. 2d 19, 27 (1st DCA 1975), *cert. dismissed*, 339 So. 2d 632 (Fla. 1976).

144. *See, e.g.*, Lewis v. City of Miami, 173 So. 150, 152 (Fla. 1937) ("[W]here a statute enjoins upon municipal officials the duty of furnishing city prisoners adequate housing and food, while they are being detained in custody of the municipality for municipal purposes, a negligent breach of the statutory duty is actionable against the culpable municipality which knowingly fails to carry out the intent of the statute."). *superseded by* FLA. STAT. § 768.28 (1979).

145. The *Commercial Carrier* court noted that the general duty/special duty dichotomy from *Modlin* has been criticized as "a theory which results in a duty to none where there is a

used in cases interpreting Florida Statutes § 768.28 waiver of immunity. Specifically, courts have used this analysis to hold that section 768.28 insulates from liability executive decisions concerning how, when, and whether to enforce the law and provide general protection.[146]

E. *Overview*

Gordon v. City of West Palm Beach[147] was frequently cited by courts as a comprehensive description of the law of municipal sovereign immunity as it existed after *Modlin* and prior to the enactment of section 768.28. The *Gordon* court described the law as follows:

> (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 respondeat 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";
> (3) as to those activities which fall in the category of judicial, quasi-judicial, legislative, and quasi-legislative functions, a municipality remains immune.[148]

III. GENERAL STATUTORY WAIVER OF IMMUNITY UNDER SECTION 768.28

A. *Generally*

The 1868 Florida Constitution first authorized the Florida Legislature to waive the state's sovereign immunity by general law. Pre-

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duty to all." 371 So. 2d at 1015; *see also* John H. Derrick, Annot., *Modern Status of Rule Excusing Governmental Unit from Tort Liability on Theory That Only General, Not Particular, Duty Was Owed Under Circumstances*, 38 A.L.R.4th 1194 (1985).

146. *See, e.g.*, City of Daytona Beach v. Palmer, 469 So. 2d 121 (Fla. 1985); Carter v. City of Stuart, 468 So. 2d 955 (Fla. 1985); Everton v. Willard, 468 So. 2d 936 (Fla. 1985); *Trianon*, 468 So. 2d at 912; Zieja v. Metropolitan Dade County, 508 So. 2d 354 (3d DCA 1986), *cause dismissed*, 518 So. 2d 1279 (Fla. 1987); Liebman v. Burbank, 490 So. 2d 218 (Fla. 4th DCA 1986); City of Orlando v. Kazarian, 481 So. 2d 506 (5th DCA 1985), *rev. denied*, 491 So. 2d 279 (Fla. 1986).

147. Gordon v. City of W. Palm Beach, 321 So. 2d 78 (Fla. 4th DCA 1975), *superseded by* FLA. STAT. § 768.28 (1981).

148. *Id.* at 80.

sently, Article X, section 13 of the Florida Constitution allows "provision [to] be made by *general law* for bringing suit against the state as to all liabilities now existing or hereafter originating."[149] In 1951, the Florida Legislature permitted counties with populations over 450,000 to purchase tort liability insurance and waive their sovereign immunity to the extent of such insurance coverage.[150] However, Florida did not experiment with a general waiver of sovereign immunity until 1969, when the legislature enacted Florida Statutes § 768.15.[151] This statutory waiver had no dollar cap, expressly excluded claims based on the performance of discretionary functions, and was limited to a one year period.[152]

In 1973, the Florida Legislature enacted section 768.28, pursuant to its constitutional authority to provide by general law for bringing suits against the state.[153] This statute waived the sovereign immunity

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149. FLA. CONST. art. X, § 13 (emphasis added). The people of Florida vested the power to waive immunity in the Florida Legislature at an early date. *See id.* art. I, § 19 (now FLA. CONST. art. X, § 13).

150. *See* Act of June 11, 1951, 1951 Fla. Laws ch. 27031; *see also* FLA. STAT. § 768.28 (1985) (waiving sovereign immunity to the extent of insurance coverage for tort liability in auto accidents and the ownership of property).

151. Act of July 5, 1969, 1969 Fla. Laws ch. 357, § 1 (codified at FLA. STAT. § 768.15 (1969)) (repealed 1970).

152. Until its repeal on July 1, 1970, FLA. STAT. § 768.15 provided:

> (1) WAIVER OF IMMUNITY.—The state, for itself and its counties, agencies, and instrumentalities waives immunity for liability for the torts of officers, employees, or servants committed in the state. The state and its counties, agencies, and instrumentalities shall be liable in the same manner as a private individual, but no action may be brought under this section if the claim:
>
> (a) Arises out of the performance or the failure to perform a discretionary function;
>
> (b) Arises out of a riot, unlawful assembly, public demonstration, mob violence, or civil disturbance;
>
> (c) Arises out of the issuance, denial, suspension, or revocation of, or by the failure to issue, deny, suspend, or revoke, a permit, license, certificate, approval, order, or similar authorization; or
>
> (d) Arises out of the collection or assessment of taxes.
>
> (2) PUNITIVE DAMAGES.—Punitive damages shall not be allowed in an action brought under this section.
>
> (3) VENUE.—Actions under this section shall be brought in the county where the cause of action arose.
>
> (4) REMEDIES CUMULATIVE.—The rights and remedies under this section are cumulative to all others.

FLA STAT. § 768.15 (1969) (repealed 1970).

153. *Id.* Act of June 26, 1973, 1973 Fla. Laws ch. 313, § 1 (codified at FLA. STAT. § 768.28 (1973)). Section 768.28's waiver of sovereign immunity was effective July 1, 1974, for the execu-

of the state, its agencies and subdivisions for tort liability, but only to the extent specified in the act.[154]

B. *Terms of Waiver Under Section 768.28*

Section 768.28(1) allows individuals to prosecute certain actions at law against the state or any of its agencies or subdivisions.[155] Subject to the limitations specified in the act, individuals may recover money damages in tort for injury or loss of property, personal injury, or death.[156] However, the damage or injury must have been caused by the negligent or wrongful act or omission of any employee of the state, or of a state agency or subdivision, while acting within the scope of the employee's office or employment.[157] Additionally, the injury must have occurred under circumstances in which the state or such agency or subdivision, if a private person, would have been liable to the claimant.[158]

C. *Breadth of Waiver*

The Florida Supreme Court has recognized the breadth of section 768.28's waiver and has rejected various arguments designed to restrict its scope. For instance, the court has rejected arguments that the waiver covers only proprietary functions,[159] and, the waiver applies

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tive department of the state, and January 1, 1975, for all other agencies and subdivisions of the state. Circuit Court v. Department of Natural Resources, 339 So. 2d 1113, 1116 (Fla. 1976). While the legislature did not later reenact in FLA. STAT. § 768.28 (1991) the express discretionary function exception in FLA. STAT. § 768.15 (1969), it did except from liability actions arising from riot, unlawful assembly, public demonstration, mob violence, or civil disturbance. FLA. STAT. § 768.28(13) (1991).

154. FLA. STAT. § 768.28 (1988).

155. *Id.* § 768.28(1).

156. *Id.*

157. *Id.*

158. *Id.* It has been pointed out that § 768.28 "merely provides that a governmental entity has potential liability where a private party would have a duty under similar circumstances." McFadden v. County of Orange, 499 So. 2d 920, 926 (Fla. 5th DCA 1986) (Sharp, J., dissenting). In electing to treat the state like a private litigant, certain areas of immunity must remain. The more obvious of such immunities are legislative immunity, judicial immunity, and high-level executive immunity.

159. Howlett *ex rel.* Howlett v. Rose, 110 S. Ct. 2430, 2436 (1990). "Although the terms of the waiver could be read narrowly to restrict liability to claims against the state in its proprietary capacity, the Florida courts have rejected that interpretation." *Id.* at 2435 (citing *Commercial Carrier*, 371 So. 2d at 1016). Sovereign immunity in Florida turns on the nature of the claim — whether the duty allegedly breached is discretionary, not on the subject matter of the dispute. *Id.* at 2436 n.11.

only to governmental functions performed by private individuals.[160] Further, the waiver is not limited to direct tort actions against the state; section 768.28 also authorizes actions for contribution or indemnity based on the tortious conduct of the state or its agencies and subdivisions.[161]

Express statutory exceptions to the section 768.28 waiver are extremely limited. For example, one limitation bars actions arising out of official conduct brought by anyone who unlawfully participates in a riot, unlawful assembly, public demonstration, mob violence, or civil disturbance.[162] Nor is the state liable when the responsible officer, employee, or agent is maliciously motivated or acts outside the scope of employment.[163]

D. *Justifications for Waiver*

The doctrine of sovereign immunity of local governments has long been under attack.[164] The principal criticisms have been: (1) the injustice of leaving an injured plaintiff without a remedy;[165] (2) the need to deter tortious conduct of government employees;[166] and (3) the policy of enhancing the public's ability to make informed decisions about the

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160. *See* Department of Health & Rehab. Servs. v. Yamuni, 529 So. 2d 258, 261 (Fla. 1988) ("We recede from any suggestion in *Reddish* that there has been no waiver of immunity for activities performed only by the government and not private persons. The only government activities for which there is no waiver of immunity are basic policy making decisions at the planning level."); *Commercial Carrier*, 371 So. 2d at 1016-17 (citing Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955)); Dunagan v. Seely, 533 So. 2d 867, 869 (Fla. 1st DCA 1988).

161. *Commercial Carrier*, 371 So. 2d at 1022.

162. FLA. STAT. § 768.28(13) (1991). "This is consistent with the equitable notion that the state will not compensate the wrongdoer for the consequences of his wrongs." *Everton*, 468 So. 2d at 943 n.6 (Shaw, J., dissenting).

163. FLA. STAT. § 768.28(9)(a) (1991).

164. *See* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957); Williams v. City of Green Cove Springs, 65 So. 2d 56, 57 (Fla. 1953); City of Miami v. Bethel, 65 So. 2d 34, 37 (Fla. 1953). A current of criticism argues that a municipality assuming the losses due to the tortious conduct of officers and employees is better than the injured person assuming such losses. Furthermore, these critics regard the torts of public employees, as in other cases of vicarious liability, as a cost of governmental administration which the public should bear.

165. *Everton*, 468 So. 2d at 948 (Shaw, J., dissenting).

166. Carter v. City of Stuart, 468 So. 2d 955, 959 (Fla. 1985) (Shaw, J., dissenting) (citing PROSSER & KEETON, *supra* note 10, § 4, at 25-26); *see also* Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137 (1951)). FLA. STAT. § 284 (1983) requires risk management and safety programs at the state level and provides a model for political subdivisions. Except for a municipality, the affected agency or subdivision may, at its discretion, request the assistance of the Department of Insurance in the consideration, adjustment, and settlement of any claim under this act. FLA. STAT. § 768.28(3) (1991).

conduct and efficiency of its government by bringing wrongful conduct to public attention.[167]

E. *Entities Within the Scope of Waiver*

Section 768.28(2) waives sovereign immunity for tort liability on behalf of the state and its agencies or subdivisions.[168] The section defines "state agencies or subdivisions"[169] to include the executive departments,[170] the legislature, the judicial branch (including public defenders),[171] independent establishments of the state, as well as counties, municipalities, and corporations and entities acting primarily as instrumentalities or agencies of the state,[172] including the Spaceport Florida Authority.[173] In addition, Florida courts have held the following entities to be state agencies and subdivisions within the meaning of section 768.28: special taxing districts,[174] electric authorities,[175] the

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167. *Carter*, 468 So. 2d at 959 (Shaw, J., dissenting) ("A tort suit, where facts are established, opens up the activities of government to public scrutiny and permits the public to make informed decisions about the conduct and efficiency of its agents.").

168. *See* FLA. STAT. § 768.28(2) (1991).

169. *Id. Cf. id* § 1.01(8) (defining "political subdivision" to "include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state").

170. All functions of the executive branch of state government are to be allotted among not more than 25 departments, exclusive of those specifically provided for or authorized by the Constitution. FLA. CONST. art. IV, § 6; *see also* 48 FLA. JUR. 2D § 62-120 (1984) (analyzing the executive branch of Florida's government).

171. 1984 Fla. Laws ch. 84-335 amended FLA. STAT. § 768.28(2) to include public defenders as part of the judicial branch within the definition of state agencies and subdivisions.

172. While there are no clear criteria for determining whether an entity is a "state agency or subdivision" within the meaning of § 768.28(2), the critical factor is the existence of governmental "control over the 'detailed physical performance' and 'day-to-day operation' of that entity." Shands Teaching Hosp. v. Lee, 498 So. 2d 77, 79 (Fla. 1st DCA 1985) (citing United States v. Orleans, 425 U.S. 807 (1976)); *see also* Skoblow v. Ameri-Manage, 483 So. 2d 809, 811-12 (3d DCA 1986), *approved*, 514 So. 2d 1077 (Fla. 1987), *cert. denied*, 491 U.S. 904 (1989) (holding that a management firm under contract with the state to operate a state hospital is a corporation primarily acting as an instrumentality or agency of the state).

173. FLA. STAT. § 768.28(2) (1991).

174. Eldred v. North Broward Hosp. Dist., 498 So. 2d 911, 914 (Fla. 1986) ("special taxing district is a constitutionally established local governmental entity charged with the responsibility to provide for the 'public health . . . and good' of the citizens within the district" and is included as one of the "four types of local governmental entities, along with counties, school districts, and municipalities." Thus, the legislature clearly "intended the provisions of section 768.28(2) to include special taxing districts within the phrase 'independent establishments of the state.'").

175. Sebring Utils. Comm'n v. Sicher, 509 So. 2d 968, 970 (Fla. 2d DCA 1987); Jetton v. Jacksonville Elec. Auth., 399 So. 2d 396, 398 (1st DCA), *petition denied*, 411 So. 2d 383 (Fla. 1981).

Florida National Guard,[176] the Board of Regents,[177] a zoning district,[178] the clerk of the circuit court,[179] sheriffs and their deputies,[180] port or canal authorities,[181] and county Public Health Trusts.[182]

The Florida Supreme Court has recognized that municipalities are unequivocally included within the statutory definition of "state agencies and subdivisions."[183] In *Cauley v. City of Jacksonville*,[184] the court specifically rejected the argument that a different immunity standard should apply to a municipality than to a county government.[185] The court noted that the statute applies to cities just as it applies to other subdivisions of the state, even though cities previously had no state sovereign immunity.[186] The court reasoned that there was no constitutional prohibition against legislatively granting limited immunity to cities and that the legislature intended for cities to be on the same footing as the state and its agencies.[187]

IV. SCOPE OF WAIVER OF IMMUNITY UNDER SECTION 768.28

A. *Introduction*

Section 768.28 waives governmental immunity from tort liability "under circumstances in which the state or [an] agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state. . . ."[188] Although this language could be interpreted to mean that private tort liability and governmental tort liability are coextensive in Florida, Florida courts have recognized two exceptions. First, the discretionary function exception is based

176. Crawford v. Department of Military Affairs, 412 So. 2d 449, 451 (5th DCA), *petition denied*, 419 So. 2d 1196 (Fla. 1982). *But cf.* FLA. STAT. § 768.28(9)(c) (1991) (holding that Florida National Guard member is not acting within scope of state employment when performing duties under provisions of federal law).

177. Shands Teaching Hosp. v. Lee, 478 So. 2d 77, 78 (Fla. 1st DCA 1985).

178. Op. Att'y Gen. Fla. 87-41 (1987).

179. Thigpin v. Sun Bank, 458 So. 2d 315, 316 (Fla. 5th DCA 1984).

180. Beard v. Hambrick, 396 So. 2d 708, 712 (Fla. 1981).

181. Op. Att'y Gen. Fla. 78-106, -127 (1978).

182. Jaar v. University of Miami, 474 So. 2d 239, 244 (3d DCA 1985), *rev. denied*, 484 So. 2d 10 (Fla. 1986).

183. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1019 (Fla. 1979).

184. 403 So. 2d 379 (Fla. 1981).

185. *Id.* at 383-87.

186. *Id.*

187. *Id.*

188. FLA. STAT. § 768.28(1) (1991).

on the separation of powers doctrine.[189] Second, the public duty doctrine exception[190] primarily protects the government against overburdensome tort liability, as well as furthering separation of powers interests.[191] Section 768.28 waives governmental immunity unless one of these exceptions applies to the tortious governmental conduct sued upon.[192]

Prior to the enactment of section 768.28, Florida's common law of municipal sovereign immunity had struggled to determine which municipal acts should be immune, and which should be subject to tort liability.[193] Courts applying this law recognized both the public duty doctrine and discretionary function exceptions from tort liability.[194] Florida courts defining these exceptions balanced many of the same competing interests and policies that courts now consider in defining the scope of the discretionary function and public duty doctrine exceptions under section 768.28.[195] Consequently, this pre-waiver law has been a basis for defining the scope of the section 768.28 waiver of immunity[196] even though the Florida Supreme Court has held that section 768.28 was not intended simply to codify the pre-waiver law of municipal sovereign immunity.[197]

Both the law of municipal immunity and the law developed under section 768.28 illustrate that no single formulation can satisfactorily reconcile the competing interests and policies involved in defining the discretionary function and public duty doctrine exceptions. Suggestions for such formulations, such as the governmental-proprietary distinction or the planning level-operational level test, have not been successful.

No single formulation of these exceptions is possible because they protect interests and policies of varying strengths. For example, those

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189. *See* Woods v. City of Palatka, 63 So. 2d 636 (Fla. 1953); City of Miami v. Oates, 10 So. 2d 721 (Fla. 1942).

190. *See* Everton v. Willard, 468 So. 2d 936, 938 (Fla. 1985) (Shaw, J., dissenting). Also referred to as the "general duty"-"special duty" doctrine exception. *Commercial Carrier*, 371 So. 2d at 1015.

191. *Everton*, 468 So. 2d at 938 (Shaw, J., dissenting).

192. FLA. STAT. § 768.28(9)(a) (1991); *id.* § 768.28(13). There is a statutory exception to the waiver of sovereign immunity under § 768.28(9)(a) when a governmental officer, agent, or employee acts outside the scope of employment or is maliciously motivated, and under § 768.28(13) when the "victim" is unlawfully participating in a riot, unlawful assembly, public demonstration, mob violence, or civil disobedience. *See Everton*, 468 So. 2d at 943 n.6 (Shaw, J., dissenting).

193. *Commercial Carrier*, 371 So. 2d at 1015.

194. *Id.* at 1015-16.

195. *See id.*

196. *Id.* at 1016.

197. *Id.*

basic governmental functions which Florida courts view as central to the separation of powers doctrine[198] will automatically be held immune. This is because the separation of powers doctrine protects legislative and executive discretion from undue judicial interference through the imposition of tort damage awards.[199] Similarly, Florida courts will hold governmental acts central to the public duty doctrine immune. The public duty doctrine shields a governmental entity from liability for simply failing to provide a governmental service or enforce the law.[200] However, as the interests protected by the separation of powers and public duty doctrines diminish in strength, courts more likely will hold that competing interests favoring liability outweigh the need for immunity. Such interests include the need to compensate an injured claimant, the need to deter tortious governmental conduct and the need to expose governmental wrongdoing. Moreover, factors favoring liability such as the existence of a special relationship between the government and the injured claimant may become decisive in resolving immunity issues.[201]

A substantial body of case law reflects the judicial weighing of the competing interests involved in determining whether exceptions exist to the waiver of immunity under section 768.28.[202] This case law has defined a number of relatively bright line areas of immunity and liability which readily can be identified and categorized.[203] Courts usually resolve issues of immunity falling outside these defined areas of immunity and liability on a case-by-case basis.[204]

To determine immunity issues under case law construing section 768.28, one should consider:

1. Was the governmental act in question simply a failure to provide a governmental service or law enforcement which resulted in injury caused by a danger that the governmental entity did not initially create? If so, Florida courts will generally find immunity.[205]

2. However, in question one above, if a special relationship existed

198. *See supra* text accompanying notes 169-73.

199. *See* FLA. STAT. § 768.28 (1991).

200. *See supra* text accompanying notes 190-91.

201. *Cf. Commercial Carrier*, 371 So. 2d at 1015 (distinguishing a general duty from a special duty).

202. *See infra* text accompanying notes 211-44.

203. *See infra* text accompanying notes 211-44.

204. *See infra* text accompanying notes 205-10.

205. *See, e.g.*, Carter v. City of Stuart, 468 So. 2d 955, 957 (Fla. 1985); *Everton*, 468 So. 2d at 939; Trianon Park Condo. Ass'n v. City of Hialeah, 468 So. 2d 912, 923 (Fla. 1985).

between the governmental entity and the claimant, such as a custodial relationship, the court will generally find liability.[206]

3. Did the governmental entity initially create the danger causing injury? If so, the Florida courts generally will find liability for nondiscretionary governmental acts, such as operating a motor vehicle on a public highway.[207]

4. Did the governmental act result from high-level policy judgment, such as that reflected in a plan for a public project? If so, Florida courts generally will find immunity.[208]

5. Did the governmental act result from a discretionary decision at a lower level of the executive branch, such as a decision to assign a juvenile inmate to a particular cell?[209] If so, Florida courts will resolve the immunity issue by balancing the need for immunity against competing interests and factors favoring liability.[210]

The foregoing background is not intended to be a comprehensive formulation of the doctrine of sovereign immunity. It is intended

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206. *See, e.g.*, Kaisner v. Kolb, 543 So. 2d 732, 734 (Fla. 1989).

207. *See, e.g.*, Sintros v. LaValle, 406 So. 2d 483, 484 (Fla. 5th DCA 1981).

208. *See* Ingham v. Department of Transp., 419 So. 2d 1081, 1082 (Fla. 1982); Department of Transp. v. Neilson, 419 So. 2d 1071, 1077 (Fla. 1982).

209. *See, e.g.*, Department of Health & Rehab. Servs. v. Whaley, 574 So. 2d 100, 104 (Fla. 1991).

210. *See Trianon*, 468 So. 2d at 918; Ellmer v. City of St. Petersburg, 378 So. 2d 825, 827 (Fla. 2d DCA 1979). Immunity is not confined to the decisions of executive officials who are at the highest level. It extends also to lower administrative officers when they engage in making a decision by weighing the policies for and against it, such as a police officer's decision not to make an arrest. *See also* United States v. Gaubert, 111A S. Ct. 1267, 1275 (1991).

> A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions. Day-to-day management of banking affairs, like the management of other businesses, regularly require judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level. "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." (quoting United States v. Varig Airlines, 467 U.S. 797, 813 (1984)). . . . The Court's first use of the term "operational" in connection with the discretionary function exception occurred in *Dalehite*, where the Court noted that "[t]he decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program." 346 U.S. at 42. . . . [B]ut the distinction in *Dalehite* was merely description of the level at which the challenged conduct occurred. There was no suggestion that decisions made at an operational level could not also be based on policy.

Id.

merely to present an overview of some of the principal issues involved in the discussion that follows. With this overview in mind, we now turn to the cases interpreting the scope of the section 768.28 waiver of sovereign immunity.

B. Commercial Carrier

In the 1979 case of *Commercial Carrier Corp. v. Indian River County*,[211] the Florida Supreme Court specifically addressed the scope of the sovereign immunity waiver contained in section 768.28. *Commercial Carrier* involved a negligence action against Indian River County for failure to maintain a stop sign at an intersection and for the Florida Department of Transportation's failure to paint or replace the word "STOP" on the pavement in front of the intersection.[212] The court acknowledged that section 768.28 does not contain an exception for discretionary acts, as the Federal Tort Claims Act does.[213] However, the *Commercial Carrier* court reasoned that under the separation of powers doctrine "certain policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability."[214] Recognizing that "orthodox tort liability stops and the act of governing begins,"[215] with "certain judgmental decisions of governmental authorities which are inherent in the act of governing,"[216] the court held that section 768.28 insulated certain "discretionary" governmental functions from tort liability.[217] The court reasoned that "certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance."[218] Further, these functions could be identified through a case-by-case distinction between "the 'planning' and 'operational' levels of decision-making by governmental agencies."[219] The *Commercial Carrier* court

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211. 371 So. 2d 1010 (Fla. 1979).

212. *Id.* at 1013.

213. 28 U.S.C. § 171 (1988). The exceptions from tort liability under the Federal Tort Claims Act (FTCA) are listed in 28 U.S.C. § 2680. Subsection (a) provides an exception as to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.* § 2680(a).

214. *Commercial Carrier*, 371 So. 2d at 1020.

215. *Id.* at 1018 (quoting Evangelical United Brethren Church v. State, 407 P.2d 440, 444 (1965)).

216. *Id.* at 1020.

217. *Id.* at 1022.

218. *Id.*

219. *Id.*

urged that this distinction be made according to the preliminary test iterated in *Evangelical United Brethren Church v. State.*[220]

The *Evangelical* test, adopted in *Commercial Carrier*, poses the following questions:[221]

1. Does the challenged government act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

2. Is the questioned act, omission, or decision essential to accomplishing the governmental policy, program, or objective?

3. Does the act, omission, or decision require the governmental agency to exercise basic policy evaluation, judgment, and expertise?

4. Does the governmental agency involved possess the requisite constitutional or statutory authority and duty to effect the challenged act, omission, or decision?

If all of the above questions can be answered in the affirmative, then the *Evangelical* analysis suggests that the governmental conduct is discretionary and immune. If one or more of the questions are answered in the negative, then further inquiry is necessary to determine whether the conduct is immune.[222] As the *Commercial Carrier* court approved the *Evangelical* test and distinguished between "planning" and "operational" level governmental decisions, it also acknowledged that the planning-operational level test for immunity issues creates uncertainty.[223] However, the court adopted that test because it emphasized separation of powers considerations as the proper basis for governmental immunity.[224]

The court in *Commercial Carrier* distinguished immune discretionary acts from non-immune operational level acts by defining operational

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220. *Id.*

221. *Id.* at 1019 (quoting *Evangelical United Brethren Church*, 407 P.2d at 445).

222. *Id.* Although the court in *Commercial Carrier* did not specifically describe the analysis to be used in making this further inquiry, the court did implicitly approve the policy analysis articulated in Lipman v. Brisbane Elementary Sch. Dist., 359 P.2d 465, 467 (1961).

> Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages.

Id. For a good illustration of this type of analysis, see Comuntzis v. Pinellas County Sch. Bd., 508 So. 2d 750, 753 (Fla. 2d DCA 1987); Bellavance v. State, 390 So. 2d 422, 424-25 (Fla. 1st DCA 1980).

223. *Commercial Carrier*, 371 So. 2d at 1022.

224. *Id.*

level acts as those "that implement policy."[225] Applying this planning-operational level test to the facts of the case, the court held that the negligent failure to maintain the traffic devices was operational level conduct that subjected the municipality to liability.[226]

The planning-operational level test adopted in *Commercial Carrier* and relied on in subsequent decisions focuses primarily on governmental discretion as it relates to the separation of powers doctrine.[227] Although this is the paramount factor in determining immunity issues, other interests and policies also are relevant to section 768.28 immunity issues. Consequently, many commentators have recognized that narrowly applying the planning-operational level test for immunity without considering all relevant interests and policies, can lead to confusion, uncertainty and incorrect results.[228]

C. Trianon

The Florida Supreme Court's decision in *Trianon Park Condominium Association, Inc. v. City of Hialeah*[229] soon highlighted the

225. *Id.* at 1021. In Kaisner v. Kolb, 543 So. 2d 732, 737 (Fla. 1989), it was later explained that an "operational" function "is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented."

226. *Commercial Carrier*, 371 So. 2d at 1022.

227. *Id.*; *see* Johnson v. State, 447 P.2d 352, 361 n.8 (1968) (en banc) ("Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government."); *Kaisner*, 543 So. 2d at 736 ("the discretionary function exception is grounded in the doctrine of separation of powers").

228. *See* Davis v. Department of Corrections, 460 So. 2d 452, 458-59 (Fla. 1st DCA 1984); William N. Drake, Jr., *Clarifying the Confusion Over Governmental Immunity for Planning*, 57 FLA. B.J. 146 (Mar. 1983); William N. Drake, Jr. & Richard D. Oldham III, *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); Larry A. Klein & Brad A. Chalker, *Developments in Florida's Doctrine of Sovereign Immunity*, 35 U. MIAMI L. REV. 999 (1981); John B. Ostrow & Joseph H. Lowe, *Sovereign Immunity*, 33 U. MIAMI L. REV. 1297 (1979); Deborah L. Caventer, Note, *The Demise of the Discretionary Exception to Sovereign Immunity*, 18 STETSON L. REV. 615 (1989); Joseph M. Hurrox, Note, *Florida's Waiver of Sovereign Immunity: Fact or Fiction?*, 16 STETSON L. REV. 805 (1987); Gail A. McCarthy, Note, *The Varying Standards of Governmental Immunity*, 24 NEW ENG. L.J. 991 (1990); S. Stockwell Stoutemire, Note, *The Doctrine of Sovereign Immunity Is Alive and Well*, 8 FLA. ST. U.L. REV. 377 (1980); Susan C. McDonald, Comment, *Sovereign Immunity — Revisited But Still Not Refined*, 12 FLA. ST. U.L. REV. 401 (1984); Denise C. Middendorf, Comment, *How Much Wrong Can the King Do? A Look at the Modern Sovereign Immunity Doctrine*, 13 STETSON L. REV. 359 (1984); John Mizell, Comment, *The Florida Supreme Court's View of State Sovereign Immunity: An Exercise in Confusion Producing Restrictive Results*, 15 STETSON L. REV. 831 (1986).

229. 468 So. 2d 912 (Fla. 1985).

limitations inherent in the planning-operational level test for immunity. By attending to the policy of limiting excessive tort liability, the *Trianon* court expanded and modified the principles of immunity set forth in *Commercial Carrier*.

In *Trianon*, the Florida Supreme Court held that a city owed no common law or statutory tort duty to a private landowner to conduct a building code inspection reasonably.[230] Consequently, the city was not liable for property damage resulting from negligent inspection.[231] The majority reached this result by applying principles of the public duty doctrine.[232] As stated in *Modlin*, this doctrine provides that a government owes a duty to enforce the law only to the public generally and not to any particular individual, absent circumstances or legislative intent which create a special tort duty to particular individuals.[233] In support of its adoption of the public duty doctrine, the *Trianon* court cited general policies espoused by the *Restatement (Second) of Torts*.[234] These policies include the need to avoid excessive fiscal impact on governmental entities,[235] the need to prevent chilling of the law enforcement process,[236] and the availability of other remedies against those who initially created the danger which caused damage.[237]

The public duty doctrine recognized in *Trianon* expands the exemption from tort liability provided by the *Commercial Carrier* doctrine of discretionary function immunity. Under *Trianon*, the public duty doctrine renders immune not only discretionary governmental conduct

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230. *Id.* at 923.

231. *Id.*

232. *Id.* at 922; *see* Laura Robinson, Note, *Rebuilding the Wall of Sovereign Immunity: Municipal Liability for Negligent Building Inspection*, 37 U. FLA. L. REV. 343 (1985).

233. *See Modlin*, 201 So. 2d at 75.

234. *See Trianon*, 468 So. 2d at 917 (quoting RESTATEMENT (SECOND) OF TORTS § 288 cmt. b (1964)) ("legislative enactments for the benefit of the general public do not automatically create an independent duty to either individual citizens or a specific class of citizens"); *id.* at 918 (quoting RESTATEMENT (SECOND) OF TORTS § 315 (1977)) (there is no common law duty to prevent the misconduct of third persons).

235. *Id.* at 922-23. The court noted that to hold governmental entities financially accountable for the negligent enforcement of building codes would "result in substantial fiscal impact on governmental entities" and would make the governmental entity and its taxpayers insurers for all building construction defects. *Id.*

236. *Id.* at 923. This concept was more fully discussed in the cases of Everton v. Willard, 468 So. 2d 936, 939 (Fla. 1985) and Carter v. City of Stuart, 468 So. 2d 955, 957 (Fla. 1985).

237. *Trianon*, 468 So. 2d at 923 ("The government clearly has no responsibility to protect personal property interests or ensure the quality of buildings that individuals erect or purchase. The proper remedy for faulty construction lies in an action against the contractor, developer, or seller.").

but also "operational" conduct within its scope.[238] Arguably, the *Trianon* court expanded the scope of governmental tort immunity because it focused more directly on the policy of limiting excessive tort liability than the *Commercial Carrier* court did. In contrast to the public duty doctrine, the discretionary function doctrine of *Commercial Carrier* was primarily concerned with limiting tort liability as a means of protecting separation of powers interests.

The *Trianon* holding, therefore, requires a plaintiff suing the government in tort to allege a common law or statutory tort duty other than that owed to the public generally. The plaintiff also must establish that the governmental tortious conduct is not subject to immunity under the discretionary function doctrine of *Commercial Carrier.*

In addition to adopting the public duty doctrine, the *Trianon* court identified four categories of governmental conduct for use in determining sovereign immunity issues:

> (I) legislative, permitting, licensing and executive officer functions;[239]
> (II) enforcement of laws and the protection of the public safety;[240]
> (III) capital improvements and property control operations; and
> (IV) providing professional educational and general services for the health and welfare of the citizens.[241]

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238. It has been acknowledged that the area of governmental inspections does not "fit neatly into either the planning or operational categorization" yet is an essential activity of the government which must remain immune from liability. Johnson v. Collier County, 468 So. 2d 249, 251 (Fla. 2d DCA 1985) (citing Neuman v. Davis Water & Waste Inc., 433 So. 2d 559, 562-63 (2d DCA 1982), *rev. denied,* 441 So. 2d 632 (Fla. 1983)).

239. *Trianon,* 468 So. 2d at 919. *Trianon* states that such functions as the enactment of, or failure to enact, laws or regulations, or the issuance of, or refusal to issue, licenses, permits, variances, or directives, are basic governmental functions inherent within the act of governing. *Id.*

240. *Id.* at 921. The court in *Trianon* stated that

> this discretionary power to enforce compliance with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors, arresting officers, and other law enforcement officials, as well as the discretionary authority given fire protection agencies to suppress fires. This same discretionary power to enforce compliance with the law is given to regulatory officials such as building inspectors, fire department inspectors, health department inspectors, elevator inspectors, hotel inspectors, environmental inspectors, and marine patrol officers.

Id.

241. *Id.* at 919.

In considering governmental tort liability under these four categories, the *Trianon* court stated:

> [T]here is no governmental tort liability [regarding] the discretionary governmental functions described in categories I and II because there has never been a common law duty of care with respect to these legislative, executive, and police power functions, and the statutory waiver of sovereign immunity did not create a new duty of care.[242]

On the other hand, the court recognized:

> [T]here may be substantial governmental liability under categories III and IV. This result follows because there is a common law duty of care regarding how property is maintained and operated and how professional and general services are performed. It is in these latter two categories that the *Evangelical Brethren* test is most appropriately utilized to determine what conduct constitutes a discretionary planning or judgmental function and what conduct is operational for which the governmental entity may be liable.[243]

Courts have used these four *Trianon* categories in subsequent immunity decisions but have held them to be "rough" guides rather than inflexible rules.[244]

D. *General Areas of Immunity*

The following general areas of immunity have emerged in cases construing section 768.28. Some courts developing these general areas of immunity have recognized bright line categories and general rules and principles of immunity. Other courts have resolved immunity issues in these areas on a case-by-case basis.

1. Discretionary Decisions of Coordinate Branches of Government

As noted previously, certain "discretionary" governmental functions remain immune from tort liability under the separation of powers doctrine.[245] The term "discretionary," as used in this context, means

242. *Id.* at 921.

243. *Id.*

244. Department of Health & Rehab. Servs. v. Yamuni, 529 So. 2d 258, 261 (Fla. 1988) ("the categories set out in *Trianon* offer only a rough guide to the type of activities which are either immune or not immune").

245. *Id.* at 260. While discretionary conduct must be the product of judgment or choice,

that the governmental act was an exercise of executive and legislative power such that, if a court intervened by way of tort law, it would entangle itself inappropriately in fundamental questions of policy and planning.[246] The following is a nonexclusive list of basic, governmental functions which Florida courts have held to be immune from tort liability by virtue of the separation of powers doctrine.

a. Enactment of Laws

Notwithstanding section 768.28's broad waiver of sovereign immunity, Florida law retains a legislative immunity. Thus, the state cannot be liable for any claim resulting from the adoption of or failure to adopt any statute, charter, ordinance, order, regulation, resolution or resolve, or any other wrongful exercise of legislative functions.[247]

> [T]he legislature, commissions, boards, city councils, and executive officers, by their enactment of, or failure to enact, laws or regulations . . . are acting pursuant to basic governmental functions performed by the legislative or executive branches of government. The judicial branch has no authority to interfere with the conduct of those functions unless they violate a constitutional or statutory provision.[248]

Since zoning is a legislative function, zoning decisions do not ordinarily give rise to any claim for compensation against the zoning authority.[249]

b. Issuance of Licenses and Permits

The legislature, commissions, boards, city councils, and executive officers are immune from tort liability for issuing or refusing to issue,

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"discretion in the *Commercial Carrier* sense refers to discretion at the policy making or planning level." *Id.*

246. Kaisner v. Kolb, 543 So. 2d 732, 737 (Fla. 1989). The reason for the discretionary function exception 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." *Commercial Carrier*, 371 So. 2d at 1019 (quoting Cornelius J. Peck, *The Federal Tort Claims Act*, 31 WASH. L. REV. 207, 240 (1956)).

247. *See, e.g.*, Brynnwood Condo. I Ass'n v. City of Clearwater, 474 So. 2d 317, 319 (2d DCA 1985), *rev. denied*, 484 So. 2d 7 (Fla. 1986) (city's decision to adopt plumbing and building codes allowing the use of copper pipes does not render the city liable since the adoption of codes and other ordinance making procedures are basic governmental policymaking processes for which a municipality is immune from liability).

248. *Trianon*, 468 So. 2d at 919.

249. Pinellas County v. Brown, 420 So. 2d 308, 309 (2d DCA 1982), *cert. denied*, 430 So. 2d 450 (Fla. 1983); New Port Largo v. Monroe County, 706 F. Supp. 1507, 1521 (S.D. Fla. 1988).

licenses, permits, variances, or directives.[250] The decision to issue a permit or license is immune from tort liability because it is committed to the discretion of a coordinate branch of government.[251] Denying a license, permit, zoning reclassification or the like may even be more likely to involve discretion.[252] Additionally, such denials often interfere only with economic opportunities and rarely cause physical harm.[253] Thus, government liability ordinarily cannot be predicated on the government negligently issuing a certificate of occupancy[254] or a permit for construction of electrical facilities within a town's right of way,[255] reissuing a driver's license to an incompetent driver without examination,[256] or wrongfully refusing or revoking a building permit.[257] Moreover, issuing a license or permit does not create a governmental duty to warn of dangerous conditions that result from activities of a licensee or permittee.[258]

c. Judicial or Quasi-Judicial Acts

Florida retains judicial immunity to protect against liability for judicial decisions.[259] Immunity also extends to the acts of executive

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250. It should be noted that FLA. STAT. § 768.15(c) (1969), the predecessor to FLA. STAT. § 768.28 (1991), expressly exempted from the waiver of immunity claims which arose out of the "issuance, denial, suspension, or revocation of, or by the failure to issue, deny, suspend, or revoke, a permit, license, certificate, approval, order or similar authorization; . . . ." *See* Hensley v. Seminole County, 268 So. 2d 452, 453 (Fla. 4th DCA 1972) (no liability for vehicle inspection); Proser v. Berger, 132 So. 2d 439, 441 (3d DCA), *cert. denied*, 136 So. 2d 343 (Fla. 1961) (state department may be held liable for breach of contract, but not for tortious acts).

251. PROSSER & KEETON, *supra* note 10, § 131, at 1050.

252. *Id.*

253. *Id.*

254. Victoria Village "G" Condo. Ass'n v. City of Coconut Creek, 488 So. 2d 900 (4th DCA), *rev. denied*, 497 So. 2d 1218 (Fla. 1986).

255. Tomblin v. Town of Palm Beach, 552 So. 2d 1182, 1183 (Fla. 4th DCA 1989).

256. Dietrick v. Department of Highway Safety & Motor Vehicles, 496 So. 2d 212 (Fla. 5th DCA 1986).

257. City of Cape Coral v. Landahl, Brown & Weed, 470 So. 2d 25, 27 (2d DCA), *rev. denied*, 480 So. 2d 1294 (Fla. 1985), *cert. denied*, 478 U.S. 1010 (1986); City of Live Oak v. Arnold, 468 So. 2d 410, 412 (Fla. 1st DCA 1985).

258. *See* Huff v. Goldcoast Jet Ski Rentals, 515 So. 2d 1349, 1350-51 (Fla. 4th DCA 1987) ("It is common knowledge that some drivers of automobiles exceed posted speed limit on public highways. But that would not justify the contention that, by issuing a license to operate an automobile rental agency abutting a public highway near a school zone or other limited speed zone, a governmental agency thereby *creates* a known dangerous condition that may give rise to a duty to warn other travelers on the highway.").

259. Historically, judges of courts of superior or general jurisdiction are not liable in civil actions for their judicial acts. McDaniel v. Harrell, 87 So. 631, 633 (Fla. 1921). The immunity applies even when such acts are in excess of their jurisdiction and are alleged to have been

branch officials who perform quasi-judicial or prosecutorial functions which are intimately associated with the judicial phase of the criminal process.[260]

(1) Judicial immunity

Section 768.28's waiver of sovereign immunity applies to "state agencies or subdivisions."[261] By definition, this includes "the executive departments, the Legislature, the *judicial branch*, and the independent establishments of the state. . . ."[262] However, "it does not abrogate the common law principle of judicial immunity."[263] The doctrine insures immunity from tort liability for a judge's acts performed in the judge's judicial capacity, unless such acts are undertaken with a clear absence of all jurisdiction. For example, a judge's decision to sentence an individual as a habitual offender cannot give rise to tort liability.[264]

(2) Prosecutors

Courts have determined that a State Attorney is part of the judicial branch of government for purposes of section 768.28's waiver of immunity.[265] Further, Florida courts have determined that prosecutors are absolutely immune from liability for their conduct in prosecuting and presenting the State's case, insofar as that conduct is intimately associated with the judicial phase of the criminal process.[266]

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done maliciously or corruptly. *Id.* Under common law principles, there is no municipal liability for an error of a court in rendering judgment, at least where no corruption or malice is imputed. *Id.* Also, no liability inures for imprisonment because of an irregular, erroneous, or even void judgment; nor for the negligence of its administrative officers in the performance of their official duties, such as the levying of executions or writs, pursuant to order of the municipal court. *Id.*; *see also* Forrester v. White, 484 U.S. 219, 225 (1988); Merry E. Lindberg, Comment, *Judicial Immunity: An Unqualified Sanction of Tyranny from the Bench?*, 30 U. FLA. L. REV. 810 (1978).

260. Burns v. Reed, 111 S. Ct. 1934 (1991).

261. FLA. STAT. § 768.28(1) (1991).

262. *Id.* § 768.28(2).

263. Berry v. State, 400 So. 2d 80, 82 (4th DCA), *rev. denied*, 411 So. 2d 380 (Fla. 1981).

264. *Id.* at 83.

265. *Id.*

266. Hansen v. State, 503 So. 2d 1324, 1326 (Fla. 1st DCA 1987); Lloyd v. Hines, 474 So. 2d 376, 378 (Fla. 1st DCA 1985); *see also* Lawrence A. Dvorin, Comment, *Prosecutors' Right to Qualified Immunity*, 22 SUFFOLK U.L. REV. 1259 (Winter 1988) (stating that an absolute or qualified immunity defense in civil suits is a possible obstacle to plaintiffs seeking monetary redress for harm resulting from prosecutors' misconduct or lack of conduct).

(3) Court-appointed psychiatrists

In Florida, a psychiatrist appointed by the court to examine a criminal defendant enjoys quasi-judicial immunity from liability.[267] This immunity applies when, based on an examination, the psychiatrist erroneously determines that the accused would pose no harm to others if released on bail.[268]

d. Funding and Modernization of Public Improvements

There is no liability for a governmental entity's failure to build, expand, upgrade or otherwise expend money on capital improvements such as bridges, buildings and roads.[269] Deciding whether to build or modernize a particular improvement is a discretionary function committed to a coordinate branch of government with which the courts cannot interfere.[270] Courts have reasoned that "to hold otherwise . . . would supplant the wisdom of the judicial branch for that of the governmental entities whose job it is to determine, fund, and supervise necessary road construction and improvements, thereby violating the separation of powers doctrine."[271]

This rule prevents tort liability from arising out of decisions whether to build a storm pump system to protect individual property owners from flooding due to natural causes,[272] provide a walkway, guardrail or other protective device on an existing road,[273] or to up-

267. *See* Zock v. Miller, 505 So. 2d 18, 19 (Fla. 3d DCA 1987) (court-appointed psychiatrist enjoys quasi-judicial immunity from liability); Cawthon v. Coffer, 264 So. 2d 873, 874 (Fla. 2d DCA 1972) (stating that court-ordered psychiatrists could not be held liable to plaintiff on basis that he was adjudged incompetent as result of psychiatrists' negligent failure to conduct a thorough physical and mental evaluation).

268. *Zock*, 505 So. 2d at 19.

269. *Trianon*, 468 So. 2d at 920; *see also* City of St. Petersburg v. Collom, 419 So. 2d 1082, 1086 (Fla. 1982) ("The judicial branch can neither mandate the building of expensive and failsafe improvements, nor otherwise require expenditure for such improvements"); Perez v. Department of Transp., 435 So. 2d 830, 831 (Fla. 1983) (decision concerning whether or not to upgrade and improve roadway is judgmental, planning-level function) (superseded by statute as stated in School Bd. of Orange County v. Coffey, 524 So. 2d 1052, 1053 (Fla. 5th DCA 1988)).

270. *Trianon*, 468 So. 2d at 920.

271. Department of Transp. v. Neilson, 419 So. 2d 1071, 1077 (Fla. 1982) (superseded by statute as stated in *Coffey*, 524 So. 2d at 1053).

272. Slemp v. City of N. Miami, 545 So. 2d 256, 258 (Fla. 1989). However, "once the city has undertaken to provide such protection, by building a storm sewer pump system, it assumes the responsibility to do so with reasonable care." *Id.*

273. Nehmad v. Metropolitan Dade County, 545 So. 2d 300, 301 (Fla. 3d DCA 1989); Clarke v. Department of Transp., 506 So. 2d 24, 25 (Fla. 1st DCA 1987); Hyde v. Florida Dep't of Transp., 452 So. 2d 1109, 1111 (Fla. 2d DCA 1984); David P. Chapus, Annot., *Governmental Tort Liability as to Highway Median Barriers*, 58 A.L.R.4th 559 (1987).

grade a railroad intersection.[274] Also held immune was a governmental decision not to build a new jail despite the old jail's obvious inability to house adequately a population larger than that for which it was intended.[275]

e. Traffic Control

In *Department of Transportation v. Neilson*,[276] the Florida Supreme Court held that section 768.28's discretionary function waiver of immunity does not apply to decisions regarding the installation of appropriate traffic control measures or the establishment of speed limits.[277] The court explained that "many municipalities and counties make these decisions including even the installation of single traffic lights within the ambit of their legislative function."[278] Moreover, traffic control is strictly within a governmental entity's police power.[279] Reexamining these governmental decisions necessarily raises the issue of the government's proper use of its police power.[280] Therefore, liability cannot be predicated on a county's decision to use a particular traffic control device,[281] establish excessively high speed limits,[282] create or open a road before center lines or other safety devices are in place,[283] determine school bus stop placement,[284] fix a particular traffic zone,[285] or time a pedestrian control device.[286]

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274. Department of Transp. v. Webb, 438 So. 2d 780, 781 (Fla. 1983). However, the failure to place warning signs at an intersection known to be dangerous may give rise to liability. *Id.*

275. White v. County of Palm Beach, 404 So. 2d 123, 125 (Fla. 4th DCA 1981).

276. 419 So. 2d 1071 (Fla. 1982).

277. *Id.* at 1075-77; *see also* Department of Transp. v. Konney, 587 So. 2d 1292 (Fla. 1991).

278. 419 So. 2d at 1077.

279. *Id.*

280. *Id.*; *see* William N. Drake, *Clarifying the Confusion Over Governmental Immunity for Planning*, 57 FLA. B.J. 146, 148 (Mar. 1983).

281. Romine v. Metropolitan Dade County, 401 So. 2d 882 (3d DCA), *rev. denied*, 412 So. 2d 469 (Fla. 1982).

282. *See* Ferla v. Metropolitan Dade County, 374 So. 2d 64, 67 (3d DCA 1979), *cert. denied*, 385 So. 2d 759 (Fla. 1980) (liability cannot be predicated upon alleged negligence in setting excessively high speeds).

283. *See* Payne v. Broward County, 461 So. 2d 63, 65-66 (Fla. 1984) (a governmental entity is always protected by sovereign immunity from liability for the decision to create or open a road, regardless of whether the decision to open the road was unwise. If, however, the absence of a traffic control device constitutes a hidden trap or danger there may be a duty to warn).

284. *See* Harrison v. Escambia County Sch. Bd., 434 So. 2d 316 (Fla. 1983); Duval County Sch. Bd. v. Dutko, 483 So. 2d 492 (Fla. 1st DCA 1986). Both these cases state that placement of a school bus stop is a planning-level decision and thus the school board is normally immune from liability for such a decision. *Harrison*, 434 So. 2d at 319-20; *Duval*, 483 So. 2d at 495. If the school board proceeds with its decision while knowing of a dangerous condition, it may then be liable. *Harrison*, 434 So. 2d at 319-20; *Duval*, 483 So. 2d at 495.

However, immunity is waived for negligent performance of such operational level activities as erecting or maintaining traffic control devices, or warning of known dangerous road conditions.[287]

f. Adoption of Public Improvement or Welfare Programs

The government is immune from tort liability for damages caused by adopting or refusing to adopt public improvement or recreation programs. Thus, the United States Supreme Court has held that the Federal Tort Claims Act's discretionary function exception rendered immune a governmental decision to implement a "spot check" plan for airplane inspection,[288] and a dangerous fertilizer export program.[289] The rationale for this rule of immunity is that

> [L]iability 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.[290]

Florida courts applying this rule have held that immunity extends to governmental decisions whether to implement a brucellosis testing

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285. A.L. Lewis Elementary Sch. v. Metropolitan Dade County, 376 So. 2d 32, 34 (Fla. 3d DCA 1979).

286. Conover v. Metropolitan Dade County, 527 So. 2d 946 (Fla. 3d DCA 1988) (county immune from liability for personal injuries allegedly sustained by pedestrian as result of negligent timing of pedestrian control device; timing of control device was planning-level decision); *but see id.* (Ferguson, J., dissenting) (timing device constituted a hidden trap or danger).

287. *See, e.g.*, Osorio v. Metropolitan Dade County, 459 So. 2d 332 (3d DCA 1984), *rev. denied*, 469 So. 2d 749 (Fla. 1985) (question of material fact as to whether worker's deviation from work order and misplacement of stop ahead sign constitutes a legal cause of an accident precludes summary judgment); Universal Dry Wall v. Dade County, 375 So. 2d 573 (Fla. 3d DCA 1979) (holding that claim that county negligently erected stop sign was improperly dismissed); Gardner v. Metropolitan Dade County, 374 So. 2d 635 (Fla. 3d DCA 1979) (county may be liable for placing stop sign so low to ground that it was not visible to motorists entering the intersection).

288. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 821 (1984).

289. PROSSER & KEETON, *supra* note 10, § 131, at 1040 (citing the leading case of Dalehite v. United States, 346 U.S. 15 (1953)).

290. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1019 (Fla. 1979) (quoting from Peck, *supra* note 246, at 240).

program,[291] add chemicals to otherwise safe drinking water to prevent corrosion of a property owner's pipes,[292] operate a designated swimming area,[293] monitor the disposal site of toxic chemicals,[294] or provide proper procedures for cornea removal.[295]

g. Planning and Design of Public Improvements

A governmental entity is immune from liability for any claim arising out of a plan or design for construction or improvements to public property.[296] This immunity includes, but is not limited to, the construction or improvement of public buildings, highways, roads, streets, bridges, and rights of way.[297] However, the governing authority of the governmental entity must have approved the plan or design in advance.[298] Moreover, the plan or design must conform to engineering or design standards in effect at the time the plan or design is prepared.[299] The reasoning underlying this rule is:

> [T]o [prefer] a jury's verdict as to the reasonableness and safety of a plan of governmental services . . . over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts.[300]

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291. Hines v. Columbia Livestock Mkt., 516 So. 2d 1040 (Fla. 1st DCA 1987).

292. Brynnwood Condo. I Ass'n v. City of Clearwater, 474 So. 2d 317, 319 (2d DCA 1985), *rev. denied*, 484 So. 2d 7 (Fla. 1986). Liability can be predicated upon a failure to provide potable drinking water, however. *Id.* at 318.

293. Butler v. Sarasota County, 501 So. 2d 579 (Fla. 1986); Avallone v. Board of County Comm'rs, 493 So. 2d 1002 (Fla. 1986). However, once the government unit decides to operate the swimming facility, it assumes the common law duty to operate the facility safely. *Id.* at 1005.

294. *See* Windham v. Department of Transp., 476 So. 2d 735, 742 (1st DCA 1985), *rev. denied*, 488 So. 2d 69 (Fla. 1986) ("The Department's failure to monitor the disposal site, . . . particularly after a period of more than seventeen years from date of the improper use and disposal of the chemical, implicates the Department's judgmental or planning level decisionmaking, rather than its operational activities.").

295. Kirker v. Orange County, 519 So. 2d 682, 685 (Fla. 5th DCA 1988).

296. Department of Transp. v. Neilson, 419 So. 2d 1071, 1075 (Fla. 1982). *Neilson* recognizes, however, that a governmental entity may be liable for "an engineering design defect not inherent in the overall plan for a project it has directed be built, or for an inherent defect which creates a known dangerous condition." *Id.* at 1077.

297. *Id.*

298. *Id.*

299. *Id.* at 1075.

300. *Commercial Carrier*, 371 So. 2d at 1018 (quoting Weiss v. Fote, 167 N.E.2d 63 (N.Y. 1960)).

(1) Location of public improvements

Governmental entities must have the power to select the site of roads, buildings or other structures, and are immune from liability for such decisions.[301] For example, in both *Hosey v. City of Ft. Lauderdale*,[302] and *Miller v. City of Ft. Lauderdale*,[303] motorists sued a city, claiming injury as a result of a collision with negligently placed street light poles.[304] Both opinions held that the placement of the street light poles were planning level decisions, rather than operational level activities subject to tort liability.[305] As planning level decisions, the placement of the street light poles were protected by sovereign immunity.[306]

(2) Planning and design of roadways and intersections

In the trilogy of cases consolidated under *Neilson*, the Florida Supreme Court held that the initial plan and design of roadways and intersections are planning-level functions for which the government is immune from liability.[307] A roadway's particular alignment,[308]

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301. *See* City of Delray Beach v. Watts, 461 So. 2d 142 (Fla. 4th DCA 1984) (requiring a judgment for a city because the initial placement of a garbage dumpster was a planning-level decision, and the dumpster was in an open and obvious condition); *cf.* CSX Transp. v. Whittler, 584 So. 2d 579 (Fla. 4th DCA 1991) (the negligent moving and replacing of a dumpster to an unsafe position does not constitute a planning-level activity).

302. 533 So. 2d 956 (Fla. 4th DCA 1988).

303. 508 So. 2d 1328 (Fla. 4th DCA 1987); *cf.* Allen v. Port Everglades Auth., 553 So. 2d 1341 (Fla. 4th DCA 1989) (city is liable for failure to warn of dangerous condition created by city only if dangerous condition is hidden or not readily apparent and only after city knows or should know of danger).

304. *Hosey*, 553 So. 2d at 957; *Miller*, 508 So. 2d at 1330.

305. *Hosey*, 553 So. 2d at 957; *Miller*, 508 So. 2d at 1330.

306. *Hosey*, 533 So. 2d at 957; *Miller*, 508 So. 2d at 1330.

307. Department of Transp. v. Neilson, 419 So. 2d 1071, 1077 (Fla. 1982) ("[T]he decision to build or change a road, and all the determinations inherent in such a decision," are immune); Ingham v. Department of Transp., 419 So. 2d 1081, 1082 (Fla. 1982) ("[T]he alleged defects in the construction of the road, the median, . . . the intersection, . . . nor the failure to install additional traffic devices . . . [are] actionable because each is a judgmental, planning level function" and therefore immune); City of St. Petersburg v. Collom, 419 So. 2d 1082, 1086 (Fla. 1982) ("[A]n inherent defect in a plan for improvement adopted by a governmental entity cannot subject the entity to liability.").

The initial planning and designing of bridges also is a planning-level function, and thus decisions regarding planning and designing bridges are immune. Perez v. Department of Transp., 435 So. 2d 830 (Fla. 1983) (stating that government is immune from planning and designing decisions relating to bridge but may be liable for failing to warn of known dangerous condition).

308. *Neilson*, 419 So. 2d at 1073; Department of Transp. v. Caffiero, 522 So. 2d 57 (2d DCA), *rev. denied*, 531 So. 2d 167 (Fla. 1988).

obstructed view of traffic,[309] highly unusual configuration,[310] or curve[311] does not in itself give rise to liability. Additionally, liability cannot be predicated on decisions relating to the position, shape, and size of a median,[312] the number of lanes, whether a highway will intersect other streets, what type of construction materials will be used and the route the highway will take.[313]

Similarly, a governmental entity cannot be liable for judgmental, planning level decisions, such as constructing a road with a sharp curve which cannot be negotiated by an automobile traveling more than twenty-five miles per hour,[314] constructing a two-lane highway where traffic use indicates four-laning is necessary,[315] or opening a road before the installation of traffic markings or signals.[316] In each of the foregoing examples, courts held the inherent risks to have resulted from the decisions of a coordinate branch of government to adopt the plan in question. For cost efficiency or other reasons, the government decided that the plans embodied a feasible approach. These exercises of policy judgment were held immune from judicial review through tort damage awards.[317]

(3) Design of military equipment

In *Boyle v. United Technologies Corp.*,[318] the United States Supreme Court held that a contractor providing military equipment to the federal government cannot be held liable under state tort law for injury caused by a design defect. The court stated the policy for such immunity as:

> The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors

309. Bailey Drainage Dist. v. Stark, 526 So. 2d 678 (Fla. 1988).

310. Department of Transp. v. Brown, 497 So. 2d 678 (4th DCA 1986), *rev. denied*, 504 So. 2d 766 (Fla. 1987); Banta v. Rosier, 399 So. 2d 444 (Fla. 5th DCA 1981).

311. *Collom*, 419 So. 2d at 1086.

312. *Ingham*, 419 So. 2d at 1082.

313. *Id.*

314. *Collom*, 419 So. 2d at 1086.

315. *Neilson*, 419 So. 2d at 1078.

316. Payne v. Broward County, 461 So. 2d 63 (Fla. 1984).

317. Imposing governmental liability for defects inherent in plans for improvements as approved by governmental entities, "would permit the judicial branch to substantially interfere with the functioning of the legislative and executive branches of government." *Collom*, 419 So. 2d at 1085.

318. 487 U.S. 500 (1988).

> will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability [because] a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.[319]

h. Classification and Assignment of Prison Inmates

Making policies and procedures for classifying, supervising and maintaining inmates is a law enforcement function protected by sovereign immunity. In *Reddish v. Smith*,[320] a man who was shot by an escaped prisoner sued the Department of Corrections for negligently transferring the prisoner to minimum custody status.[321] The court held that the administrative process in question was immune because it was an inherent feature of the essential governmental role assigned to the Department of Corrections.[322] *Reddish* established the principle that judgmental decisions relating to the classification, assignment, placement and supervision of prison inmates often are law enforcement functions immune from tort liability as discretionary functions of government.[323]

Following this principle, Florida courts have found immunity for governmental decisions permitting prisoners access to unbarricaded jail areas, or to confer with an attorney in an unsecured room.[324] Similarly, governmental decisions reclassifying prisoners to minimum custody status and transferring prisoners from one correctional facility to another,[325] assigning prisoners to kitchen detail,[326] or determining security measures to be employed,[327] have been held immune.

2. Providing Governmental Services and Enforcing the Law

Under the public duty doctrine, courts generally hold that governments have no private tort duty to enforce the law or to provide

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319. *Id.* at 511-12.
320. 468 So. 2d 929 (Fla. 1985).
321. *Id.* at 930.
322. *Id.* at 931.
323. *Id.*
324. Parker v. Murphy, 510 So. 2d 990 (Fla. 1st DCA 1987).
325. *Reddish*, 468 So. 2d at 929.
326. Ursin v. Law Enforcement Ins. Co., 450 So. 2d 1282 (Fla. 2d DCA 1984).
327. Emig v. Department of Health & Rehab. Servs., 456 So. 2d 1204 (Fla. 1st DCA 1984); Davis v. Department of Corrections, 460 So. 2d 452 (Fla. 1st DCA 1984).

governmental services to members of the public.[328] In addition, the discretionary function exception to section 768.28's waiver of immunity renders immune the decision of which governmental services to provide. Consequently, courts have held that governmental tort liability does not arise from a government's mere failure to provide services such as electricity to residents,[329] park patron supervision,[330] patrol officers at congested intersections,[331] or warnings of riot conditions.[332]

a. Fire Protection

Florida courts have held governmental entities immune from liability for claims arising from the failure to provide adequate firefighting personnel and equipment.[333] Specifically, governmental decisions of how to fight a particular fire, how to rescue victims in a fire, and the amount and type of equipment to send to a fire, cannot ordinarily give rise to tort liability.[334] Courts sometimes indicate that "failure to provide adequate fire protection [denies] a benefit owing to the community as a whole, but that it does not constitute a wrong or injury to a member thereof so as to give rise to a right of individual redress."[335] However, the main policy supporting such governmental immunity is "the thought that a conflagration might cause losses, the payment of which would bankrupt the community."[336] Additionally, courts realize that "the crushing burden of extensive losses can be better distributed through the medium of private insurance."[337]

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328. *See* Brynnwood Condo. I Ass'n v. City of Clearwater, 474 So. 2d 317, 319 (2d DCA 1985), *rev. denied*, 484 So. 2d 7 (Fla. 1986).

329. Griffin v. City of Quincy, 410 So. 2d 170, 173 (1st DCA 1982), *petition denied*, 434 So. 2d 887 (Fla. 1983); *see also* Gaines v. City of Orlando, 450 So. 2d 1174, 1179 (Fla. 5th DCA 1984) (explaining that decisions regarding an electrical plant's building and location are proper subjects for the exercise of a city's legislative powers).

330. *See* Dennis v. City of Tampa, 581 So. 2d 1345, 1350 (2d DCA), *rev. denied*, 591 So. 2d 181 (Fla. 1991).

331. Eder v. Department of Highway Safety, 463 So. 2d 443 (4th DCA), *rev. denied*, 475 So. 2d 694 (Fla. 1985).

332. Ellmer v. City of St. Petersburg, 378 So. 2d 825 (Fla. 2d DCA 1979).

333. City of Daytona Beach v. Palmer, 469 So. 2d 121, 122 (Fla. 1985).

334. *Id.* at 123; *Trianon*, 468 So. 2d at 919 ("There has never been a common law duty of care [in] the discretionary authority given fire protection agencies to suppress fires.").

335. Steinhardt v. Town of N. Bay Village, 132 So. 2d 764, 766 (3d DCA 1961), *cert. dismissed*, 141 So. 2d 737 (Fla. 1962).

336. *Id.*

337. *Id.*

b. Failure to Provide Police Protection Against the Misconduct of Third Parties

A governmental entity generally cannot be held accountable in tort for damages caused by its failure to protect the public from the illegal or tortious acts of other citizens.[338] Common law supports this governmental immunity by providing that there is generally no tort duty to prevent the misconduct of third parties.[339] Additionally, the common law public duty doctrine, adopted in the previously discussed *Modlin* and *Trianon* cases,[340] supports this rule of immunity. The public duty doctrine insulates a governmental entity from liability to an individual for failure to provide police protection or to enforce the law unless the individual can show that by statute or circumstances he is owed a special duty.[341] The Florida courts have held that a contrary rule would create excessive liability.[342] Furthermore, principles of justice do not require a contrary rule because the plaintiff's injuries in cases covered by the rule result from the indirect rather than direct effects of the government's negligence.[343]

In addition to preventing excessive liability in general, governmental immunity for failure to guard against third parties' illegal or tortious acts also protects separation of powers interests. Overburdensome tort liability can affect the availability and allocation of limited governmental resources, which constitutionally are subject to the policymaking authority of the legislative and executive branches of

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338. Everton v. Willard, 468 So. 2d 936, 938.

> A law enforcement officer's duty to protect the citizens is a general duty owed to the public as a whole. The victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common law duty of care to the individual citizen and resulting tort liability, absent a special duty to the victim.

Id; *see also* Caroll J. Miller, Annot., *Governmental Tort Liability for Failure to Provide Police Protection to Specifically Threatened Crime Victim*, 46 A.L.R.4th 948 (1986).

339. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1977).

340. *See supra* text accompanying notes 232-42.

341. *Everton*, 468 So. 2d at 938-39.

342. *Id.* However, Justice Shaw, dissenting in *Everton*, argued that § 768.28, which provides for liability insurance and compensatory damage caps on government liability, adequately protects against the large, perhaps lethal, financial burdens that could arise if the government waived sovereign immunity for failure to protect the general public. *Id.* at 951-53 (Shaw, J., dissenting).

343. *See* PROSSER & KEETON, *supra* note 10, § 131, at 1049 ("When the state does not have custody either of the person who creates the danger or the person who is threatened by it, there has been a strong inclination to invoke the immunity, especially in cases of non-action.").

government.[344] This policy consideration was clearly articulated in the often cited case of *Riss v. City of New York*.[345] The *Riss* court held that municipal tort liability could not be predicated on a municipality's failure to provide special police protection to an individual who was repeatedly threatened and who eventually suffered severe personal injuries from lack of such protection.[346] The court stated:

> The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits. This is quite different from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, or even highways are provided.[347]

The *Riss* rule of immunity has been invoked to deny governmental liability for:

1. failing to render assistance to a stranded motorist,[348]
2. failing to investigate sufficiently persons falsely representing themselves as I.R.S. agents while removing goods from plaintiff's store,[349]
3. failing to provide security for cargo stored on property leased from the government,[350]
4. failing to apprehend a dangerous mental patient,[351]
5. failing to warn an unsuspecting member of the public to proceed into a riot area to his detriment,[352]

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344. Riss v. City of New York, 240 N.E.2d 860 (N.Y. 1968).

345. *Id.* at 861.

346. *Id.*

347. *Id.*

348. Leibman v. Burbank, 490 So. 2d 218, 219 (Fla. 4th DCA 1986).

349. Bob's Pawn Shop v. City of Largo, 488 So. 2d 922 (Fla. 2d DCA 1986).

350. Outboard Marine Domestic Int'l Sales Corp. v. Alfa Aerofreight Serv., 555 So. 2d 1235 (3d DCA 1989), *rev. denied*, 564 So. 2d 1086 (Fla. 1990).

351. Department of Health & Rehab. Servs. v. McDougall, 359 So. 2d 528, 532 (1st DCA), *cert. denied*, 365 So. 2d 711 (Fla. 1978).

352. Higdon v. Metropolitan Dade County, 446 So. 2d 203, 208 (Fla. 3d DCA 1984); *Ellmer*, 378 So. 2d at 827.

6. failing to protect invitees in public buildings from criminal attacks by third persons,[353]
7. failing to prevent the attack of a female employee in a parking lot under police surveillance,[354]
8. failing to warn of the danger of a criminal assault which occurred in a public park,[355] or
9. failing to prevent the commission of a crime by a third person.[356]

There is an exception to this rule of immunity for failure to provide general police protection. This exception exists when there is a special relationship between the government and the plaintiff.[357]

c. Decision of Whether to Arrest or Take into Protective Custody

A law enforcement officer's decision to refrain from arresting, or taking an individual into protective custody, is ordinarily immune from tort liability.[358] One court explained the justification for this immunity as follows:

> [T]he decision of whether to enforce the law by making an arrest is a basic judgmental or discretionary governmental function that is immune from suit, regardless of whether the decision is made by the officer on the street, by his sergeant, lieutenant or captain, or by the sheriff or chief of police.[359]

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353. Zieja v. Metropolitan Dade County, 508 So. 2d 354, 356 (3d DCA 1986), *cause dismissed*, 518 So. 2d 1279 (Fla. 1987), and *disapproved by* Jacksonville v. Mills, 544 So. 2d 190 (Fla. 1989).

354. Sapp v. City of Tallahassee, 348 So. 2d 363, 365 (1st DCA), *cert. denied*, 354 So. 2d 985 (Fla. 1977).

355. Davis v. City of Miami, 568 So. 2d 1301, 1302 (Fla. 3d DCA 1990); *see also* Edward L. Raymond, Jr., Annot., *State's Liability for Personal Injuries from Criminal Attack in State Park*, 59 A.L.R.4th 1236, 1239-41 (1988) (listing cases denying a duty based on a special relationship between the state and park users).

356. Caribbean Ship Chandler v. Metropolitan Dade County, 523 So. 2d 642 (3d DCA), *rev. denied*, 534 So. 2d 398 (Fla. 1988).

357. *See infra* notes 475-518 and accompanying text.

358. *Everton*, 468 So. 2d at 937.

> [T]he proper planning and implementation of a viable system of law enforcement for any governmental unit must necessarily include the discretion of the officer on the scene to arrest or not arrest as his judgment at the time dictates. When that discretion is exercised, neither the officer nor the employing governmental entity should be held liable in tort for the consequences of the exercise of that discretion.

Id. at 937 (quoting Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1022 (Fla. 1979)); *see also* Cynthia Z. MacKinnon, Note, *Negligence of Municipal Employees: Re-Defining the Scope of Police Liability*, 35 U. FLA. L. REV. 720 (1983).

359. *Everton*, 468 So. 2d at 937.

Accordingly, governmental tort liability cannot be predicated on a government agent's discretionary, judgmental decisions to stop a motorist for violation of traffic laws,[360] to state during the course of an official investigation that an arrest will not be made,[361] to engage in a high speed pursuit on city streets to apprehend a lawbreaker.[362] A governmental body in Florida is also immune from tort liability when a police officer stops a visibly intoxicated driver negligently operating a motor vehicle, and then permits the driver to continue operating the motor vehicle, causing injury to an innocent third party.[363]

d. Failure to Enforce Statutes and Ordinances Generally

The preceding two subsections, dealing with police enforcement decisions, discuss part of the general rule prohibiting government tort liability for the action or inaction of governmental officers or employees carrying out their discretionary powers to enforce compliance with

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360. *See* Kaisner v. Kolb, 543 So. 2d 732, 739 (Fla. 1989).

> Were we to establish a rule preventing officers from ordering motorists to the roadside, then we improperly would be entangling ourselves in matters involving basic policy evaluation or planning. . . . Obviously, there may be many ways of ordering motorists to the roadside, some safer than others, most requiring neither greater cost nor a change in fundamental governmental policies. The issue here involved neither the policies themselves nor the decision to order petitioners to the roadside, which we would be powerless to alter by way of tort law.

Id. at 737-38.

361. Rosenberg v. Kriminger, 469 So. 2d 879, 880 (Fla. 3d DCA 1985).

362. City of Pinellas Park v. Brown, 17 Fla. L. Weekly S530 (July 23, 1992). The court stated that "the actual execution of a hot-pursuit policy is entitled to a high degree of judicial deference . . . and . . . certain police actions may involve a level of such urgency as to be considered discretionary and not operational." *Id.* at S532. In *Pinellas*, however, the court found governmental liability, reasoning that "in the absence of such an emergency, the method chosen for engaging in hot-pursuit will remain an operational function . . . if accomplished in a manner contrary to reason and public safety." *Id.* The court then stressed the police officers' "enormous overreaction" and disregard for police agency policy for termination of hot-pursuits and found the acts to be operational. *Id.*

363. *Everton*, 468 So. 2d at 939. Justice Shaw's dissent in *Everton* noted that a police officer's "decision not to take charge of an intoxicated driver is not the basic governmental policy decision which *Commercial Carrier* held to be immune under the separation of powers doctrine." *Id.* at 946-47; *see also* James L. Isham, Annot., *Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer*, 48 A.L.R.4th 320, 326-27 (1986) (stating that the majority view refuses to impose liability for failure to arrest without a special relationship between the officer and tort victim).

the law.[364] The rule denies liability because legislative enactments for the benefit of the general public do not create an independent duty to private citizens.[365]

This rule of immunity for law enforcement decisions also is supported by separation of powers concerns. As the Florida Supreme Court stated in *Carter v. City of Stuart*,[366] "[d]eciding which laws are proper and should be enacted is a legislative function. How and in what manner those laws are enforced is, in most instances, a judgmental decision of the executive branch. The judicial branch should not trespass into the decisional process of either."[367]

Moreover, the separation of powers doctrine dictates that the proper allocation of law enforcement resources is a matter for the executive and legislative branches to decide.[368] As the Florida Supreme Court observed:

> A government must have the flexibility to set enforcement priorities on its police power ordinances in line with its budgetary constraints. Without the ability to make such choices a government must either pay the high cost of total enforcement or forego the exercise of its police power. Neither option serves the public interest.[369]

Accordingly, the government has been held immune from tort liability for damages allegedly resulting from the failure to properly enforce various types of laws. For example, the government will not be liable for failing to enforce laws requiring the impounding of dangerous dogs found running at large;[370] limiting shrub heights at intersections;[371] prohibiting the possession and detonation of fireworks;[372] pro-

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364. *Trianon*, 468 So. 2d at 919. "How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance for which there never has been a common law duty of care." *Id.*

365. *Id.* at 917 (citing RESTATEMENT (SECOND) OF TORTS § 288 cmt. b (1977)).

366. 468 So. 2d 955, 957 (Fla. 1985).

367. *Id.*

368. *Id.*; *Riss*, 240 N.E.2d at 861.

369. *Carter*, 468 So. 2d at 957.

370. *Id.* at 956.

371. Elliott v. City of Hollywood, 399 So. 2d 507, 508 (Fla. 4th DCA 1981).

372. Delgado v. City of Miami Beach, 518 So. 2d 968, 969 (Fla. 3d DCA 1988); *see also* Adamczyk v. Zambelli, 166 N.E.2d 93 (Ill. App. Ct. 1960), where the plaintiff charged that the city's policemen were negligent in failing to suppress the unlawful explosion of fireworks by participants in a church parade. In denying liability, the court reasoned that the "wrong was not in the city but in those who improperly and unlawfully used the street." *Id.* at 97.

hibiting drag racing on public streets,[373] and governing the placement of newspaper vending machines.[374]

The government will generally not be liable in tort for negligently conducted building inspections.[375] Nor will the government face liability when other types of inspectors fail to use due care in enforcing compliance with laws designed to protect the public.[376] The government has invoked this general rule to preclude liability for negligently conducted inspections of elevators, hotels and restaurants, water and sewer plants, and swimming pools and inspections performed by fire departments.[377]

e. Failure to Guard Against Risks Created by Nature

Generally, Florida courts hold that a governmental entity has no duty to warn or guard against risks created by nature. These natural risks include attacks by wild animals[378] and smoke from an improperly suppressed forest fire.[379] Only when the condition constitutes a hidden trap will the government face liability.[380] Furthermore, liability cannot be predicated on dangerous conditions which exist in natural or artificial bodies of water unless a governmental entity has designated the body of water as a swimming facility and knew of the dangerous condition.[381]

f. Provision of Inaccurate Information from Public Records

Courts have held governmental entities immune from liability for failure to maintain and provide accurate information in public re-

373. Faust v. City of North Port, 529 So. 2d 1167 (Fla. 2d DCA 1988).

374. Bovio v. City of Miami Springs, 523 So. 2d 1247, 1249 (Fla. 3d DCA 1988). If a hidden trap is created, however, liability may exist. *Allen*, 553 So. 2d at 1341.

375. *Trianon*, 468 So. 2d at 915.

376. *Id.* at 922.

377. *See* J.L. Isham, Annot., *Municipal Liability for Negligent Fire Inspection and Subsequent Enforcement*, 69 A.L.R.4th 739 (1989).

378. *See* Palumbo v. Game & Fresh Water Fish Comm'n, 487 So. 2d 352 (Fla. 1st DCA 1986) (holding that a decision of how to fence-in alligators is a discretionary, planning-level decision for which the defendants are free from liability); *see also* Wamser v. City of St. Petersburg, 339 So. 2d 244 (Fla. 2d DCA 1976) (holding that a landowner lacks a duty to protect invitees from *ferae naturae*; rather, he only has a duty to protect against non-indigenous animals).

379. Wright v. Department of Agric., 540 So. 2d 830 (1st DCA 1988), *rev. denied*, 544 So. 2d 201 (Fla. 1989).

380. *See* City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982).

381. Pelz v. City of Clearwater, 568 So. 2d 949 (2d DCA 1990), *rev. denied*, 581 So. 2d 166 (Fla. 1991).

cords.[382] Courts justified this immunity by reasoning that if the government owed individual citizens such a duty, the government potentially could face multitudinous litigation.[383] This is because court recognition of a duty owed to individuals would allow those individuals to sue the government regarding the accuracy of information provided by governmental entities in a wide range of public records.

g. Educational Malpractice

One Florida court has held that the section 768.28 waiver of immunity does not give rise to a cause of action for "educational malpractice" for a student who allegedly had been misclassified and placed in an improper special educational program for a number of years.[384] Thus, the government retains immunity for negligently providing educational services.

3. Ultra-Hazardous Activities

Section 768.28's waiver of immunity does not extend to claims based on liability without fault.[385] Therefore, Florida courts have held section 768.28's limited waiver of immunity does not encompass suits based on a theory of strict liability for ultrahazardous activities. However, this rule of immunity against strict liability claims has not been expressly addressed by the Florida Supreme Court and is not definitively settled.

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382. Friedberg v. Town of Longboat Key, 504 So. 2d 52 (Fla. 2d DCA 1987).

383. *Id.* at 53; *see also* Block v. Neal, 460 U.S. 289 (1983) (holding that negligence actions based on the government's failure to use due care in communicating information are barred under Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(h) (1988)); City of Tarpon Springs v. Garrigan, 510 So. 2d 1198 (Fla. 2d DCA 1987) (holding that a city inspector's provision of wrong information is immune from liability when given as part of a discretionary decision); Chester v. Metropolitan Dade County, 493 So. 2d 1119 (Fla. 3d DCA 1986) (holding that failure to fill out accident report cannot give rise to tort liability since any duty to do so is for the benefit of the public as a whole, not for the benefit of victims of accidents so that they can pursue civil suits); *cf.* Rodriquez v. Commercial Union Ins. Co., 449 So. 2d 375 (Fla. 3d DCA 1984).

384. Tubell v. Dade County Pub. Sch., 419 So. 2d 388 (Fla. 3d DCA 1982); *see also* Theresa Ludwig Kruk, Annot., *Tort Liability of Public School or Government Agency for Misclassification or Wrongful Placement of Student in Special Education Program*, 33 A.L.R.4th 1166 (1991); Joel E. Smith, Annot., *Tort Liability of Public Schools and Institutions of Higher Learning for Educational Malpractice*, 1 A.L.R.4th 1139 (1991).

385. Schick v. Florida Dep't of Agric., 504 So. 2d 1318 (1st DCA) (relying on Laird v. Nelms, 406 U.S. 797, (1972)) (holding that language in the FTCA similar to that in FLA. STAT. § 768.28 excludes damages caused by non-negligent, ultra-hazardous federal government conduct from its waiver of sovereign immunity), *rev. denied*, 513 So. 2d 1060 (Fla. 1987).

4. *Feres* Doctrine

In *Feres v. United States*,[386] the United States Supreme Court held that military service members cannot sue the government in tort for injuries that "arise out of or are in the course of activity incident to service."[387] Further, in a later case, this *Feres* doctrine barred a Federal Tort Claims Act action on behalf of a service member killed during an activity incident to service, even though the alleged negligence was by civilian employees of the federal government.[388] The *Feres* decision and its progeny were based on several policy considerations including the "generous statutory disability and death benefits"[389] available to service members and the need to avoid involvement of the judiciary in "sensitive military affairs at the expense of military discipline and effectiveness."[390]

E. *General Areas of Liability*

The following is a partial list of operations and functions for which the government's tortious performance is generally subject to a waiver of immunity.

1. Liability Arising Out of the Ownership, Maintenance, and Operation of Property

Once a governmental entity builds or takes control of property or an improvement, it has the same common law duty as a private person to maintain and operate the property properly.[391] Breach of that duty can give rise to governmental tort liability.[392]

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386. 340 U.S. 135 (1950).

387. *Id.* at 146.

388. United States v. Johnson, 481 U.S. 681 (1987).

389. *Id.* at 689-90.

390. *Id.* "Civilian employees of the government also may play an integral role in military activities[, and] . . . an inquiry into the civilian activities would have the same effect on military discipline as a direct inquiry into military judgments." *Id.* at 691 n.11.

391. *Trianon*, 468 So. 2d at 921.

392. *Id.*; *see also* Galati v. Town of Longboat Key, 562 So. 2d 780 (Fla. 2d DCA 1990).

> In Florida, the landowner owes the following duties to an invitee: (1) to use reasonable care in maintaining the premises in a reasonably safe condition; and (2) to give the invitee warning of concealed perils which are or should be known to the landowner and which are unknown to the invitee and cannot be discovered by him through the exercise of due care.

City of Milton v. Broxson, 514 So. 2d 1116, 1118 (Fla. 1st DCA 1987).

a. Public Buildings

Florida courts have held governmental entities liable in tort for negligently maintaining public buildings such as courthouses[393] or city halls.[394] Consequently, a county which has negligently maintained the floors of its courthouse would not be insulated from tort liability in a slip and fall case.[395] However, courts distinguish this duty to maintain from the immune discretionary function of determining whether to provide security protection in government buildings from criminal attacks by third persons.[396]

b. Parks and Recreational Areas

Once governments decide to operate recreational facilities, they have a common law duty to operate the facilities safely. This duty resembles the duty of a private individual to operate facilities safely. Although cities are not insurers of the safety of all who use their free public parks, cities do have a duty to maintain their parks in a reasonably safe condition.[397] Therefore, courts generally hold municipalities liable for negligently operating or maintaining playground equipment in public parks.[398]

c. Designated Swimming Areas

A government unit has the discretionary authority to decide whether to operate swimming facilities, and the governmental unit is immune from suit on that discretionary question.[399] However, once the governmental unit decides to operate a swimming facility, it assumes the common law duty to operate such facility safely.[400] The duty resembles the common law duty of a private individual in like cir-

393. City of Jacksonville v. Mills, 544 So. 2d 190 (Fla. 1989) (stating that city is analogous to private landowners, so the city is liable for negligent maintenance of its property).

394. Izzo v. City of N. Miami, 551 So. 2d 534 (Fla. 3d DCA 1989).

395. *Mills*, 544 So. 2d at 192.

396. *Zieja*, 508 So. 2d at 357; *District Bd. of Trustees*, 578 So. 2d at 8.

397. City of Miami v. Ameller, 472 So. 2d 728, 729 (Fla. 1985); *see* Avallone v. Board of County Comm'rs, 493 So. 2d 1002 (Fla. 1986); Pickett v. City of Jacksonville, 20 So. 2d 484 (Fla. 1945); Ide v. City of St. Cloud, 8 So. 2d 924 (Fla. 1942); City of Milton v. Broxson, 514 So. 2d 1116 (Fla. 1st DCA 1987).

398. *Ameller*, 472 So. 2d at 729 (failure to provide proper cushioning surface under monkey bars in public park stated cause of action); Jenkins v. City of Miami Beach, 389 So. 2d 1195 (Fla. 3d DCA 1980) (negligent maintenance of water fountain in a public park is an operational-level activity).

399. Butler v. Sarasota County, 501 So. 2d 579 (Fla. 1986).

400. *Id.*

cumstances.[401] Therefore, the government agent's failure to provide lifeguards or other supervisory personnel at a designated swimming facility may give rise to tort liability.[402] Similarly, failure to warn of dangerous conditions may give rise to liability.[403]

d. Streets and Sidewalks

Pursuant to established principles of negligence, a governmental entity has a duty to maintain its streets and sidewalks in a reasonably safe condition.[404] Thus, Florida courts have held government entities liable in tort for failing to maintain their sidewalks,[405] parking lots[406] and waterways[407] free from unreasonably dangerous obstructions of which they knew or should have known. Liability will result even if an obstruction may have been created initially by some third person.[408] Under these rules of negligence, governments have been held liable for failing to repair holes or cracks in sidewalks,[409] to correct protrusions such as subterranean root growth,[410] to use reasonable care to cut back foliage blocking motorists' views,[411] and to protect against slippery conditions.[412] In general, governmental entities in Florida may

401. *Id.*

402. *See Avallone*, 493 So. 2d at 1005; Andrews v. Department of Natural Resources, 557 So. 2d 85, 89 (Fla. 2d DCA 1990).

403. *See id.*; *cf. Pelz*, 563 So. 2d at 949; Warren v. Palm Beach County, 528 So. 2d 413 (Fla. 4th DCA 1988) (holding that absent knowledge of the dangerous condition, a city lacks a duty to warn).

404. Woods v. City of Palatka, 63 So. 2d 636 (Fla. 1953). A governmental entity's duty to warn travelers of unexpected hazards in its streets has long been held to be a non-planning level, operational duty, and it existed at common law prior to the waiving of sovereign immunity. *See id.* at 637; 19 MCQUILLEN, *supra* note 31, § 54.03b.

405. *See Bovio*, 523 So. 2d at 1247; Department of Transp. v. Kennedy, 429 So. 2d 1210, 1211 (Fla. 2d DCA 1983) (holding state is immune for injuries sustained when plaintiff tripped and fell over iron rods extending over a sidewalk located on a state road right-of-way).

406. *See* Daniele v. Board of County Comm'rs, 375 So. 2d 1, 3 (Fla. 4th DCA 1979).

407. Grim v. Donovan, 498 So. 2d 1050 (Fla. 4th DCA 1986).

408. *See* City of Jacksonville v. Outlaw, 538 So. 2d 1360 (Fla. 1st DCA 1989); Camillo v. Department of Transp., 546 So. 2d 4 (Fla. 3d DCA 1988); City of Tamarac v. Garcher, 398 So. 2d 889 (Fla. 1st DCA 1981).

409. *See* Martin v. City of Jacksonville, 483 So. 2d 804, 806 (Fla. 1st DCA 1986).

410. *See* Sullivan v. Silver Palms Property, 558 So. 2d 409 (Fla. 1990).

411. Hughes v. City of Ft. Lauderdale, 519 So. 2d 43 (Fla. 4th DCA 1988); Armas v. Metropolitan Dade County, 429 So. 2d 59 (Fla. 3d DCA 1983); Town of Belleair v. Taylor, 425 So. 2d 669 (Fla. 2d DCA 1983).

412. *See* Metropolitan Dade County v. Yelvington, 392 So. 2d 911, 912 (Fla. 3d DCA 1980) (involving slippery algae condition on boat launching ramp).

be liable for hazardous conditions adjacent to sidewalks or paved roadways.[413]

e. Existing Roads, Traffic Control Devices, and Stop Signs

Governmental entities have a duty to exercise reasonable care to maintain travelled portions of highways in a safe condition.[414] Thus, governmental bodies can be held liable for negligently failing to maintain existing roads,[415] stop signs or traffic control devices[416] in accordance with their original designs. Moreover, compliance with an established maintenance policy is not a sufficient basis to invoke the gov-

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413. *See, e.g.*, Turner v. City of Tallahassee, 566 So. 2d 871, 872 (Fla. 1st DCA 1990) (finding a genuine issue of material fact existed which precluded summary judgment for city in negligence action by pedestrian who was forced onto grassy area to avoid oncoming automobile and stepped into hole, obscured by grass); Warren v. Department of Transp., 559 So. 2d 387 (Fla. 3d DCA 1990) (raising a factual issue of whether the defendant breached a duty of due care to those on the sidewalk by maintaining the immediately adjacent ditch in a negligent condition which would present a foreseeable danger to them); Underwood v. City of N. Miami, 559 So. 2d 97 (Fla. 3d DCA 1990) (holding that once a governmental entity undertakes to repair a grassy parkway that it has no common law duty to maintain, a duty then arises to complete the repair in a non-negligent manner); City of Pensacola v. Stamm, 448 So. 2d 39 (Fla. 1st DCA 1984) (holding that an affirmative duty arises for a municipality to maintain a grass strip between a sidewalk and a street which was closed for an arts festival at a public park, where it was reasonably foreseeable that members of public would walk on grass area to enter or leave park). *See also* James O. Pearson, Jr., Annot., *Liability, in Motor Vehicle-Related Cases, of Governmental Entity for Injury, Death, or Property Damage Resulting from Defect or Obstruction in Shoulder of Street or Highway*, 19 A.L.R.4th 532 (1991); James L. Isham, Annot., *State and Local Government Liability for Injury or Death of Bicyclist Due to Defect or Obstruction in Public Bicycle Path*, 68 A.L.R.4th 204 (1991).

414. City of Tamarac v. Garchar, 398 So. 2d 889, 893 (Fla. 1st DCA 1981).

415. *See Taylor*, 425 So. 2d at 670; Foley v. Department of Transp., 422 So. 2d 978 (Fla. 1st DCA 1982); Wojtan v. Herpando County, 379 So. 2d 198 (Fla. 5th DCA 1980) (finding county liable for failure to maintain roadway and its shoulders).

416. *See Commercial Carrier*, 371 So. 2d at 1022; *see also* Robinson v. Department of Transp., 465 So. 2d 1301 (4th DCA) (holding that improper maintenance of an existing traffic control device is an operational decision, therefore, an action could be brought against governmental entity), *rev. denied*, 476 So. 2d 673 (Fla. 1985); Wallace v. National Mut. Ins. Co., 376 So. 2d 39 (Fla. 4th DCA 1979) (holding that improper maintenance of a stop sign was an operational activity, thus the city was not exempt from liability); Haspil v. Department of Transp., 374 So. 2d 633 (Fla. 3d DCA 1979) (failure of state to repair, replace, and maintain any warning apparatus at location after knowing of probability of injury was actionable). However, "[c]ases holding an entity liable for failure to report, repair, or maintain a traffic control device are based on the premise that the entity had some duty, custody, or control. . . ." Wells v. Stephenson, 561 So. 2d 1215, 1217-18 (Fla. 2d DCA 1990) (holding that a sheriff cannot be held liable for failure to report, repair, or, warn of missing stop sign at intersection where sheriff had no duty, custody or control over sign and had not created dangerous condition); McFadden v. Orange County, 499 So. 2d 920 (Fla. 5th DCA 1986).

ernmental immunity reserved for planning level decisions.[417] However, governmental bodies have no duty to upgrade highways from their original designs or to prevent obsolescence.[418]

f. Sewers and Electrical Systems

A court may find a governmental entity liable for negligent maintenance and operation of sewers and electrical systems. For example, in *Slemp v. City of North Miami*,[419] the Florida Supreme Court held that a city could be liable for flooding damages resulting from the allegedly negligent maintenance of a city storm sewer pump system.[420] Likewise, a court may predicate liability on a city's negligent operation of an electrical system; however, a city retains immunity when deciding whether to enter the business of providing electricity to its residents.[421]

g. Creation of Known Dangerous Conditions

A governmental entity is not immune from liability for creating a known hazard or trap, even if the hazard arose from a judgmental, planning-level decision.[422] The Florida Supreme Court applied this rule to hold that a governmental entity may be liable in tort for having knowledge of an obstruction to visibility at a traffic intersection and failing to warn of the danger.[423]

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417. *Kennedy*, 429 So. 2d at 1211; *Foley*, 422 So. 2d at 978; *see also* Palm Beach County Bd. of County Comm'rs v. Salas, 511 So. 2d 544, 546-47 (Fla. 1987).

418. *See* Perez v. Department of Transp., 435 So. 2d 830, 831 (Fla. 1983) (complaint alleging that state did not upgrade *beyond* original design, rather than alleging state did not maintain bridge up to specifications of original design, does not allege an operational-level violation); Department of Transp. v. Neilson, 419 So. 2d 1071, 1078 (Fla. 1982).

419. 545 So. 2d 256 (Fla. 1989).

420. *Id.* at 257; *see also* City of St. Petersburg v. Collom, 419 So. 2d 1082, 1087 (Fla. 1982) (city's improper maintenance of a sewer or drainage system was held to impose liability regardless of sovereign immunity); Stephanie A. Vaughan, Note, *Municipal Immunity: A Historical and Modern Perspective*, 19 STETSON L. REV. 997 (1990).

421. *Griffin*, 410 So. 2d at 170; *see* Hardie v. City of Gainesville, 482 So. 2d 394 (1st DCA 1985), *rev. denied*, 488 So. 2d 67 (Fla. 1986); Austin v. City of Mt. Dora, 417 So. 2d 807 (Fla. 5th DCA 1982).

422. *Collom*, 419 So. 2d at 1086 ("[w]ithout substantially interfering with the governing powers of the coordinate branches, courts can require (1) the necessary warning or correction of a *known* dangerous condition"); *see also Neilson*, 419 So. 2d at 1078 ("The failure to so warn of a known danger is, in our view, a negligent omission at the operational level of government and cannot reasonably be argued to be within the judgmental, planning-level sphere. Clearly, this type of failure may serve as the basis for an action against the governmental entity."); Ralph v. City of Daytona Beach, 471 So. 2d 1, 2 (Fla. 1983).

423. Bailey Drainage Dist. v. Stark, 526 So. 2d 678, 681 (Fla. 1988); *see also* Department of Transp. v. Konney, 587 So. 2d 1292 (Fla. 1992).

Generally, a governmental entity will not be liable for inherent defects in plans for improvements that it adopts. Only in exceptional cases does a governmental entity's failure to warn of a known dangerous condition create a cause of action.[424] To establish the known dangerous condition exception, a plaintiff must allege that (1) the government created a dangerous condition,[425] (2) the condition was not readily apparent to the injured party,[426] (3) the government had knowledge of the dangerous condition,[427] and (4) the government failed to take steps to warn the public of the danger or to avert the danger.[428]

Once the government has knowledge of a hidden danger or trap on one of its roadways, it has a duty either to warn motorists of the

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424. *Collom*, 419 So. 2d at 1086; *accord* Barrera v. Department of Transp., 470 So. 2d 750, 751 (Fla. 3d DCA 1985); Reinhart v. Seaboard Coastline Ry., 422 So. 2d 41, 44 (Fla. 2d DCA 1982).

425. *See, e.g.*, Duval County Sch. Bd. v. Dutko, 483 So. 2d 492, 495 (Fla. 1st DCA 1988).

> The *Collom* case speaks of the "creation" of a known dangerous condition. It appears to us that this requirement is satisfied by evidence that the school board continued to maintain this school bus stop location as a designated bus stop, without protective measures or warnings of any kind, after the occurrence of events and the receipt of complaints which should have alerted the board to the existence of dangers to which the waiting children were being exposed.

Id. Alderman v. Lamar, 493 So. 2d 495, 498 (5th DCA 1986), *rev. denied*, 503 So. 2d 326 (Fla. 1987).

426. *Collom*, 419 So. 2d at 1083. The duty to warn does *not* apply to dangers which are open and obvious and thus do not create a hidden trap. *But see* Payne v. Broward County, 461 So. 2d 63, 66 (Fla. 1984) (holding that "governmental entity has no duty to warn pedestrians of routine dangers of crossing street midblock" because danger is obvious); Department of Transp. v. Caffiero, 522 So. 2d 57, 59 (Fla. 2d DCA 1988) (holding that the dangers of leaving a straight six-lane road while travelling at high rate of speed were readily apparent to the general public, thus the doctrine of sovereign immunity shielded the Department of Transportation from liability when it temporarily widened a road without moving the culvert headwall at the same time); Paneque v. Dade County, 478 So. 2d 414, 415 (Fla. 3d DCA 1985) (holding county immune from liability to pedestrian, who was struck by automobile while crossing street, for alleged failure to warn of dangers of crossing street because danger was readily apparent); *Barrera*, 470 So. 2d at 752 (holding that DOT's decision not to replace a low clearance warning sign on a bridge was not actionable in part because "the low clearance of the bridge was readily apparent to persons who could be injured by it"); City of Delray Beach v. Watts, 461 So. 2d 142, 142 (Fla. 4th DCA 1984) (holding that the dangers of a trash dumpster are "readily apparent," thus a suit against the city is barred).

427. *Collum*, 419 So. 2d at 1083. "In order for a party to be charged with constructive knowledge of a dangerous condition, such condition must have existed for a sufficient length of time so that it should have been discovered by such party." Escambia County v. Stichweh, 536 So. 2d 1058, 1061 (Fla. 1st DCA 1988); *see also* Halum v. Palm Beach County, 571 So. 2d 515, 517 (Fla. 4th DCA 1990) (allowing evidence of other similar accidents on the roadway in question to show that the county had notice of the existing dangerous condition).

428. *See Collum*, 419 So. 2d at 1084.

danger or to correct the dangerous condition.[429] Thus, the entity has a duty to correct or warn of an intersection's highly unusual configuration,[430] standing water,[431] a light pole located six inches from the curb,[432] or a drop-off at the end of uncompleted pavement.[433] Failing to do so constitutes actionable negligence.[434] For example, a governmental entity cannot be liable for planning and building a road with a sharp curve which cannot be negotiated by an automobile travelling more than twenty-five miles per hour. In this case, the entity has made a decision at the judgmental, planning level. However, if the entity builds the road knowing that automobiles cannot negotiate the curve at more than twenty-five miles per hour, then the entity has an operational level duty to warn motorists of the hazard.[435]

2. Liability Arising from Operational Level Conduct Affirmatively Creating Risks of Harm

Florida courts often base governmental tort liability on the negligent performance of operational level functions. An operational level function is one "not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented."[436] Where the operational level governmental act affirmatively creates the danger causing injury, the policies underlying the discretionary function and public duty doctrine exceptions to tort liability do not apply.[437] Thus, when a government em-

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429. Hoover v. Courington, 557 So. 2d 923, 924 (Fla. 5th DCA 1990).

430. *See* Department of Transp. v. Brown, 497 So. 2d 678, 680 (Fla. 4th DCA 1986); *cf.* Department of Transp. v. Konney, 587 So. 2d 1292 (Fla. 1992).

431. *See Courington*, 557 So. 2d at 924.

432. *See* Allen v. Port Everglades Auth., 553 So. 2d 1341, 1343 (Fla. 4th DCA 1989); *cf.* Miller v. City of Fort Lauderdale, 508 So. 2d 1328 (Fla. 4th DCA 1987) (holding that the location of street lighting is a planning level function and therefore is within the sovereign immunity of the city). However, in *Miller*, the plaintiff did not claim that liability of the city was based upon a failure to warn of a hidden trap or dangerous condition which was not readily apparent. *See id.* at 1330.

433. *See* Brien v. Florida Dep't of Transp., 538 So. 2d 526, 527 (Fla. 4th DCA 1989).

434. *Id. See generally Bailey Drainage Dist.*, 526 So. 2d at 678.

435. *Collom*, 419 So. 2d at 1086.

436. *Kaisner*, 543 So. 2d at 737.

437. *See generally Trianon*, 468 So. 2d at 920 (holding that "[t]he lack of a common law duty for exercising a discretionary police power function must, however, be distinguished from existing common law duties of care applicable to the officials or employees in the operation of motor vehicles or the handling of firearms during the course of their employment to enforce compliance with the law.").

ployee negligently operates a motor vehicle, the government may be liable.

A leading United States Supreme Court case, *Indian Towing Co. v. United States*,[438] recognized the rule of basing tort liability on negligently performed operational functions. In *Indian Towing*, the plaintiff sued the government for failing to maintain a lighthouse in good working order.[439] The Court stated that the initial decision to undertake and maintain lighthouse service was a discretionary judgment.[440] The Court held, however, that the failure to maintain the lighthouse in good condition subjected the government to suit under the Federal Tort Claims Act since this conduct did not involve any permissible exercise of policy judgment.[441]

Florida follows a rule similar to that set forth in *Indian Towing* and subjects governmental entities to liability for certain types of negligent "operational level" conduct in implementing discretionary decisions.[442] For example, policy decisions relating to staffing a state medical facility may be discretionary judgmental decisions for which governmental entities are immune.[443] However, malpractice in rendering specific medical services clearly would breach existing common law duties and would render the governmental entity liable in tort.[444]

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438. 450 U.S. 61 (1955). However, not all operational-level actions are outside the scope of the FTCA's discretionary function exception.

439. *Id.*

440. *Id.*

441. *Id.* at 69.

442. *See, e.g.*, First Am. Title Ins. Co. v. Dixon, 17 Fla. L. Weekly D1708 (4th DCA July 15, 1992) (clerk of circuit court's recording and indexing of claims of interest in land are operational and ministerial functions, not discretionary); Slemp v. City of N. Miami, 545 So. 2d 256, 258 (Fla. 1989) (holding a city liable for flooding damages that resulted from the negligent maintenance of a storm sewer pump system, that it constructed); Osario v. Metropolitan Dade County, 459 So. 2d 332, 333 (Fla. 3d DCA 1984) (while decision regarding proper location for stop sign constituted planning decision that was immune from suit, liability could be premised upon negligence in carrying out the operational activity of installing the stop ahead sign); *Griffin*, 410 So. 2d at 173 (regardless of whether the basic decision to install a particular electrical distribution system is discretionary, the implementation of the "policy, program, or objectives" to provide electricity is an operational level function for which a city is not immune from tort liability.); Hollis v. School Bd. of Leon County, 384 So. 2d 661, 666 (Fla. 1st DCA 1980) (once a school board implemented policy for the training of school bus drivers and the inspection of school bus transportation system, it was required to carry out the resulting operations without negligence); Weissberg v. City of Miami Beach, 383 So. 2d 1158, 1159 (Fla. 3d DCA 1980) (once the procedure of providing a policeman to direct traffic is established, the failure to ensure that he non-negligently carries out his function is operational-level conduct).

443. *Trianon*, 468 So. 2d at 921.

444. *Id; see also St. George*, 568 So. 2d at 932 (municipality not entitled to sovereign immunity for acts of paramedics).

Similarly, a county's initial decision to utilize a left turn signal is a planning level decision.[445] However, the county's later decision to deactivate that signal and block off the left turn lane for road maintenance constitutes operational level conduct which subjects the county to liability if negligently performed.[446]

Kaisner v. Kolb[447] provides another example of this rule of government liability. The *Kaisner* court held that immunity existed for a police officer's decision to stop a motorist for violating a traffic law, but immunity was waived for the officer's operational level conduct in controlling the scene after the motorist had been stopped.[448] The *Kaisner* court concluded that finding the government liable for negligently controlling the scene would not entangle the court unnecessarily in the operations of the executive.[449] The *Kaisner* court reasoned that its determination did not offend the separation of powers doctrine because police decisions regarding the precise manner in which a motorist is ordered to the side of the road merely implemented the discretionary, and hence immune, decision of whether to stop the motorist.[450]

a. Law Enforcement and Public Safety Activities

A governmental entity cannot be held liable for failing to protect all citizens at all times from illegal or tortious activities of other citizens.[451] However, a governmental entity can be liable for operational acts which affirmatively create a risk causing injury to the plaintiff.[452]

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445. *Salas*, 511 So. 2d at 546; *Robinson*, 465 So. 2d at 1303.

446. *Salas*, 511 So. 2d at 546; *Robinson*, 465 So. 2d at 1303.

447. 543 So. 2d 732, 738 (Fla. 1969).

448. *Id.*

449. *Id.*

450. *Id.*

451. The origin of the rule lay in the early common law distinction between action and inaction, or "misfeasance" and "nonfeasance." In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. However, liability for nonfeasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff. *See* RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1977); PROSSER & KEETON, *supra* note 10, § 56.

452. *Kaisner*, 543 So. 2d at 736. *But cf. id.* at n.3 ("the way in which government agents respond to a serious emergency is entitled to great deference, and may in fact reach a level of such urgency as to be considered discretionary and not operational," albeit a risk of harm to others is created).

Thus, a governmental entity faces liability for negligently performing the following acts: securing the scene of an accident;[453] directing traffic;[454] investigating a van parked on a roadway shoulder;[455] executing a search warrant;[456] towing vehicles;[457] conducting an arrest;[458] maintaining locked cell doors;[459] handling a weapon;[460] operating a van while transporting prisoners;[461] assigning a juvenile inmate to a dangerous location;[462] driving a fire engine to a fire scene;[463] or handling equipment.[464] In addition, the Florida Supreme Court has held that governmental entities may be held liable for negligently operating vehicles during high speed police chases,[465] even when the decision to initiate and continue the chase is protected as a discretionary judgmental activity.[466]

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453. Department of Highway Safety v. Kropff, 491 So. 2d 1252, 1255 (Fla. 3d DCA 1986).

454. *Weissberg*, 383 So. 2d at 1159.

455. Owens v. Department of Highway Safety, 572 So. 2d 953, 955 (Fla. 5th DCA 1990).

456. State v. Robinson, 565 So. 2d 730, 733 (Fla. 2d DCA 1990).

457. E.J. Strickland Constr. v. Department of Agric., 515 So. 2d 1331, 1334 (Fla. 5th DCA 1987).

458. City of N. Bay Village v. Braelow, 498 So. 2d 417, 418 (Fla. 1986); *see also* Mazzilli v. Doud, 485 So. 2d 477, 479 (3d DCA), *rev. dismissed*, 492 So. 2d 333 (Fla. 1986) (holding a governmental entity liable for the acts of its law enforcement officers with regard to the unreasonable use of deadly force). *Contra* Carpenter v. City of St. Petersburg, 547 So. 2d 341 (Fla. 2d DCA 1989) (finding a city immune from liability on negligent arrest theory).

459. Dunagan v. Seely, 533 So. 2d 867, 869 (Fla. 1st DCA 1988).

460. *E.g.*, *Trianon*, 468 So. 2d at 920; *see also* Annot., *Liability of Municipal Corporation for Shooting of Bystander by Law Enforcement Officer Attempting to Enforce the Law*, 76 A.L.R.3d 1176 (1977).

461. *E.g.*, *Reddish*, 468 So. 2d at 932.

462. Department of Health & Rehab. Servs. v. Whaley, 574 So. 2d 100, 104 (Fla. 1991).

463. *E.g.*, City of Daytona Beach v. Palmer, 469 So. 2d 121, 123 (Fla. 1985).

464. *Id.*; Hines v. Columbia Livestock Mkt., 516 So. 2d 1040, 1042 (Fla. 1st DCA 1987); *see also* CSX Transp. v. Whittler, 584 So. 2d 579 (Fla. 4th DCA 1991) (holding that a city is liable where a dumpmaster driver negligently causes the dumpster to fall on a vehicle or pedestrian while moving the dumpster).

465. *See, e.g.*, Sintros v. La Valle, 406 So. 2d 483, 484 (Fla. 5th DCA 1981) (holding police officer's negligent driving of motor vehicle during "police chase" an operational-level activity for which county was not immune); *see also* Joel E. Smith, Annot., *Liability of Governmental Unit or Its Officers for Injury to Innocent Pedestrian or Occupant of Parked Vehicle, or for Damage to Such Vehicle, as Result of Police Chase*, 100 A.L.R.3d 815 (1980); Dale R. Agthe, Annot., *Municipal or State Liability for Injuries Resulting from Police Roadblocks or Commandeering of Private Vehicles*, 19 A.L.R.4th 937 (1983).

466. *Cf.* Rhodes v. Lamar, 490 So. 2d 1061, 1062 (Fla. 5th DCA 1986) (granting immunity to county and sheriff from liability to driver injured when automobile he was operating was struck by motor vehicle operated by individual being pursued by sheriff's department marked patrol unit since there was "no allegation nor showing [that driver's injury] was proximately

b. Negligent Supervision and Transportation of Students

Because a school board's decision to establish a particular school is based on its discretionary authority, the board is immune from liability for its decision.[467] However, teachers and school boards have a duty to control and supervise the activities of students at school.[468] This duty includes protecting pupils from foreseeable injuries caused by other students.[469]

As a general rule, if a public school provides transportation for its pupils, it owes a duty to exercise reasonable care in transporting them.[470] The board's duty stems from the school board's physical custody of its students.[471] Thus, the board has breached no duty when a student is injured before reaching or after leaving a designated bus stop.[472]

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caused or contributed to by the negligent acts of deputies in the operation of their motor vehicles"); *see also* Brown v. City of Pinellas Park, 557 So. 2d 161, 163 (Fla. 2d DCA 1990) (finding that although initiation of pursuit resulting in injuries to innocent bystander is not actionable, the manner of continued pursuit may be actionable where the pursuing officers are put on clear notice of danger to innocent bystanders, which could have been avoided by terminating the pursuit).

467. *See* Collins v. School Bd., 471 So. 2d 560 (4th DCA 1985), *mandamus denied*, 491 So. 2d 280 (Fla. 1986).

468. *Id.*; Leahy v. School Bd., 450 So. 2d 883 (Fla. 5th DCA 1984) (refusing to immunize a school board from liability for improperly supervising a football drill); Ankers v. District Sch. Bd., 406 So. 2d 72 (Fla. 2d DCA 1981); Bryant v. School Bd., 399 So. 2d 417 (1st DCA 1981), *modified*, Rupp v. Bryant, 417 So. 2d 658 (Fla. 1982) (negligent failure to supervise hazing at school club is actionable); Padgett v. School Bd., 395 So. 2d 584 (Fla. 1st DCA 1981); *Barrera*, 366 So. 2d at 531; *see also* Cheryl M. Bailey, Annot., *Tort Liability of College, University, Fraternity, or Sorority for Injury or Death of Member or Prospective Member by Hazing or Initiation Activity*, 68 A.L.R.4th 228 (1989).

469. *See, e.g.*, Bonica v. Dade County Sch. Bd., 549 So. 2d 220, 222 (Fla. 3d DCA 1989) (holding school was not entitled to sovereign immunity where student assaulted by classmate alleged school principal negligently failed to carry out operational duty of supervision); *Comuntzis*, 508 So. 2d at 753; Broward County Sch. Bd. v. Ruiz, 493 So. 2d 474, 477 (Fla. 4th DCA 1986) (finding school breached its duty to provide adequate security when student waiting after school in cafeteria, where no supervision was provided, was attacked and beaten by other students).

470. Harrison v. Escambia County Sch. Bd., 434 So. 2d 316, 319 (Fla. 1983); School Bd. v. Surette, 394 So. 2d 147 (Fla. 4th DCA 1981) (holding that decedent, who was killed by a car while waiting at a school bus stop, was a person to whom the school board owed duty to provide safe transportation, and holding that the school board was shielded from liability because it did not owe special duty to decedent as member of general public inapplicable); Allen E. Korpela, Annot., *Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Associated with the Transportation of Students*, 34 A.L.R.3d 1210 (1970).

471. *Harrison*, 434 So. 2d at 319.

472. *Id.*

c. Negligent Hiring and Retention of Employees

The Florida Supreme Court first recognized the tort of negligent retention of employees in 1954.[473] The court stated that an action for negligent retention was grounded on an employer's negligence in "knowingly keeping a dangerous servant on the premises which the employer knew or should have known was dangerous and incompetent and liable to do harm to the tenants."[474] School boards and other governmental entities have the same common law duty as private employers to protect others from the result of negligent hiring, supervision or retention of employees. Thus, these governmental entities are liable for injuries caused by a violation of this duty.[475]

3. Special Relationships Creating Liability

A special relationship between a governmental entity and a particular class of individuals may create a duty to exercise care for the benefit of that class. Thus, liability may be imposed on the government for failing to enforce a statute or regulation or to provide protection or services to that particular individual or class of individuals.[476] The following illustrate situations in which a special relationship between a governmental entity and an individual gives rise to a duty to take action for the aid or benefit of the individual.[477]

a. Protective Custody

Under traditional tort principles, one who legally has custody of another has a duty to exercise reasonable care to protect that individ-

473. Mallory v. O'Neal, 69 So. 2d 313 (Fla. 3d DCA 1989).

474. Watson v. City of Hialeah, 552 So. 2d 1146, 1148 (Fla. 3d DCA 1989) (citing *Mallory*, 69 So. 2d at 315); *see also* Garcia v. Duffy, 492 So. 2d 435, 438 (Fla. 2d DCA 1986) ("negligent . . . retention, allows for recovery against an employer for acts of an employee committed outside the scope and course of employment").

475. *See* Sheridan v. United States, 487 U.S. 392 (1988); School Bd. v. Coffey, 524 So. 2d 1052 (5th DCA), *rev. denied*, 534 So. 2d 401 (Fla. 1988); Brantly v. Dade County Sch. Bd., 493 So. 2d 471 (Fla. 3d DCA 1986); Willis v. Dade County Sch. Bd., 411 So. 2d 245 (3d DCA), *petition denied*, 418 So. 2d 1278 (Fla. 1982). *See generally* Kerrie Jo Qualtrough, Comment, *The Federal Tort Claims Act May No Longer Protect the Federal Government from Liability When a Federal Employee, Acting Outside the Scope of Employment, Is Negligently Allowed to Commit Assault and Battery*, 30 S. TEX. L.J. 465-90 (1989) (discussing impact of *Sheridan* case on immunity of federal government from negligence for allowing its employee to commit an intentional tort).

476. *Everton*, 468 So. 2d at 938; RESTATEMENT (SECOND) OF TORTS § 314 cmt. a (1977).

477. The special relationship rule when considered in combination with the public duty doctrine becomes a mechanism for focusing upon whether a duty is actually owed an individual claimant rather than the public at large.

ual from harm.[478] This custodial relationship may result in governmental liability under section 768.28 if the governmental entity engages in negligent operational level conduct.[479] For example, in *Kaisner v. Kolb*,[480] sheriff's deputies stopped petitioner's vehicle in the curb lane of a street for an expired inspection sticker.[481] The deputies parked behind the petitioner's vehicle.[482] As the petitioner stood between the two vehicles, a third vehicle struck the deputies' car from behind.[483] As a result, the deputies' car struck the petitioner.[484] The *Kaisner* court relied on earlier decisions that held the government liable to persons injured while in custody or detained by law enforcement officers.[485] The *Kaisner* court held that the sheriff's deputies owed a duty of care to the petitioner when they directed him to stop and thus "deprived [him] of his normal opportunity for protection."[486]

(1) Prisoners

Courts have found a waiver of immunity when the government negligently fails to protect prisoners from injuries inflicted by inmates

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478. RESTATEMENT (SECOND) OF TORTS § 320 (1977).

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.

Id.

479. Deciding whether to take someone into custody is a discretionary act for which sovereign immunity has not been waived. A person taken into custody, however, is owed a common law duty of care. Numerous cases have recognized that this duty of exercising reasonable care exists and that it is an operational level function. Department of Health & Rehab. Servs. v. Whaley, 574 So. 2d 100 (Fla. 1991); Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989) (accident victim was in "custody" of police for purposes of establishing duty by police which could give rise to county liability when he was injured in an automobile accident after he stopped his vehicle in response to a police request to do so); Department of Highway Safety & Motor Vehicles v. Kropff, 491 So. 2d 1252 (Fla. 3d DCA 1986) (assigning liability for injury caused by officer's negligence during roadside stop); Ferguson v. Perry, 593 So. 2d 273 (Fla. 5th DCA 1992) (discussing duty of care owed by sheriff to obviously severely intoxicated inmate).

480. 543 So. 2d 732 (Fla. 1989).

481. *Id.* at 733.

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.* at 734.

486. *Id.*

or guards,[487] or to protect a prisoner from his own suicidal impulses.[488] However, to hold a prison custodian liable for breaching his duty of reasonable care, a prisoner must show that the injuries sustained were the reasonably foreseeable consequence of the custodian's negligence.[489]

(2) Children and juvenile detainees

Children in the state's custody have garnered special judicial concern. Thus, courts have found that governmental custodians owe juvenile inmates a duty greater than that generally owed to adult prisoners.[490] This special statutory duty requires a waiver of governmental immunity.[491]

b. Custody of Third Persons Injuring the Plaintiff

Persons who assume custody of others create a special relationship necessitating special precautions. Similarly, a relationship involving the state's right or ability to control a third person's conduct creates an exception to the general rule of custodial liability stated in *Restatement* section 315.[492] The Restatement indicates that there is no tort

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487. *See, e.g.*, Green v. Inman, 539 So. 2d 614, 615 (Fla. 4th DCA 1989) (decisions as to selection of trustees or placement of inmates are immune from liability, but negligent acts of jail staff which allowed assault to occur can lead to liability); McCall v. Department of Health & Rehab. Servs., 536 So. 2d 1098, 1100 (Fla. 1st DCA 1988); Dunagan v. Seely, 533 So. 2d 867, 869 (Fla. 1st DCA 1988); Sanders v. City of Belle Glade, 510 So. 2d 962, 964 (Fla. 4th DCA 1987); White v. Palm Beach County, 404 So. 2d 123, 124 (Fla. 4th DCA 1981).

488. *Cf.* Overby v. Wille, 411 So. 2d 1331, 1332 (Fla. 4th DCA 1982) (where arrestee made known to police his mental condition and behaved in irrational manner, the foreseeability of arrestee's suicide was a question for the jury). *See generally* Jane M. Draper, Annot., *Civil Liability of Prison or Jail Authorities for Self-Inflicted Injury or Death of Prisoner*, 79 A.L.R.3d 1210 (1977) (discussing cases regarding the civil liability of prison authorities with minor discussion of relevant statutory provisions).

489. *See, e.g.*, Miller v. Department of Health & Rehab. Servs., 474 So. 2d 1228, 1230, 1231 (Fla. 1st DCA 1985); Spann v. Department of Corrections, 421 So. 2d 1090, 1092 (Fla. 4th DCA 1982).

490. *See* Department of Health & Rehab. Servs. v. Whaley, 574 So. 2d 100, 104 (Fla. 1991) (sovereign immunity did not shield H.R.S. from liability in action for damages for alleged sexual assault committed on detainee by fellow detainee while in juvenile detention facility); Hutchinson v. Miller, 548 So. 2d 883, 884 (Fla. 5th DCA 1989) (finding that whether sheriff was negligent in failing to protect juvenile detainee from taunts and abuse and whether detainee's suicide was foreseeable as a result of this failure to protect were issues of material fact precluding a summary judgment).

491. *See Whaley*, 574 So. 2d at 104.

492. RESTATEMENT (SECOND) OF TORTS § 319 (1977).

duty to control the conduct of a third person for protection of others.[493] However, if a governmental entity enters this special custodial relationship, the entity may not be immune when it negligently performs operational level activities. Thus, the entity may be liable for negligently supervising inmates,[494] or releasing a mental patient without adequate evaluation.[495]

c. Protection of Persons Assisting in Apprehension of Suspected Criminals

When the government asks a person to assist in apprehending or prosecuting a suspected criminal, the government enters a special relationship with that person, which results in a waiver of immunity. Thus, the government is liable for negligently failing to protect such person from the risks created by the requested assistance.[496] When the government actively calls on private citizens to help apprehend criminals and uses the help rendered, police protection for those citizens is not merely a benefit withheld by government inaction.[497] Under these circumstances, the relationship between the government and these citizens creates a duty to provide police protection. Thus, governmental inaction in this regard could give rise to governmental tort liability.[498]

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493. The Restatement states: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Id.*

494. *See* Reddish v. Smith, 468 So. 2d 929, 932 (Fla. 1985) (implying that the negligence of employees who had an operational duty to supervise and confine inmates at the time they escaped may be actionable); *cf.* Nova Univ., Inc. v. Wagner, 491 So. 2d 1116, 1118 (Fla. 1986) (holding that a child care institution that accepted delinquent or ungovernable children as residents had a duty to exercise reasonable care to prevent harm to the general public); *see* Newsome v. Department of Corrections, 435 So. 2d 887, 888 (Fla. 1st DCA 1983).

495. *See* Bellavance v. State, 390 So. 2d 422 (Fla. 1st DCA 1980); *see also* Janet Boeth Jones, Annot., *Governmental Tort Liability for Injuries Caused by Negligently Released Individual*, 6 A.L.R.4th 1155 (1981) (analyzing state and federal cases discussing the liability of governmental entities for injuries caused by a negligently released person); Janet Boeth Jones, Annot., *Liability of Governmental Officer or Entity for Failure to Warn or Notify of Release of Potentially Dangerous Individual from Custody*, 12 A.L.R.4th 722 (1982) (analyzing state and federal cases discussing the liability of a governmental officer or entity for damages for injuries arising out of the failure to warn persons of the release of a potentially dangerous person).

496. *See Everton*, 468 So. 2d at 938; Schuster v. City of New York, 154 N.E.2d 534, 537 (N.Y. 1958).

497. *Everton*, 468 So. 2d at 938.

498. *Id.*

d. Reliance on Voluntary Undertaking

A governmental entity may create a special relationship by voluntarily undertaking to act on behalf of a particular citizen who detrimentally relies on a promise of protection offered by the government.[499] One court has explained the liability as:

> In such circumstances the municipality's liability is not that of an insurer for failing to protect from harm a member of the general public, but rather liability is based upon the municipality's own affirmative conduct which, having induced the citizen's reasonable reliance, must be considered to have progressed to a point after which the failure to provide the promised protection will result not "merely in withholding a benefit, but positively or actively in working an injury."[500]

The United States Supreme Court adopted this rule of liability in the leading case of *Indian Towing Co. v. United States*.[501] In *Indian Towing*, the plaintiff sued the government for failing to maintain a lighthouse in good working order.[502] The Court stated that the initial decision of whether to undertake lighthouse service was immune.[503] However, "once the government exercised discretion in undertaking to warn the public of danger, thereby inducing reliance, it was under a duty to perform its 'good samaritan' task in a careful manner and with due care."[504]

Florida courts have adopted a similar rule of liability.[505] One Florida court applied this rule to find the government liable for injuries caused when the plaintiff relied on "911" emergency police or fire protection and the government failed to provide promised assistance.[506] Other

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499. MCQUILLEN, *supra* note 31, § 53.04c, at 171-72; DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 202 (1989).

500. Kircher v. City of Jamestown, 543 N.E.2d 443 (N.Y. 1989) (citing DeLong v. Erie County, 60 N.Y.2d 296, 305 (N.Y. 1983) and H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160 (N.Y. 1928)).

501. 350 U.S. 61 (1955).

502. *Id.* at 62.

503. *Id.* at 69.

504. *Id.*

505. *See, e.g.*, Department of Highway Safety & Motor Vehicles v. Kropff, 491 So. 2d 1252, 1255 (Fla. 3d DCA 1986) (stating that once an action was undertaken, even gratuitously, it must have been performed in accordance with an obligation to provide reasonable care).

506. *See* St. George v. City of Deerfield Beach, 568 So. 2d 931, 932 (Fla. 4th DCA 1990) (finding that a woman's second call to 911 emergency service created a special relationship that precluded the municipality from claiming sovereign immunity for the mishandling of the call);

courts have found the government liable for negligently failing to contact the Coast Guard to report that a boater may be missing,[507] and failing to protect a child from abuse while discouraging others from protecting the child involved.[508]

e. Special Statutory Duty

As the Florida Supreme Court observed in *Trianon*, the government does not waive immunity via section 768.28 whenever a government employee fails to perform a statutory duty to the public.[509] However, in certain instances, a statute designed to protect a specific class of persons creates a special duty to particular members of the protected class.[510] This duty results in waiving immunity when the government negligently fails to perform the statutory duty.[511] The Florida Supreme Court applied this exception in *Department of Health & Rehabilitative Services v. Yamuni*.[512] The *Yamuni* court found a waiver of immunity for negligent failure to investigate and protect a child from child abuse as required by Florida Statutes § 827.07.[513] The court found that section 827.07 imposed on the Florida Department of Health and Rehabilitative Services the "primary duty . . . to immediately prevent any

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see also Jay M. Zitler, Annot., *Liability for Failure of Police Response to Emergency Call*, 39 A.L.R.4th 691 (1985) (analyzing state and federal cases discussing when the government may be liable for the failure of police to respond to an emergency telephone call); Douglas L. Bates, *911: The Call That No One Answered*, 10 NOVA. L.J. 1319 (1986).

507. *See* Hartley v. Floyd, 512 So. 2d 1022, 1024 (Fla. 1st DCA 1987) (finding a duty to perform and liability for performance when a deputy agreed to check for a missing boater's vehicle at a boat ramp and inform the Coast Guard).

508. *See* Department of Health & Rehab. Servs. v. Yamuni, 529 So. 2d 258, 262 (Fla. 1988); *see also* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989). "It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger." *Id.* at 201-02; *see* RESTATEMENT (SECOND) OF TORTS § 323 (1977) (one who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion). *See generally* PROSSER & KEETON, *supra* note 10, § 56 (discussing "special relationships" which may give rise to affirmative duties to act); Deborah L. Caventer, Note, *The Demise of the Discretionary Exception to Sovereign Immunity*, 18 STETSON L. REV. 615 (1989) (discussing *Yamuni* case); Katherine Elizabeth Seiler, Note, *Waiver of Sovereign Immunity, Pursuant to Fla. Stat. § 768.28 for Negligent Conduct of HRS Caseworker*, 19 CUMB. L. REV. 393 (1989) (discussing *Yamuni* case).

509. *Trianon*, 468 So. 2d at 918.

510. *Id.*

511. *Id.*

512. 529 So. 2d 258, 261 (Fla. 1988).

513. *Id.*

further harm to the child."[514] The court further held that under this statute "the relationship established between H.R.S and the abused child is a very special one."[515] This statutory creation of a special relationship was one of the bases for finding a waiver of immunity in *Yamuni*.[516]

The special statutory relationship doctrine applied in *Yamuni* has potential application in a wide variety of cases.[517] However, the criteria for applying the doctrine were not developed fully in *Yamuni*. Thus, the scope of the waiver of immunity that will be recognized under the doctrine awaits further development by the Florida Supreme Court.[518]

V. MONETARY LIMITS ON RECOVERY WHEN IMMUNITY IS WAIVED

A. *Limitations on Recovery of Compensatory Damages*

The waiver of sovereign immunity places financial burdens on the government. To limit these financial burdens, Florida law limits the amount of damages that may be recovered on a claim against a public entity.[519] Liability is limited to $100,000 on a claim by any one person,

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514. *Id.*

515. *Id.*

516. *Id.*

517. *See also* Department of Health & Rehab. Servs. v. Whaley, 574 So. 2d 100, 101 (Fla. 1991) (noting that the duty owed by HRS to use care to protect a juvenile detainee from potential harm by third persons was an operational duty not subject to sovereign immunity); Lewis v. City of Miami, 173 So. 150, 153 (Fla. 1937) (noting that the negligent breach of a municipality's statutory duty to provide city prisoners with adequate housing and food was actionable when the municipality knowingly failed to adhere to the statute).

518. In addition to this special statutory relationship doctrine of *Yamuni*, Florida courts have held that a statute expressly directing specific conduct renders the performance of that conduct mandatory rather than discretionary, resulting in waiver of immunity for negligent failure to comply with the statutory duty. *See* Feldstein v. City of Key West, 512 So. 2d 217, 219 (Fla. 3d DCA 1987) (finding that a city's failure to fulfill a statutory duty to install ramps at crosswalks that had curbs and sidewalks are not excusable as a planning decision); A.L. Lewis Elementary Sch. v. Metropolitan Dade County, 376 So. 2d 32, 34 (Fla. 3d DCA 1979) (finding that the express statutory duty of a government required government action and eliminated government discretion to act).

519. FLA. STAT. § 768.28(5) (1991) provides in pertinent part:

> 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 $100,000 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 $200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be

or to $200,000 for all claims arising from the same incident or occurrence.[520] However, judgments may be rendered in excess of the statutory limits.[521] In these cases, the governmental entity may pay the judgment up to the limits of liability.[522] The successful plaintiff may then present the unpaid portion of the judgment in a claim bill to the legislature, which may act to pay it in whole or in part.[523]

1. Separate Incidents and Occurrences

Florida Statutes § 768.28(5) limits the payment of all claims or judgments "arising out of the same incident or occurrence" to $200,000.[524] Under this statutory provision, the Fifth District Court of Appeal held that arresting the same individual on two separate occasions constituted two incidents or occurrences for purposes of the cap on recovery, even though both arrests were based on the same ordinance.[525]

2. Separate Claims by Different Individuals

Section 768.28(5) states that "neither the state nor its agencies or subdivisions shall be liable to pay a claim or judgment by any one person which exceeds the sum of $100,000."[526] This language does not limit damages for separate claims by different individuals in the same lawsuit[527] or for derivative claims.[528]

In *State Department of Corrections v. Parker*,[529] the court applied section 768.28(5) in a widow's action for loss of consortium against a

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settled and paid pursuant to this act up to $100,000 or $200,000, 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.

Id.

520. *Id.*

521. *Id.*

522. *Id.*

523. *Id.*

524. *See, e.g.*, Rumbough v. City of Tampa, 403 So. 2d 1139, 1142 (Fla. 2d DCA 1981).

525. Pierce v. Town of Hastings, 509 So. 2d 1134, 1136 (Fla. 5th DCA 1987).

526. FLA. STAT. § 768.28(5) (1991).

527. *See* Department of Health & Rehab. Servs. v. McDougall, 359 So. 2d 528, 533 (1st DCA), *cert. denied*, 365 So. 2d 711 (Fla. 1978).

528. Board of Regents v. Yant, 360 So. 2d 99, 101 (1st DCA), *cert. denied*, 364 So. 2d 892 (Fla. 1978).

529. 553 So. 2d 289 (Fla. 4th DCA 1989) (per curiam).

state agency.[530] The court deemed the widow's consortium claim separate and distinct from her action as personal representative of her husband's estate against the agency.[531] Because the widow's action for loss of consortium was distinct from that of the estate's claim, section 768.28(5) permitted each to recover $100,000, or a combined amount of $200,000.[532] Another Florida court reached a similar result in a personal injury action against a state agency on behalf of a minor and his mother.[533] The jury in this case returned a verdict for the injured child and for his mother for her payment of bills incident to the child's medical treatment.[534] The court held that the child's claim and his mother's derivative claim were separate claims under the statute.[535]

3. Court Costs and Postjudgment Interest

The doctrine of sovereign immunity does not shield a governmental entity from paying postjudgment interest.[536] However, section 768.28(5)'s statutory limit on the amount of tort recovery includes all elements of damages, costs, and postjudgment interest.[537]

4. Cumulative Per Incident Limit on Aggregate Recovery

The statutory limits on damages in section 768.28(5) apply to the aggregate recovery regardless of the number of governmental entities sued.[538] Thus, a plaintiff may recover a total of $100,000 from governmental entities per incident, rather than $100,000 from each liable public entity. In *Gerard v. Department of Transportation*,[539] the Florida Supreme Court flatly rejected the notion that a plaintiff can

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530. *Id.*

531. *Id.*

532. *Id.*

533. *Yant*, 360 So. 2d at 101.

534. *Id.* at 100.

535. *Id.* at 101.

536. *See* Palm Beach County v. Town of Palm Beach, 579 So. 2d 719, 720 (Fla. 1991).

537. *See* City of Lake Worth v. Nicolas, 434 So. 2d 315, 316 (Fla. 1983); Godoy v. Dade County, 428 So. 2d 662 (Fla. 1983); Berek v. Metropolitan Dade County, 422 So. 2d 838 (Fla. 1982); Evanston Ins. Co. v. City of Homestead, 563 So. 2d 755 (Fla. 3d DCA 1990) (per curiam); DeAlmeida v. Graham, 524 So. 2d 666 (Fla. 4th DCA 1987); City of Hallandale v. Arose, 435 So. 2d 985 (Fla. 4th DCA 1983) (although costs are recoverable against a governmental body, the statutory limit of liability constitutes the absolute maximum amount of recovery including all elements of damages, costs, and postjudgment interest).

538. FLA. STAT. § 768.28(5) (1991).

539. 472 So. 2d 1170 (Fla. 1985).

"stack" sovereigns to exceed the statutory recovery limits.[540] Thus, the *Gerard* court held that the State Department of Transportation was entitled to a setoff against its statutory waiver of immunity in the total amount paid by its codefendant.[541]

5. Application of Monetary Limits to Municipalities

Florida courts construed the original version of section 768.28 not to limit in any substantial way the tort liability of municipalities.[542] However, in 1977 the legislature amended section 768.28(5) to clarify that the monetary limits on liability apply to municipalities.[543] Thus, the limitations on liability apply to all governmental entities subject to the waiver of sovereign immunity statute, even if the entity could not have asserted sovereign immunity to tort liability before the effective date of the Act.

B. *Judgment in Excess of Cap*

The statutory cap on the amount of damages recoverable against a governmental entity does not affect the plaintiff's right to a judgment for full damages.[544] Section 768.28(5) expressly authorizes judgments in excess of the statutory limits.[545] Therefore, a claimant whose claim has been paid up to the limit is not precluded from seeking a judgment

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540. *Id.* at 1172-73.

541. Pensacola Jr. College v. Montgomery, 539 So. 2d 1153, 1155 (Fla. 1st DCA 1989) (subtracting direct payments of a state college for a student's medical bills from the amount of the college's waiver of sovereign immunity rather than permitting larger jury award); Vasquez v. Board of Regents, 548 So. 2d 251, 254 (Fla. 2d DCA 1989) (finding that acceptance of $100,000 settlement payment from state hospital authority exhausted the waiver of immunity limits, precluding any recovery from vicariously liable parties); *see also* Orange County v. Gipson, 539 So. 2d 526, 530 (Fla. 5th DCA 1989) (imposing a cumulative per incident limitation on total recovery regardless of the number of government entities).

542. *See* Op. Att'y Gen. Fla. 76-41 (1976).

543. The legislature amended § 768.28(5) in 1977 by adding: "*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.*" Act of June 2, 1977, 1977 Fla. Laws ch. 86. The constitutionality of this limitation was upheld in Cauley v. City of Jacksonville, 403 So. 2d 379 (Fla. 1981). *See generally* Mary Ava Bobko, *Constitutionality of Florida's Statute Limiting Tort Recovery Against a Municipality*: Cauley v. City of Jacksonville, 6 NOVA L.J. 335 (1982) (evaluating sovereign immunity under *Cauley v. City of Jacksonville*).

544. FLA. STAT. § 768.28(5) (1991).

545. *Id.*

for an excess sum.[546] The claimant can obtain the judgment for the excess as a preliminary step to seeking a claim bill in the legislature.[547]

1. Recovery of Excess Judgments by Legislative Appropriation

The portion of a judgment obtained against a governmental entity which exceeds section 768.28's statutory limits of liability may be paid only if specifically authorized by the legislature.[548] If the legislature refuses to approve payment of the excess portion of the judgment, the state, agency, or responsible subdivision is liable only up to the statutory limits. The judgment would be unenforceable to the extent that it exceeds those limits.[549]

Section 768.28 does not indicate the source of funds to be used if the legislature approves payment of damages exceeding the statutory limits. However, the legislature, in its discretion, may direct that the payment come in whole or part from the general revenue fund or from funds of the responsible local governing body.[550] Insurance also may cover damages in excess of statutory limits.[551]

2. Claim Bill Procedure

a. Definitions

A claim bill seeks compensation for a person injured by an act or omission of the state or the state's subdivisions, agencies, officers or employees.[552] The claim bill is available when there is no other legal remedy.[553] Claim bills are of two types. The first type of bill presents a claim for an excess judgment in tort.[554] This type of bill is used to

546. *Id.*

547. *Id.*

548. *See Gerard*, 472 So. 2d at 1172; City of Lake Worth v. Nicolas, 434 So. 2d 315, 316 (Fla. 1983); South Broward Topeekeegeeyugnee Park Dist. v. Martin, 564 So. 2d 1265, 1267 (Fla. 4th DCA 1990).

549. FLA. STAT. § 768.28(5) (1991) provides that the portion of a judgment that exceeds the statutory cap on recovery "may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature."

550. *See, e.g.*, Hess v. Metropolitan Dade County, 467 So. 2d 297, 301 (Fla. 1985) (upholding constitutionality of a statute authorizing payment from Dade County for an amount exceeding the general statutory cap to a specific plaintiff); Op. Att'y Gen. Fla. 75-69 (1975).

551. *See* FLA. STAT. § 111.072 (1991); Everton v. Willard, 468 So. 2d 936, 953 (Fla. 1985) (Shaw, J., dissenting).

552. D. Stephen Kahn, *Legislative Claim Bills*, FLA. B.J., Apr. 1988, at 23.

553. *Id.*

554. *Id.*

collect the unsatisfied difference between the statutory dollar limits on collectibility and the full amount of the claimant's tort judgment against a governmental body.[555] The second type of bill presents an equitable claim filed without an underlying excess judgment.[556]

Any member of the legislature may introduce a claim bill.[557] A local bill presents a claim against a municipality, special district, local constitutional officer or county.[558] A general bill presents a claim against a state agency.[559] A relief act is a legislative measure that directs the Comptroller of Florida, or a unit of local government, to pay a specific sum of money to a claimant to satisfy an equitable or moral obligation.[560]

b. Procedure

To obtain legislative relief under a claim bill a party must adhere to the following procedures. First, the party must submit the claim bill within four years "after the cause for relief accrued."[561] Next, a special master conducts a hearing on the bill and prepares a final report and recommendation for the Committee on Taxation, Finance and Claims.[562] If the claim bill is reported favorably by the Committee, the claim bill must pass in the House and the Senate, and be approved by the Governor.[563]

C. *Punitive Damages and Prejudgment Interest*

Section 768.28(5) provides that "[t]he 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

555. *Id.*
556. *Id.*
557. *Id.*
558. *Id.*
559. *Id.*
560. The legislature must appropriate the funds to pay the portion of a judgment exceeding the statutory limits of liability. Op. Att'y Gen. Fla 75-69 (1975).
561. FLA. STAT. § 11.065(1) (1991). "No claims against the state shall be presented to the Legislature more than 4 years after the cause for relief accrued." *Id.*
562. *Id.*
563. Gerard v. Department of Transp., 472 So. 2d 1170, 1173 (Fla. 1985) (noting that the House and Senate will conduct their own independent hearings which are similar to non-jury trials to determine whether public funds should be expended excess judgment).

before judgment."[564] Therefore, the state is immune from liability for punitive damages and prejudgment interest.

D. *Limit on Attorney's Fees*

To insure that the injured party will receive the maximum benefit of section 768.28(5)'s limited recovery, section 768.28(8) limits the plaintiff's attorney's fee to twenty-five percent of any judgment or settlement.[565] This twenty-five percent limitation applies to all situations involving waiver of sovereign immunity regardless of the source of payment.[566] For example, the limitation applies even when the state, agency or subdivision has purchased liability insurance.[567]

VI. EMPLOYEE LIABILITY UNDER SECTION 768.28

A. *Pre-Waiver Public Employee Liability*

Prior to the waiver of immunity enacted in section 768.28, governmental tort victims could sue public employees individually. Early Florida cases imposed extremely broad tort liability on public officers and employees for negligent conduct occurring in the course of their duties.[568] These cases generally held that negligent conduct was effectively outside the scope of an officer's or employee's authority; thus, the conduct was not protected by sovereign immunity.[569] However, later cases decided by Florida courts limited this broad liability.[570]

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564. *See* Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965); Sebring Utils. Comm'n v. Sicher, 509 So. 2d 968, 970 (Fla. 2d DCA 1987); *cf.* New Port Largo v. Monroe County, 706 F. Supp. 1507, 1524 (S.D. Fla. 1988) (holding that although the state is immune from punitive damages, punitive damages are recoverable against a state agent in individual capacity).

565. FLA. STAT. § 768.28(8); *see also* Shands Teaching Hosp. & Clinics v. Lee, 478 So. 2d 77, 78 (Fla. 1st DCA 1985) (limiting attorney fees to 25% of settlement award with a state agency); North Broward Hosp. Dist. v. Johnson, 538 So. 2d 876, 877 (Fla. 4th DCA 1988) (holding that the failure of the trial court to mention the statutory limitation on attorney's fees awards did not preclude the losing party from using the statutory provision to limit the recovery).

566. Ingraham v. Dade County Sch. Bd., 450 So. 2d 847, 849 (Fla. 1984).

567. *Id.*

568. *See, e.g.*, Hampton v. Board of Educ., 105 So. 323, 328 (Fla. 1925); *see also* Rupp v. Bryant, 417 So. 2d 658, 663 (Fla. 1982) (explaining the evolution of Florida governmental tort liability); Robert G. Vaughn, *The Personal Accountability of Public Employees*, 25 AM. U.L. REV. 85 (1975) (discussing the history of imposing tort liability on the government).

569. *Rupp*, 417 So. 2d at 661.

570. *See id.* at 662 (noting that this liability began to diminish with the expansion of governmental agencies and services in the 1930s and continued to diminish with the waiver of sovereign immunity and the "special duty" requirement for officer tort liability).

B. *Post-Waiver Public Employee Liability*

1. Government Employee Immunity Under Section 768.28

Subsection 768.28(9) addresses the extent to which government employees and officials should be subject to individual tort liability when governmental tort immunity has been waived under section 768.28.[571] Under the present statutory scheme of subsection 768.28(9)(a),[572] government agents and employees can neither be named as parties nor be held personally liable in tort for any injury or damage caused by simple negligence occurring within the scope of their employment.[573] Instead, the plaintiff's exclusive remedy[574] is suit against the governmental entity involved or the head of such entity in his or her official capacity.[575]

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571. *See* District School Bd. v. Talmadge, 381 So. 2d 698, 702 (Fla. 1980); Department of Corrections v. Koch, 582 So. 2d 5, 8 (Fla. 1st DCA 1991) ("Sec. 768.28(9) did not abolish the right of an injured person to sue and recover based on the liability of a negligent employee; it merely required that the action be maintained against the public employer as the sole, substitute defendant.").

572. Subsection (9) was amended by the legislature in Act of July 1, 1980, 1980 Fla. Laws ch. 271 to change the result of the Florida Supreme Court's decision in *District Sch. Bd. v. Talmadge*, holding that public employees were partially indemnified but not immunized from suit for injuries they inflicted in the course of their employment.

573. In this regard, FLA. STAT. § 768.28(9)(a) provides that:

> No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Id.

574. Section 768.28(9)(a) states that:

> The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Id.

575. Official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent," and do not seek personal liability. Kentucky v. Graham, 473 U.S. 159, 165 (1985) (quoting Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690 n.55 (1978)); New Port Largo v. Monroe County, 706 F. Supp. 1507, 1520 n.6 (S.D. Fla. 1988) (quoting Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690 n.55 (1978)). A public officer sued in his official capacity may be described merely by his

However, the public entity involved is not liable in tort if the employee or other agent either acted outside the scope of the employment, or acted in bad faith with malicious purpose or in a manner exhibiting wanton and willful disregard for human rights, safety or property.[576] In this event, the plaintiff's only option is to bring suit against the government employee in his or her individual capacity.[577] Plaintiffs can plead in the alternative if they are unsure whether the government employee's conduct meets a standard for individual liability.[578]

2. Federal Employee Immunity

On November 1, 1988, the Federal Employees Liability Reform and Tort Compensation Act of 1988 was enacted to amend sections of the Federal Tort Claims Act. The amendments provide federal employees with absolute immunity from liability for common-law torts committed within the scope of employment.[579] Congress created this immunity by precluding direct actions against federal employees.[580] Instead, a plaintiff's "exclusive remedy" is an action against the United States under the Federal Tort Claims Act.[581] Congress's rationale for

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official title and need not necessarily be described by name, and when a public officer ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Ruff v. Wells, 504 So. 2d 16 (Fla. 2d DCA 1987).

576. *See, e.g.*, Stephenson v. School Bd. of Polk County, 467 So. 2d 1112 (Fla. 2d DCA 1985) (holding that school board was not liable for acts of its employees committed within the scope of employment but in bad faith or with wanton and willful disregard of human rights, safety, or property); Willis v. Dade County Sch. Bd., 411 So. 2d 245 (Fla. 3d DCA 1982) (holding that school board was immune from suit when a teacher acts in bad faith or with malicious purpose or acts beyond the scope of employment).

577. Section 768.28(9)(a) provides that:

> The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

FLA. STAT. § 768.28(9)(a) (1991).

578. FLA. R. CIV. P. 1.110(b), (g).

579. H.R. 4612, 100th Cong., 2d Sess. § 2(b) (1988). Congress passed the Act in response to Westfall v. Erwin, 484 U.S. 292 (1988), which "seriously eroded the common law tort immunity previously available to Federal employees," and "created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce." H.R. 4612, § 2(a)(4)-(5).

580. *Id.* § 5.

581. *Id.*

immunizing federal employees and officials from personal liability for acts arising from the performance of their official duties, was "the promotion of 'fearless, vigorous, and effective administration of policies of government.'"[582]

3. Employees as Adverse Witnesses

When a plaintiff sues a governmental entity for negligent acts of its employee, the plaintiff may call the employee as a witness. Further, when an employee of the state or its subdivision is called as a witness in a tort action which resulted from the employee's actions, the employee *must* be considered an adverse witness.[583] Therefore, there is no need to establish that the employee is "unwilling or hostile" under Florida Rules of Civil Procedure 1.450(a) before interrogating the employee with leading questions.[584] Additionally, an employee witness may be impeached under section 90.608(2) without proving the employee "unwilling or hostile."[585]

4. Private Purchase of Liability Insurance by Employee

Absent a statute to the contrary, a government employee's private purchase of liability insurance does not waive the employee's statutory immunity from tort claims.[586]

5. Immunity of State Shared by Employee

If a particular public entity is entitled to sovereign immunity in a tort action based on alleged negligence of its employees, the employees involved are also immune from tort liability for negligently performing their duties as public employees.[587]

6. Immunity of Coemployees

Section 768.28(9)(a) grants sovereign immunity to coemployees who work for the state or any of its subdivisions.[588] However, a coemployee is not immune from liability when acting with malicious purpose, in

582. *Rupp*, 417 So. 2d at 663 (citing Barr v. Matteo, 360 U.S. 564, 571 (1959)); *see* Norton v. McShane, 332 F.2d 855, 858 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965).

583. FLA. STAT. § 768.28(9)(a) (1991).

584. *Id.*; *see* FLA. R. CIV. P. 1.450(a); Rotte v. City of Jacksonville, 543 So. 2d 842, 843 (Fla. 1st DCA 1989).

585. *Rotte*, 543 So. 2d at 843.

586. Atwater v. Broward County, 556 So. 2d 1161, 1162 (Fla. 4th DCA 1990).

587. *See* Jaar v. University of Miami, 474 So. 2d 239, 245 (Fla. 3d DCA 1985).

588. FLA. STAT. § 768.28(9)(a) (1991).

bad faith, or in a manner exhibiting wanton and willful disregard of human rights, safety or property.[589] A state coemployee who merely acts with gross negligence and not with the greater degree of culpability specified in the statute, is entitled to immunity.[590]

C. *Agents and Employees in General*

Section 768.28(9) provides immunity to regular state, county and municipal employees.[591] Additionally, the following are within section 768.28(9)(a)'s definition of governmental agents or employees: volunteer fire fighters;[592] outside prison health care providers;[593] public defenders, assistant public defenders, and investigators and other employees or agents of public defenders;[594] members of county tourist development councils and tourism promotion agencies;[595] psychological examiners designated by the Board of Psychological Examiners;[596] and physicians employed by a public hospital.[597]

Florida Statutes § 768.28(9)(b)(1) does not define fully the term "officer, employee, or agent." However, the federal courts have established a test for defining these terms in cases involving the Federal Tort Claims Act, after which the Florida act is modeled.[598] Federal courts have held the primary test for determining whether a tortfeasor is a government employee is whether the government controls or has the right to control that person's work.[599]

D. *Course and Scope of Employment*

Governmental tort liability under section 768.28 is predicated on

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589. Elliott v. Duggar, 579 So. 2d 827, 831 (Fla. 1st DCA 1991); *see* Department of Corrections v. Koch, 582 So. 2d 5, 8 (Fla. 1st DCA 1991).

590. *Elliot*, 579 So. 2d at 831; *see Koch*, 582 So. 2d at 8. However, § 768.28 has been held not to abolish the common law right of recovery upon which the unrelated works exception to the Workers' Compensation Act is based. *Koch*, 582 So. 2d at 17.

591. *See, e.g.*, Hollis v. School Bd., 384 So. 2d 661 (Fla. 1st DCA 1980) (holding that school bus driver was an employee of the school superintendent and the school board).

592. FLA. STAT. § 768.28(9)(b)(1) (1991).

593. *Id.* § 768.28(10)(a).

594. *Id.* § 768.28(9)(b)(2).

595. Op. Att'y Gen. Fla. 90-259 (1990).

596. Op. Att'y Gen. Fla. 89-195 (1989).

597. Bates v. Sahasranaman, 522 So. 2d 545 (Fla. 4th DCA 1988).

598. *Cf.* 28 U.S.C. § 1346(b) (1988) (exposing the United States to liability for money damages "caused by the negligent or wrongful act or omission of any employee of the Government").

599. *See* Logue v. United States, 412 U.S. 521, 527-28 (1973).

the doctrine of respondeat superior.[600] Therefore, governmental tort liability under section 768.28 depends on whether the negligent or wrongful act of the employee occurred within the scope of the office or employment.[601] Under Florida law, scope of employment is determined according to a three-part test, "[a]n employee's conduct is within the scope of his employment only if it is the kind he is employed to perform, it occurs substantially within the time and space limits of the employment and it was activated at least in part by a purpose to serve the master."[602]

Clearly, the scope of employment is considerably broader than that conduct explicitly authorized by the employer. However, liability does not extend to cases in which the servant commits a tort which the master did not direct nor could be held, from the nature of the employment, to have authorized or expected the servant to do.[603]

1. Off-Duty Police Officers

Under certain circumstances, a governmental body may be held liable for the acts of its police officers who are off duty or outside their jurisdiction.[604] Because a law enforcement officer is on call for duty is not dispositive of whether that off-duty officer is acting within the course of his or her employment.[605] Officers act within the scope of their employment only when they carry out their primary responsibility, the "prevention or detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state."[606]

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600. DeBolt v. Department of Health & Rehab. Servs., 427 So. 2d 221, 223 n.6 (Fla. 1st DCA 1983).

601. *Id.*

602. Morrison Motor Co. v. Manheim Serv. Corp., 346 So. 2d 102 (Fla. 2d DCA 1977).

603. Generally, an employee who deviates from his employment to engage in a personal errand is outside the scope of his employment if an accident occurs before he returns to the course he was pursuing in his employer's interest. Drinnenberg v. Department of Transp., 481 So. 2d 51 (Fla. 2d DCA 1985).

604. *See* Garner v. Saunders, 281 So. 2d 392 (Fla. 2d DCA 1973); Op. Att'y Gen. Fla. 89-167 (1989) (concluding that a law enforcement officer rendering emergency aid to ill, injured, or distressed persons may be acting within the scope of his employment). *But see* Craft v. John Sirounis & Sons, 575 So. 2d 795 (Fla. 4th DCA 1991) (concluding that off-duty police officers who participated in a barroom brawl were not acting in the scope of their employment); Curtis v. Bulldog Leasing Co., 513 So. 2d 238 (Fla. 4th DCA 1987) (holding that sovereign immunity was not waived when an off-duty police officer observing an accident outside of his jurisdiction stopped to render assistance since he was not acting within the scope of his duty).

605. Palm Beach County Sheriff's Office v. Ginn, 570 So. 2d 1059, 1060 (Fla. 1st DCA 1990).

606. FLA. STAT. § 440.091(1) (1991). This statute specifically delineates the circumstances under which law enforcement officers act within the course of their employment for purposes

2. Intentional Torts

A governmental entity is not immunized from liability for its employees' intentional torts which fall within the scope of employment[607] if the conduct does not involve bad faith, malicious purpose, or a wanton and willful disregard of human rights, safety, or property.[608] For example, governmental bodies are liable for intentional torts such as assault and battery committed by police officers during an arrest,[609] intentional misrepresentation,[610] false arrest,[611] and conversion.[612] In

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of coverage by the workers' compensation law. That section provides, in pertinent part, as follows:

> 440.091 Law enforcement officer; when acting within the course of employment. —If an employee:
>
> (1) Is elected, appointed, or employed full time by a municipality, the state, or any political subdivision and is vested with authority to bear arms and make arrest and his *primary responsibility* is the prevention or detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state;
>
> (2) Was discharging that primary responsibility within the state in a place and under circumstances reasonably consistent with that primary responsibility; and
>
> (3) Was not engaged in services for which he was paid by a private employer, and he and his public employer had no agreement providing for workers' compensation coverage for that private employment;
>
> the employee shall be deemed to have been acting within the course of employment.

Id. (emphasis added).

607. Hennagan v. Department of Highway Safety, 467 So. 2d 748 (Fla. 1st DCA 1985).

> [C]onduct may be within the scope of employment, even if it is unauthorized, if it is of the same general nature as that authorized or is incidental to the conduct authorized. . . . The purpose of the employee's act, rather than the method of performance thereof, is said to be the important consideration.

Id.

608. Duyser v. School Bd., 573 So. 2d 130 (Fla. 4th DCA 1991). Florida Statutes § 768.28(9)(a) (1989), provides

> the pertinent statutory authority to the effect that a governmental entity is liable for all torts, negligent and intentional, committed by an employee, unless committed outside the course and scope of employment or unless the employee was acting in bad faith, or with a malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property.

Id.

609. *See* Maybin v. Thompson, 514 So. 2d 1129 (Fla. 2d DCA 1987); Richardson v. City of Pompano Beach, 511 So. 2d 1121 (4th DCA 1987), *rev. denied*, 519 So. 2d 986 (Fla. 1988); *Hennagan*, 467 So. 2d at 748.

610. *E.g.*, Twigg v. Hospital Dist., 731 F. Supp. 469 (M.D. Fla. 1990).

611. Lester v. City of Tavares, 17 Fla. L. Weekly D1664 (Fla. 5th DCA July 10, 1992).

612. Springer v. Department of Natural Resources, 485 So. 2d 15 (3d DCA), *rev. denied*, 492 So. 2d 1331 (Fla. 1986) (holding that a boat owner could maintain a conversion claim against the Department of Natural Resources, when the department seized his boat without instituting forfeiture proceedings).

contrast, governmental bodies are immune from liability for intentional torts such as malicious prosecution[613] and defamation of a public figure.[614]

E. *Legal Representation at Public Expense*

Florida courts long have recognized that public officials are entitled to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose.[615] The official's entitlement to attorney's fees or representation at public expense arises under common law and is independent of statute, ordinance, or charter.[616] This common law entitlement to representation avoids the chilling effect that a denial of representation might have on public officials in performing their duties properly and diligently.[617] However, for public officials to be entitled to representation at public expense, the litigation must meet two requirements. First, the litigation must arise out of or in connection with the performance of their official duties.[618] Second, the litigation must serve a public purpose.[619]

In addition to the common law right to representation, Florida Statutes § 111.07 authorizes any agency or political subdivision of the state to provide an attorney to defend certain civil actions.[620] These actions must arise from a complaint for damages or injury suffered

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613. Craven v. Metropolitan Dade County, 545 So. 2d 932 (Fla. 3d DCA 1989); City of Coconut Creek v. Fowler, 474 So. 2d 820 (4th DCA 1985), *rev. denied*, 486 So. 2d 595 (Fla. 1986); Hambley v. Department of Natural Resources, 459 So. 2d 408 (Fla. 1st DCA 1984).

614. *See* 28 U.S.C. § 2680(h) (1988) (exemption from liability under FTCA for libel or slander); Ford v. Rowland, 562 So. 2d 731, 734 (5th DCA), *rev. denied*, 574 So. 2d 143 (Fla. 1990); Hauser v. Urchisin, 231 So. 2d 6, 8 (Fla. 1970) ("The public interest requires that statements made by officials of all branches of government in connection with their official duties be absolutely privileged.").

615. Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 916 (Fla. 1990); *accord* Nuzum v. Valdes, 407 So. 2d 277 (Fla. 3d DCA 1981).

616. *Thornber*, 568 So. 2d at 917.

617. *Id.*

618. *Id.*

619. *Id.*

620. *Id.*

> Section 111.07 as originally enacted only authorized the state to defend any tort action brought against public officials for alleged negligence arising out of the scope of their employment. In 1979 the legislature amended the statute to include any civil action brought against a public official. The major cause of that amendment was the increase in federal civil rights suits against public officials.

Id. at 918 n.6.

as a result of any act or omission of any government officer, employee or agent arising out of and within the scope of their employment or function.[621] However, an attorney will not be provided in a tort action when the officer, employee or agent acted in bad faith, with malicious purpose, or exhibited wanton and willful disregard of human rights, safety, or property.[622] Legal representation of an officer, employee or agent of a state agency may be provided by the Department of Legal Affairs.[623] In addition, the Florida Attorney General has determined that the right of representation inures to the chief judge of a judicial circuit,[624] as well as to a special master appointed by the circuit court to hear child support enforcement matters.[625]

Section 111.07 does more than simply authorize governmental entities to provide attorneys for their officers, employees, and agents in certain circumstances. In addition, this statute requires any such entity that fails to provide an attorney in the appropriate case to reimburse the defendant for court costs and reasonable attorney's fees provided the defendant prevailed in the action.[626] Additionally, the 1983 amendment to section 111.07,[627] allows any state agency or political subdivision to recover attorneys' fees paid from public funds to defend any officer, employee, or agent found personally liable for acting outside the scope of employment, in bad faith, with malicious purpose, or in wanton and willful disregard of human rights, safety, or property.[628]

VII. INSURANCE COVERAGE FOR CLAIMS SUBJECT TO WAIVER OF IMMUNITY

A. *Generally*

Florida Statutes § 768.28(14)(a) sets forth the general provisions permitting state agencies to obtain insurance.[629] Section 768.28(14)

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621. FLA. STAT. § 111.07 (1991).

622. *Id.*

623. *Id.*

624. Op. Att'y Gen. Fla. 89-2 (1989).

625. Op. Att'y Gen. Fla. 87-46 (1987).

626. FLA. STAT. § 111.07 (1991). FLA. STAT. § 284.30 (1991) requires a party seeking to have his attorney's fees paid by the state to serve a copy of the pleading that claims the fees on the Department of Insurance. Heredin v. Department of Highway Safety, 547 So. 2d 1007 (Fla. 3d DCA 1989).

627. FLA. STAT. § 111.07 (1991).

628. *Id.*

629. FLA. STAT. § 768.28(14)(a) was originally enacted as FLA. STAT. § 768.28(10) (1973) providing as follows:

provides that "the state and its agencies and subdivisions are authorized to be self-insured,[630] or to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, as a means of discharging their obligation to pay any claim, judgment, or claim bill arising under section 768.28."[631]

B. *Relationship Between Insurance Coverage and Waiver of Immunity*

1. Section 286.28 and *Avallone*

Until 1987, Florida Statutes § 286.28[632] authorized designated political subdivisions to purchase insurance to cover liability for damages arising out of the operation of motor vehicles and the ownership of buildings and other properties.[633] However, section 286.28(2) required any contract of insurance purchased pursuant to the statute to state that "the insurer shall not be entitled to the benefit of the defense of sovereign immunity."[634] In *Avallone v. Board of County Commission-*

> If the state or its agency or subdivision is insured against liability for damages for any negligent or wrongful act, omission or occurrence for which action may be brought pursuant to this section, then the limitations of this act shall not apply to actions brought to recover damages therefor to the extent such policy of insurance shall provide coverage.

Act of June 26, 1973, 1973 Fla. Laws ch. 313, § 10, *repealed by* Act of June 2, 1977, 1977 Fla. Laws ch. 86, § 2. It was replaced by § 768.28(14). Act of June 2, 1977, 1977 Fla. Laws ch. 86, § 3.

630. FLA. STAT. § 284.30 (1991) establishes a state self-insurance fund designated as the "Florida Casualty Insurance Risk Management Trust Fund" which is to provide insurance for, among other things, general liability and federal civil rights actions and court-awarded attorney's fees in other proceedings against the state. *Id.* Local governments through voluntary associations obtain similar advantages, e.g., self-insurance, management assistance, group insurance, excess coverage. Tort claims payable from the risk management trust fund are subject to the same monetary ceilings as established by the FTCA, except that such ceilings are not applicable to a claim or judgment arising under the civil rights provisions of 42 U.S.C. § 1983 or similar federal statutes. *Id.* § 284.38.

631. *Id.* § 768.28(14)(a).

632. FLA. STAT. § 286.28 (1985), *repealed by* Act of June 30, 1987, 1987 Fla. Laws ch. 134, § 4 (originally enacted as Act of June 15, 1953, 1953 Fla. Laws ch. 28,220, § 1). There were similar statutes for sheriffs' departments, school districts, and the state university system. *See* FLA. STAT. § 30.55(2) (1985), *amended by* Act of June 30, 1987, 1987 Fla. Laws ch. 134, § 4; FLA. STAT. § 230.23(9)(d) (1985), *amended by* 1987 Fla. Laws ch. 134, § 1; FLA. STAT. § 240.213(2) (1985), *amended by* 1987 Fla. Laws ch. 134, § 2.

633. FLA. STAT. § 286.28 (1985) (repealed 1987).

634. FLA. STAT. § 286.28(2) provided in pertinent part that:

> In consideration of the premium at which such insurance may be written, *it shall be a part of any insurance contract providing said coverage that the insurer shall not be entitled to the benefit of the defense of governmental immunity of any such*

ers,[635] the Florida Supreme Court interpreted section 286.28. The court held that section 286.28 waived sovereign immunity up to the limits of the policy purchased pursuant to this provision.[636] Under *Avallone*, the insured governmental entity could assert neither the statutory ceilings on collectibility nor the discretionary function exception to section 768.28's waiver of sovereign immunity as a defense to limit payment of a claim within the limits of applicable insurance coverage.[637]

2. Repeal of Section 286.28 and Amendment of Section 768.28(5)

After *Avallone*, the Florida Legislature repealed section 286.28.[638] The legislature then amended section 768.28(5) to provide that a governmental entity would not waive any defense of sovereign immunity, or increase its limits of liability, by obtaining liability insurance coverage above the applicable statutory cap on collectibility.[639] Further, this amendment allows a state agency or political subdivision to pay a claim or a judgment within the limits of its existing insurance coverage without further action by the legislature.[640] Therefore, this provision

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> *political subdivisions of the state in any suit instituted against any such political subdivision as herein provided*, or in any suit brought against the insurer to enforce collection under such an insurance contract; and that the immunity of said political subdivision against any liability described in subsection 1 hereof as to which such insurance coverage has been provided, and suit in connection therewith, are waived to the extent and only to the extent of such insurance coverage; . . . .

FLA. STAT. § 286.28 (1985) (repealed 1987) (emphasis added).

635. 493 So. 2d 1002, 1004-05 (1986).

636. *Id.* Self-insurance could not be equated with commercial insurance for purposes of determining the waiver of sovereign immunity under § 286.28. Hillsborough County Hosp. v. Taylor, 546 So. 2d 1055, 1057-58 (Fla. 1989).

637. *See* Kent A. Schenkel, Note, *Sovereign Immunity — Supreme Court of Florida Rules That Planning/Operational Dichotomy Not Applicable Under Liability Insurance Statute*, 15 FLA. ST. U. L. REV. 123 (1987).

638. FLA. STAT. § 768.28(5) (1991).

639. *Id.*

640. *Id.* Act of June 30, 1987, 1987 Fla. Laws ch. 134, § 3, amended § 768.28(5) to add the following language:

> Notwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity, or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $100,000 or $200,000 waiver provided above.

FLA. STAT. § 768.28(5) (1991); *see Kaisner*, 543 So. 2d at 738; City of Winter Haven v. Allen, 541 So. 2d 128, 131 (2d DCA), *rev. denied*, 548 So. 2d 662 (Fla. 1989); Pensacola Jr. College v. Montgomery, 539 So. 2d 1153, 1155-56 (Fla. 1st DCA 1989); Op. Atty' Gen. 89-63 (1989).

permits a governmental entity to insure against claim bill liability in excess of the statutory ceilings on collectibility.

Section 768.28(11) provides that other laws allowing the state, its agencies, or subdivisions to buy insurance are still in force.[641] The terms of section 768.28 do not restrict in any way other laws governing state insurance.[642]

VIII. PROCEDURES FOR SUING THE STATE

A. *Generally*

Subsections (6), (7), and (11) of section 768.28 establish the statute of limitations and pre-suit notice requirements that govern tort claims permitted by section 768.28.[643] Pre-suit notice requirements protect the government from the expense of needless litigation by giving the government an opportunity to investigate and settle claims without suit.[644]

B. *Notice Requirements*

A plaintiff may not file suit against the state, its agencies, or subdivisions without first presenting the claim in writing to the appropriate agency.[645] Additionally, the claim must be presented in writing to the Department of Insurance.[646] However, claims made against a municipality,[647] or the Spaceport Florida Authority[648] need not be presented to the Department of Insurance.

A claim must be presented within three years after it accrues.[649] However, a claim for contribution pursuant to section 768.31 must be

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641. FLA. STAT. § 768.28(11) (1991).

642. *Id.*; *see, e.g.*, FLA. STAT. § 30.555 (1991).

643. FLA. STAT. § 768.28(6)-(7), (11) (1991).

644. Rabinowitz v. Town of Bay Harbor Islands, 178 So. 2d 9 (Fla. 1965); Crumbley v. City of Jacksonville, 135 So. 885 (Fla. 1931).

645. FLA. STAT. § 768.28(6)(a) (1991).

646. *Id.*

647. *Cf.* McSwain v. Dussia, 499 So. 2d 868 (Fla. 1st DCA 1986) (finding that an agency of a municipality is to be distinguished from the municipality itself such as to require notice of a medical malpractice claim against the hospital authority be given to the Department of Insurance).

648. FLA. STAT. § 768.28(6)(a) (1991).

649. *Id.* The statutory requirement of prior notice before suing the state is not jurisdictional, and may be waived. *See* Drax Int'l Ltd. v. Division of Admin., 573 So. 2d 105, 106 (Fla. 4th DCA 1991). The claim presentation requirement applies only to causes of action based in tort, which fall within the Florida waiver of sovereign immunity statute. There is no claim requirement with regard to other kinds of actions against public entities, such as for inverse condemnation. New Port Largo v. Monroe County, 706 F. Supp. 1507, 1523-24 (S.D. Fla. 1988).

presented within six months after the judgment seeking contribution against the tortfeasor becomes final.[650] The judgment becomes final after the time for appeal lapses or after appellate review.[651] If there is no final judgment, the tortfeasor seeking contribution must present the claim within six months after either discharging the common liability by payment or agreeing to discharge the common liability while the action is pending.[652]

1. Denial of Claim

A plaintiff may file suit against the governmental entity only after the appropriate agency, and Department of Insurance when applicable, have denied the claim in writing.[653] The failure of the Department of Insurance or the appropriate agency to dispose of a claim within six months after it is filed, is deemed a final denial of the claim.[654] However, the legislature has reduced the final disposition period for medical malpractice actions to 90 days.[655]

2. Allegation of Compliance With Conditions Precedent

Section 768.28(6)(b) creates two conditions precedent to maintain a tort damages suit against the state, or one of its agencies or subdivisions.[656] The plaintiff must give notice to the agency and to the Department of Insurance, and these agencies must deny the claim.[657] The plaintiff should allege both of these conditions precedent in the complaint in accordance with Florida Rules of Civil Procedure 1.120.[658] If

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650. FLA. STAT. § 768.28(6)(a) (1991).

651. *Id.*

652. *Id.*

653. *Id.* § 768.28(6)(b).

654. *Id.* § 768.28(6)(d).

655. *Id.* The legislatively imposed time requirement for a prospective defendant to act on a notice of intent to initiate litigation in a medical malpractice case is 90 days regardless of whether the defendant is a private party or state agency. *In re* Amend. to Rules of Civil Procedure Rule 1.650(d)(2), 568 So. 2d 1273 (Fla. 1990). Subsequent to the adoption of FLA. R. CIV. P. 1.650(d)(2), the legislature amended § 768.57(3)(a) and reduced the notice requirement for bringing a medical malpractice action against a state agency from 180 days to 90 days. Act of July 1, 1988, 1988 Fla. Laws ch. 173, § 3 (codified as amended at FLA. STAT. § 766.106(3)(a) (1991)).

656. FLA. STAT. § 768.28(6)(b) (1991).

657. *Id.*

658. FLA. R. CIV. P. 1.120(c) ("In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred.").

the complaint fails to allege performance of section 768.28(6)'s pre-suit notice requirements, the complaint may be dismissed with leave to amend.[659] Thus, the plaintiff may subsequently file an amended complaint which alleges compliance with the conditions precedent.[660] When the time for such notice has expired so that the plaintiff cannot fulfill the notice requirement, the trial court may dismiss the complaint with prejudice.[661]

3. Form of Notice

A claimant may submit a *written* notice of a claim to the agency involved in any form. However, section 768.28 requires that the notice sufficiently describe or identify the pertinent details of the claim so that the agency may investigate the claim.[662] Such notice of the claim may be provided by mail.[663] A claimant must provide notice of a claim even when the state defendant has purchased insurance pursuant to section 30.55 or section 286.28.[664]

4. Waiver of Notice by Defending Agency

In *Menendez v. North Broward Hospital District*,[665] the Florida Supreme Court ruled that a defending state agency could not waive the statutory requirement of notice to the Department of Insurance by its conduct.[666] Specifically, *Menendez* involved a medical malpractice action brought against a hospital district which was a governmental agency.[667] The *Menendez* court held that the hospital could not waive the defense of notice to the Department.[668]

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659. *Cf.* Thigpin v. Sun Bank, 458 So. 2d 315 (Fla. 5th DCA 1984).

660. *Id.*; Wemett v. Duval County, 485 So. 2d 892 (Fla. 1st DCA 1986); Askew v. County of Volusia, 450 So. 2d 233 (Fla. 5th DCA 1984); *see also* Hattaway v. McMillan, 903 F.2d 1440 (11th Cir. 1990) (allowing plaintiff to meet burden under FLA STAT. § 768.26(6) if initial noncompliance is cured by trial).

661. Levine v. Dade County Sch. Bd., 442 So. 2d 210 (Fla. 1983); Orange County v. Piper, 523 So. 2d 196 (Fla. 5th DCA 1988); Ryan v. Heinrich, 501 So. 2d 185 (Fla. 2d DCA 1987); Halpen v. Short, 490 So. 2d 1271 (Fla. 2d DCA 1986).

662. Metropolitan Dade County v. Coats, 559 So. 2d 71 (Fla. 3d DCA 1990); Franklin v. Palm Beach County, 534 So. 2d 828 (Fla. 4th DCA 1988). A single claims writing may notify the state of multiple claims. County of Sarasota v. Wall, 403 So. 2d 500, 501 (Fla. 2d DCA 1981).

663. *See Coats*, 559 So. 2d at 73.

664. Jozwiak v. Leonard, 513 So. 2d 666, 667 (Fla. 1987).

665. 537 So. 2d 89 (Fla. 1989).

666. *Id.* at 90.

667. *Id.* at 91.

668. *Id.*

5. Other Applications of Notice Requirements

a. Contribution-Crossclaims

Although a claimant must provide notice of claim against a county to the State Department of Insurance, a city need not provide notice of its contribution crossclaim to the Department of Insurance.[669] When a county is already a party defendant to the action, notice of claim against the county already has been given to the Department of Insurance by the original plaintiff.[670]

b. Claims Against Sheriffs

When a claimant files suit against a county sheriff's office, section 768.28(6)(a) requires that the claimant give notice to that office.[671] Notice given only to the County Attorney's Office will not satisfy the requirements of section 768.28(6)(a) if the county is not named as a defendant.[672] The sheriff's office must receive notice because the sheriff is an elected constitutional officer who retains his or her own counsel.[673]

c. Civil Rights Litigation

The federal civil rights acts preempt the notice requirements in section 768.28(6)(b) for claims arising under such acts.[674]

C. *Service of Process*

Section 768.28(7) requires that process in suits maintained pursuant to section 768.28 be served on the head of the agency concerned and on the Department of Insurance.[675] Upon proper service of process, the agency involved and the Department of Insurance have thirty days to file a responsive pleading.[676] However, section 768.28(7)'s requirement of personal service may be waived if the agency concerned fails to raise the issue of service in its motion to dismiss or answer.[677]

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669. Orange County v. Gipson, 548 So. 2d 658, 660 (Fla. 1989).
670. *Id.*
671. Pirez v. Brescher, 584 So. 2d 993 (Fla. 1991).
672. *Id.* at 995.
673. *Id.*
674. *See* Felder v. Casey, 487 U.S. 131, 153 (1988); Brennan v. City of Minneola, 723 F. Supp. 1442 (M.D. Fla. 1989); Brooks v. Elliott, 593 So. 2d 1209 (Fla. 5th DCA 1992).
675. FLA. STAT. § 768.28(7) (1991).
676. *Id.*
677. *See Coats*, 559 So. 2d at 73.

Florida Statutes § 48.111 sets forth the method of serving process on the head of a defendant state agency.[678] Section 48.111 creates a hierarchy of agency personnel to be served with process when a suit is brought against public agencies, municipalities, counties, departments, or other subdivisions of the state.[679]

D. *Statute of Limitations*

Section 768.28(12) is the statute of limitations for claims brought against the state.[680] Section 768.28(12) provides that almost "[e]very [tort] claim against the state or one of its agencies or subdivisions for damages . . . pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within four years after such claim accrues. . . ."[681] However, the statute also notes that claims for contribution are subject to the limitations of section 768.31(4), and the medical malpractice statute of limitations is contained in section 95.11(4).[682] The statute of limitations contained in section 768.28(12) may be tolled by fraudulent concealment of the facts necessary to put the injured party on notice of the negligent act or the resulting injury.[683]

Although section 768.28 requires notice to the defendant agency and denial of the claim to commence a civil action, neither requirement

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678. FLA. STAT. § 48.111 (1991) provides as follows:

(1) Process against any municipal corporation, agency, board or commission, department or subdivision of the state or any county which has a governing board, council or commission or which is a body corporate shall be served:

(a) On the president, mayor, chairman or other head thereof; and in his absence;

(b) On the vice-president, vice-mayor or vice-chairman, or in the absence of all of the above;

(c) On any member of the governing board, council or commission.

(2) Process against any public agency, board, commission or department not a body corporate or having a governing board or commission shall be served on the public officer being sued or the chief executive officer of the agency, board, commission or department.

FLA. STAT. § 48.111 (1991).

679. *Id.*; *see generally* 28 FLA. JUR. 2d, *Government Tort Liability* § 54 (1981) (citing City of Hialeah v. Carroll, 324 So. 2d 639 (Fla. 3d DCA 1976)) (Service of process by complainant on city judge was improper and insufficient service of process on city of claimant's false arrest action, for judge was not "member of governing board" within meaning of statute establishing method of service on public agencies).

680. FLA. STAT. § 768.28(12) (1991).

681. *Id.*

682. *Id.*

683. Vargas v. Glades Gen. Hosp., 566 So. 2d 282 (Fla. 4th DCA 1990).

constitutes an element of the cause of action.[684] Thus, the date when the claimant meets each requirement will not affect the date on which the cause of action accrues.[685] Accordingly, in *Department of Transportation v. Soldovere*,[686] the court held that a cause of action against the Department of Transportation accrued when the vehicular accident and attendant injuries occurred, rather than when the Department of Transportation denied the claim.[687]

E. *Venue*

The long-established common law of Florida is that venue in civil actions against the state or one of its agencies or subdivisions properly lies in the county where the state, agency, or subdivision maintains its principal headquarters absent waiver or exception.[688] The home county of municipalities and counties is the one in which they are located. Leon County, where Florida's capital, Tallahassee, is located, is the county of official residence for most state agencies.[689] Florida's common law venue rule promotes orderly and uniform handling of state litigation and helps to minimize expenditure of public funds and manpower.[690] A Florida court recognized these benefits by holding that the statutory waiver of sovereign immunity did not affect the common law privilege of the state, its agencies and subdivisions, to be sued in the county of their principal headquarters.[691]

However, the government's home venue privilege is not absolute and is subject to both waiver and exception.[692] For example, section 768.28(1) was amended in 1981 as a statutory exception to the government's home venue privilege.[693] Section 768.28(1) now provides that actions against the government may be brought in the county where

684. FLA. STAT. § 768.28(6)(b) (1991).

685. *Id.*

686. 519 So. 2d 616 (Fla. 1988).

687. *Id.* ("A cause of action for the negligence of another accrues at the time the injury is first inflicted. . . . This rule applies whether the action is against a private party or the state.").

688. Board of County Comm'rs v. Grice, 438 So. 2d 392, 394 (Fla. 1983); Navarro v. Barnett Bank, 543 So. 2d 304, 306 (Fla. 1st DCA 1989).

689. Debra King, *The Home Venue Privilege of Florida Government Entities*, 63 FLA. B.J. 87 (Dec. 1989).

690. Carlile v. Game Comm'n, 354 So. 2d 362, 364 (Fla. 1977).

691. *Id.*

692. *See, e.g.*, Schultz v. Brevard County, 431 So. 2d 187 (5th DCA), *rev. denied*, 438 So. 2d 834 (Fla. 1983).

693. Act of July 9, 1981, 1981 Fla. Laws ch. 317.

the property in litigation is located.[694] Additionally, plaintiffs may sue in the county where the cause of action accrued if the affected agency or subdivision has an office in such county for the transaction of its customary business.[695]

F. *Pleading Requirements*

A tort complaint against a governmental or public entity must allege the specific method by which the particular entity's sovereign immunity has been waived.[696] The waiver must be clear and unequivocal because immunity relates to subject matter jurisdiction.[697] Moreover, since immunity pertains to the court's subject matter jurisdiction, the issue of immunity can be raised at any time.[698]

However, the waiver of sovereign immunity does not in itself create tort liability. The plaintiff must also prove the elements of a private tort action. Thus, the plaintiff must show that the defendant owed a tort duty to the plaintiff, that the duty was violated, and that the violation caused the injury. In a suit against the government, general legal rules regarding liability for negligence apply.[699] Thus, if the plaintiff fails to plead adequately and prove his tort action against a governmental unit, the governmental unit is entitled to a judgment in its favor.[700]

G. *Checklist for Suing the State, Its Agencies, Subdivisions, or Municipalities*

As discussed previously, section 768.28 requires a claimant against the state to fulfill several requirements. The following checklist summarizes these requirements.

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694. *Id.* In the case of contract suits against the Department of Transportation, pursuant to FLA. STAT. § 337.19(3) (1987), a plaintiff must bring a contract action against the Department in either Leon County or in the county where the cause of action accrued.

695. *Id.*

696. *See* Sebring Utils. Comm'n v. Sicher, 509 So. 2d 968, 969 (Fla. 2d DCA 1987); Schmauss v. Snoll, 245 So. 2d 112, 113 (3d DCA), *cert. denied*, 248 So. 2d 172 (Fla. 1971).

697. *See Sebring*, 509 So. 2d at 969; *Schmass*, 245 So. 2d at 113.

698. *Schmass*, 245 So. 2d at 113. Case law indicates that a specific factual basis must be plead for liability. *See* Windham v. Department of Transp., 476 So. 2d 735, 741 (1st DCA 1985), *rev. denied*, 488 So. 2d 69 (Fla. 1986).

699. Tweedale v. City of St. Petersburg, 125 So. 2d 920, 920-21 (Fla. 2d DCA 1961).

700. *See* Bucholtz v. City of Jacksonville, 72 So. 2d 52, 53 (Fla. 1954); Dougherty v. Hernando County, 419 So. 2d 679, 681 (5th DCA 1982), *rev. denied*, 429 So. 2d 5 (Fla. 1983); Alvarez v. Metropolitan Dade County, 378 So. 2d 1317, 1318 (Fla. 3d DCA 1980); Jolly v. Insurance Co. of N. Am., 331 So. 2d 368, 371 (Fla. 3d DCA 1976).

1. Presentation of a written claim to an appropriate agency, as well as to the Department of Insurance, within three years after such claim accrues.
2. Denial of the claim in writing or by lapse of time.
3. Service of process on the head of the agency concerned and on the Department of Insurance (except where the defendant is a municipality or the Spaceport Florida Authority).
4. Commencement of the action within four years after the claim accrues, not four years after notice is given.
5. Allegation in the complaint of compliance with notice requirements and specific method by which sovereign immunity is waived.
6. Pleading and proof of a recognized cause of action under established principles of tort law.

IX. EXCEPTIONS TO IMMUNITY

A. *Constitutional Violations*

A governmental entity cannot use the doctrine of sovereign immunity as a defense to an action based on the United States or Florida Constitution.[701] Therefore, a governmental entity cannot use the doctrine to protect itself from liability for the violation of constitutional duties or rights.[702]

1. Taking of Property

Article X, section 6 of the Florida Constitution states that "no private property shall be taken[703] except for a public purpose and with full compensation therefor paid."[704] Thus, the state and its agencies are not permitted to take the property of a private citizen without corresponding redress to the citizen in the courts.[705] When a govern-

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701. *See* State Rd. Dep't v. Tharp, 1 So. 2d 868, 869 (Fla. 1941).

702. *Id.*

703. A taking has been defined as:

> [1] entering upon private property for more than a momentary period and, [2] under the warrant or color of legal authority, [3] devoting it to a public use, or [4] otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.

Poe v. State Rd. Dep't, 127 So. 2d 898, 900 (Fla. 1st DCA 1961) (citing 12 FLA. JUR., *Eminent Domain* § 328, at 137).

704. FLA. CONST. art. X, § 6.

705. *See, e.g.*, Department of Agric. v. Mid-Florida Growers, 541 So. 2d 1243, 1251 (Fla. 2d DCA 1989) ("In this case, we are measuring the compensation which the Department, and ultimately the taxpayers, must pay to the nursery owners as a constitutional obligation. . . .

ment agency, by its conduct or activities, takes private property without a formal exercise of the power of eminent domain, the entity violates Article X. The entity then becomes subject to suit for inverse condemnation. In such a suit, the entity cannot assert sovereign immunity as a defense.[706] For example, a state entity cannot assert sovereign immunity as a defense to an action for damages for its failure over a two-year period to honor an order requiring the return of confiscated property to its owner.[707]

Moreover, the Florida Supreme Court has held that a taking of private property for a public purpose, requiring compensation under Article X, may consist of an entirely negative act, such as destruction of property.[708] However, Florida courts also recognize that when the state exercises its police power and destroys diseased cattle, unwholesome meats, decayed fruit or fish, infected clothing, obscene books or pictures, or buildings in the path of a conflagration, the constitutional requirement of "just compensation" does not compel the state to reimburse the owner whose property is destroyed. Courts reason that such property is incapable of any lawful use and has no value.[709]

Florida courts have held that the doctrine of sovereign immunity will not bar a cause of action analogous to inverse condemnation.[710] Thus, Florida courts have permitted a suit for declaratory relief to construe an easement granted to the state, and a suit for rescission.[711]

The essential question is whether the governmental action impairs a recognized property right for a sufficient period of time, to a sufficient degree, and without sufficient justification as to create a taking.").

706. *See, e.g.*, Pinellas County v. Brown, 420 So. 2d 308, 309 (2d DCA 1982), *petition for rev. denied*, 430 So. 2d 450 (Fla. 1983); *see also* Schick v. Department of Agric., 504 So. 2d 1318 (1st DCA) (holding that doctrine of sovereign immunity did not preclude landowners' inverse condemnation suit against Florida Department of Agriculture predicated on allegations of negligence in conduct of nematode eradication program), *rev. denied*, 513 So. 2d 1060 (Fla. 1987).

707. *See In re* Forfeiture of 1976 Kenilworth Tractor, 569 So. 2d 1274 (Fla. 1990).

708. Department of Agric. v. Mid-Florida Growers, 521 So. 2d 101 (Fla. 1988), *cert. denied*, 488 U.S. 870 (1989).

709. *Mid-Florida Growers*, 521 So. 2d at 104 (citing State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959)). It has been cautioned that valid exercises of the government's police power in traditional areas of regulation may in certain cases be recast as "takings." *See* David G. Tucker, *Squeezing Blood from a Turnip: Enforcing Money Judgments Against Governmental Entities*, 64 FLA. B.J. 76 (June 1990); Richard T. Petitt, Comment, *Damages for Temporary Takings in Florida That Go "Too Far"*, 19 STETSON L. REV. 955 (1990).

710. Kempfer v. St. Johns River Water Mgmt. Dist., 475 So. 2d 920, 924 (Fla. 5th DCA 1985).

711. *Id.*

Even though section 768.28(1) does not specifically waive immunity for these causes of action, courts allowed these suits because they were analogous to inverse condemnation suits,[712] for which there is also no express waiver.[713]

2. Liability Under 42 U.S.C. § 1983

Section 1 of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983,[714] creates a remedy when persons acting under color of state law deprive a citizen of a right or privilege protected by the United States Constitution or federal laws.

a. Relation Between Immunity and § 1983 Actions

In *Howlett ex rel. Howlett v. Rose*,[715] the United States Supreme Court addressed the relationship between immunity and § 1983.[716] The Court held that "an entity with Eleventh Amendment immunity is not a 'person' within the meaning of Sec. 1983."[717] Therefore, "the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit for money damages under sec. 1983 in either federal court or state court."[718] However, such local governing bodies as municipalities,[719] school boards[720] and

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712. *See* State Rd. Dep't v. Harvey, 142 So. 2d 773, 774 (Fla. 2d DCA 1962).

713. *Id.*

714. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

715. 496 U.S. 356 (1990).

716. *Id.* at 363.

717. *Id.*

718. *Id.*; *see* Hill v. Department of Corrections, 513 So. 2d 129 (Fla. 1987), *cert. denied*, 484 U.S. 1064 (1988). However, when an official acting under color of law has deprived any person of a federal right or privilege he can be held *personally* liable in damages to the injured party under section 1983. *See* Scheuer v. Rhodes, 416 U.S. 232 (1973).

719. In Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978), the Supreme Court first determined that a municipality or other body of local government was subject to liability under section 1983. *See* Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625; Michael T. Burke & Patricia A. Burton, *Defining the Contours of Municipal Liability Under 42 U.S.C. § 1983:* Monell *Through* City of Canton v. Harris, 18 STETSON L. REV. 511 (1989).

720. *Howlett*, 496 U.S. 356 (1990) held that a state law defense of "sovereign immunity"

counties,[721] as well as Florida sheriffs,[722] are included within the definition of "persons" in 42 U.S.C. § 1983. Thus, these local governing bodies may have to pay monetary damages or provide equitable remedies when they engage in action or conduct which gives rise to a section 1983 action. Liability can accrue notwithstanding any state law immunities. Moreover, in *Town of Lake Clark Shores v. Page*,[723] the Florida Supreme Court confirmed that state trial courts have subject matter jurisdiction over section 1983 actions against municipalities.[724]

Florida Statutes § 111.07 addresses the payment of damages awarded in a section 1983 action. Section 111.07 requires full payment of any final judgment,[725] including damages, costs, and attorney's fees, from any civil rights action arising under 42 U.S.C. § 1983 or similar federal statutes.[726] However, section 111.07 does not require full payment when an officer, employee, or agent has been determined in the final judgment to have caused the harm intentionally.[727]

b. Official Policy or Custom

For a municipality or other body of local government to be liable under § 1983, the plaintiff must show that a government official or employee deprived the plaintiff of a federally protected right by acting pursuant to official government policy.[728] A local government also may

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was not available to a school board otherwise subject to suit in a Florida court, reasoning that such a defense would not be available if the action had been brought in a federal forum. By including municipalities within the class of "persons" subject to liability for violation of the Federal Constitution and laws, Congress — the supreme sovereign on matters of federal law — abolished whatever vestige of the state's sovereign immunity the municipality possessed. *Id.*

721. Elder v. Highlands County Bd. of County Comm'rs, 497 So. 2d 1334, 1336 (Fla. 2d DCA 1986).

722. In § 1983 actions, Florida sheriffs are county officials as opposed to state officials. Hufford v. Rodgers, 912 F.2d 1338, 1340-42 (11th Cir. 1990); *see also* Bailey v. Wictzack, 735 F. Supp. 1016, 1019 (S.D. Fla. 1990) ("[U]nder Florida's constitutional scheme, a county has an existence independent of the state and the sheriff is a county rather than a state official.").

723. 569 So. 2d 1256 (Fla. 1990).

724. *Id.* at 1257.

725. FLA. STAT. § 111.07 (1991). Such actions include, but are not limited to, any civil rights lawsuit seeking relief personally against the officer, employee, or agent for an act or omission under color of state law, custom, or usage, wherein it is alleged that such officer, employee, or agent has deprived another person of his rights secured under the Federal Constitution or laws. *Id.*

726. *Id.*

727. *Id.*

728. *Monell*, 436 U.S. at 694; City of Canton v. Ohio, 489 U.S. 378, 385 (1989).

be liable if a government official or employee violates a party's constitutional rights by acting in accordance with governmental custom.[729] Moreover, the custom need not been formally sanctioned or ordered to result in liability.[730]

In *Pembaur v. City of Cincinnati*,[731] the United States Supreme Court addressed the question of whether an official's decision on a single occasion was sufficient to establish an unconstitutional policy for which a city could be liable.[732] In answering this question, the Court set forth the following guidelines to assess liability: (1) the municipality must have officially sanctioned or ordered the action; (2) the action must have been taken by a municipal official with final policymaking authority, and (3) the challenged action must have been taken pursuant to a policy adopted by those officials responsible under state law for establishing policy in that area of the government's business.[733] The *Pembaur* court found that a subordinate official had been delegated final policymaking authority when that official's discretionary decision clearly was not constrained by official policies and was not subject to review.[734] The Court stated that simply going along with discretionary decisions made by subordinates will not be viewed as delegating to those subordinates the authority to make municipal policy.[735] For example, a municipality was not held liable to the owner-developer of a building project when the municipality's chief building official wrongfully refused to withdraw a stop-work order on the project.[736] The court reasoned that the official did not have final policymaking authority and was not carrying out an official policy of the municipality.[737]

B. *Breach of Contract*

Early Florida cases held that under the sovereign immunity doctrine the state could not be sued in contract unless it expressly consented to the suit.[738] However, in the 1984 case of *Pan-Am Tobacco*

729. Raben-Pastal v. City of Coconut Creek, 573 So. 2d 298, 300 (Fla. 1990), *cert. denied*, 112 S. Ct. 58 (1991).
730. *Id.*
731. 475 U.S. 469 (1986).
732. *Id.* at 471.
733. *Id.* at 481.
734. *Id.*
735. *Id.* at 483.
736. *Raben-Pastal*, 573 So. 2d at 298.
737. *Id.* at 302.
738. Gay v. Southern Builders, 66 So. 2d 499 (Fla. 1953); Bloxham v. Florida Cent. & P.R.R., 17 So. 902 (Fla. 1895).

Corp. v. State Department of Corrections,[739] the Florida Supreme Court stated that where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract.[740] The court emphasized that its holding applied only to suits on express, written contracts into which the state agency has statutory authority to enter.[741] The Fourth District Court of Appeal adopted the *Pan-Am* reasoning in *Champagne-Webber, Inc. v. Ft. Lauderdale*.[742] The *Champagne-Webber* court held that the defense of sovereign immunity will not protect a state agency from an action arising from its breach of either an express or implied covenant or condition of a contract.[743] However, as in *Pan-Am*, the *Champagne-Webber* court limited its holding to cases involving express, written contracts into which the state agency had statutory authority to enter.[744]

C. *Counterclaims Against the State*

Where a state voluntarily becomes a litigant in its own courts, by bringing an action as the original plaintiff, the state waives its immunity.[745] Florida Statutes § 760.14, enacted in 1967, effects this limited waiver of sovereign immunity.[746] Section 768.14 provides that when the state or any of its agencies or subdivisions files a tort damage suit, the defendant may counterclaim in that suit for damages resulting from the same transaction or occurrence.[747] Such a counterclaim need

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739. 471 So. 2d 4, 5 (Fla. 1984).

740. *Id.* at 5.

741. *Id.* at 6. Southern Roadbuilders v. Lee County, 495 So. 2d 189 (2d DCA 1986), *rev. denied*, 504 So. 2d 768 (Fla. 1987) arguably construed the *Pan-Am Tobacco* decision to exclude any action not based on the breach of an express covenant.

742. 519 So. 2d 696, 698 (Fla. 4th DCA 1988). *See generally* Enrico G. Gonzalez, Note, *The Demise of Sovereign Immunity in the Contractual Battle Against State Action*, 17 FLA. ST. U. L. REV. 899 (1989) (commenting on the *Champagne-Webber* decision's denial of a sovereign immunity defense for actions based on the state's breach of an implied covenant).

743. *Champagne-Webber*, 519 So. 2d at 698.

744. *Id.*

745. Dade County v. Carter, 231 So. 2d 241 (3d DCA), *cert. denied*, 237 So. 2d 761 (Fla. 1970); Annot., *Liability of State, or Its Agency or Board, for Costs in Civil Action to Which It Is a Party*, 72 A.L.R.2d 1379, 1393, § 6 (1960). "The state has standing to sue in its sovereign capacity when it has suffered an economic injury." Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989).

746. FLA. STAT. § 768.14 (1991).

747. *Id.*

not meet the requirements of Chapter 768 relating to prior presentation of tort claims to the entity involved and the Department of Insurance.[748]

X. CONCLUSION

The law of sovereign immunity in Florida is designed to implement and balance competing interests and policies. On one hand, immunity law seeks to avoid overburdensome tort liability and judicial interference with the legislative and executive discretion safeguarded by the separation of powers doctrine. On the other hand, immunity law promotes the policy of awarding compensation to injured claimants in proper cases.

Florida's common law of municipal sovereign immunity was the first body of law to recognize and balance the legitimate competing interests and policies of sovereign immunity. This body of common law continues to be a valuable source of immunity law.

In 1973, the Florida Legislature enacted a broad waiver of immunity in Florida Statutes § 768.28. The Florida courts have confronted the task of determining which governmental acts are included within section 768.28's broad waiver of immunity and which governmental acts remain immune from tort liability. In their continuing efforts to define the scope of section 768.28's waiver of immunity, Florida courts have, to a great extent, followed the time-honored common law process used to develop the law of municipal immunity. This common law process recognizes, categorizes, and balances competing interests and policy considerations. The resulting body of case law has defined general areas of immunity and liability, created areas of uncertainty and confusion, and generated many issues and unanswered questions for future resolution.

The law of sovereign immunity in Florida is, therefore, highly dynamic. Because of the significance of the competing interests and policies at stake in its resolution, this law will continue to play a vital role in Florida's jurisprudence and produce controversial decisions in cases of great importance.

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748. *Id.*