LOCAL GOVERNMENT RESPONSIBILITY FOR MISCONDUCT OF THIRD PERSONS: THE PENDULUM CONTINUES TO SWING*

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In my years of practicing law and as a judge, I have learned three things about serious issues affecting local government: (1) these types of issues never go away; (2) there are usually legitimate compelling public policy considerations on both sides of the issue; and (3) when the pendulum begins to swing in favor of one side of an issue, it will ultimately swing back in the other direction. These principles are particularly true in the area of a local government's tort responsibility for injuries caused by the misconduct of third persons; that is, the right of an injured person to recover from a local government that has negligently caused or contributed to an injury in contrast to the virtually unlimited burden on local government (and its taxpayers) if it is required to be the insurer against the wrongful acts of third parties. Our courts have struggled with this dilemma, issuing some decisions which expand the liability of local governments and alternatively issuing decisions which limit the liability. The purpose of this Article is to discuss the trends in this area which have taken place since the Florida Supreme Court's landmark decision in *Commercial Carrier Corp. v. Indian River County*.[1] This Article will also review the recent cases of *Sams v. Oelrich*,[2] *Bowden v. Henderson*,[3] *Laskey v. Martin County Sheriff's*

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1. 371 So. 2d 1010 (Fla. 1979).
2. 717 So. 2d 1044 (Fla. 1st Dist. Ct. App. 1998).
3. 700 So. 2d 714 (Fla. 2d Dist. Ct. App. 1997).

Department,[4] and *Austin v. Mylander*[5] in an effort to assess their impact on the liability of local government and to determine which way the pendulum is presently swinging.

In *Commercial Carrier*, the supreme court determined that § 768.28 of the Florida Statutes constituted a broad general waiver of sovereign immunity; however, based on the doctrine of separation of powers, the court also determined that local governments remain immune for acts involving a discretionary function.[6] The supreme court adopted a four-part test to identify these discretionary functions of a local government:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?[7]

If all four of the above can be answered affirmatively, then the activity is deemed to be discretionary, and immunity applies.[8] Action that fails the test could result in liability.[9] Because very few activities actually meet the four-part test to be considered truly discretionary, the *Commercial Carrier* decision appeared to swing the pendulum in favor of recovery by an injured party. Pursuant to this doctrine of limited immunity, the Third District Court of Appeal applied the four-part analysis and determined that a city may be subject to liability for its failure to discover building code violations.[10] The third district reasoned that "[i]nspections, plan re

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4. 708 So. 2d 1013 (Fla. 4th Dist. Ct. App. 1998).
5. 717 So. 2d 1073 (Fla. 5th Dist. Ct. App. 1998).
6. *See Commercial Carrier*, 371 So. 2d at 1022.
7. *Id*. at 1019, 1022 (commending utilization of the preliminary test proposed in Evangelical United Brethren Church v. State, 407 P.2d 440, 445 (Wash. 1965)).
8. *See id*. at 1019.
9. *See id*.
10. *See* Trianon Park Condominium Ass'n v. City of Hialeah, 423 So. 2d 911, 913

views and certification . . . did not change the overall direction or policy of the general program of building inspection in the city" and that the "City's enforcement of the established Code standards is a purely ministerial action."[11] The majority of the district courts of appeal agreed that inspection and enforcement were nothing more than operational functions of the government.[12]

Some decisions imposed liability upon local government for failure to properly regulate the misconduct of third parties in certain situations. For example, the Fifth District Court of Appeal held that a city could be liable for a police officer's failure to arrest an intoxicated motorist who immediately thereafter collided with and injured another motorist.[13] Decisions imposing liability under such circumstances were based on the general rationale that while the passage of a code, statute or regulation may be discretionary, the failure to enforce the regulation was ministerial, and thus, subject to liability.

In *Trianon Park Condominium Ass'n v. City of Hialeah*,[14] the Florida Supreme Court overturned the finding of potential liability for a local government's failure to enforce a regulation.[15] There, the court reversed the decision of the Third District in the building code case and determined that a city could not be liable for failure to enforce building codes.[16] In determining whether a local government is liable in a particular case, we are to look at not only whether sovereign immunity has been waived with respect to the conduct at

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(Fla. 3d Dist. Ct. App. 1982), *quashed*, 468 So. 2d 912 (Fla. 1985).

11. *Trianon Park*, 423 So. 2d at 913.

12. *See, e.g.*, Manors of Inverrary XII Condominium Ass'n v. Atreco-Fla., Inc., 438 So. 2d 490, 492 (Fla. 4th Dist. Ct. App. 1983), *rev. denied sub nom.* City of Lauderhill v. Manors of Inverrary XII Condominium Ass'n, 450 So. 2d 485 (Fla. 1984); Bryan v. Department of Bus. Regulation, 438 So. 2d 415, 420 (Fla. 1st Dist. Ct. App. 1983); *Trianon Park*, 423 So. 2d at 913; Jones v. City of Longwood, 404 So. 2d 1083, 1085 (Fla. 5th Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 467 (Fla. 1982). *But see* Johnson v. Collier County, 468 So. 2d 249, 251 (Fla. 2d Dist. Ct. App.) (concluding, in accordance with *Newmann v. Davis Water & Waste, Inc.*, 433 So. 2d 559 (Fla. 2d Dist. Ct. App. 1983), that the level of performance of governmental inspections is within the basic discretionary area of government from which tort immunity originates), *aff'd*, 474 So. 2d 806 (Fla. 1985).

13. *See* Huhn v. Dixie Ins. Co., 453 So. 2d 70, 70–71, 77 (Fla. 5th Dist. Ct. App. 1984), *quashed sub nom.* City of Daytona Beach v. Huhn, 468 So. 2d 963 (Fla. 1985).

14. 468 So. 2d 912 (Fla. 1985).

15. *See id.* at 923.

16. *See id.* at 915.

issue, but also whether the government owes a common law duty of care to the plaintiff with regard to the alleged negligence; if no duty of care is owed to the plaintiff, there can be no liability.[17] The legal question that remains then is how to determine whether a duty of care existed; ultimately, this will determine the extent of a local government's potential liability.

In *Trianon Park*, the supreme court reviewed the historical basis for imposing liability on a local government to determine whether a duty of care existed as to the ultimate purchasers of condominium units for the manner in which local building officials conduct inspections.[18] The court held that certain governmental functions have always been performed for the well-being of the general public as a whole and that there has never been a duty to any particular individual or potential liability for the failure to properly perform these functions.[19] The court divided governmental activities and functions into four categories, two of which are pertinent to this Article.[20] Class One functions include legislative activity, permitting, licensing, and executive office functions.[21] Class Two functions involve the protection of public safety and the power to enforce laws.[22] No duty exists to a particular individual under either class; therefore, the local government is immune from liability.[23] Under this rationale, the court determined that the failure of a code inspector to find defects caused by a builder does not create local government liability.[24]

At the same time the Florida Supreme Court decided *Trianon Park*, it issued a number of other decisions concerning local government liability in cases involving misconduct of third parties. The

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17. *See id.* at 917–19.
18. *See id*. at 917–21.
19. *See id*. at 919, 922.
20. *See Trianon Park*, 468 So. 2d at 919.
21. *See id*. For an example of a legislative function case, see *Paredes v. City of North Bay Village*, 693 So. 2d 1153, 1153 (Fla. 3d Dist. Ct. App. 1997) (holding the trial court properly granted the city's motion to dismiss because there is no common law duty of care for legislative action). For an example of a permitting functions case, see *Brown v. Department of Health & Rehabilitative Services*, 690 So. 2d 641, 642, 644 (Fla. 1st Dist. Ct. App. 1997) (holding the trial court properly dismissed plaintiffs' negligence claims because HRS owed no common law or statutory duty to the plaintiffs).
22. *See Trianon Park*, 468 So. 2d at 919.
23. *See id*. at 919–21.
24. *See id*. at 921–23.

supreme court determined that the governmental entity involved could not be liable for: (1) the actions of an escaped prisoner who shot a shopper in a mall;[25] (2) failure to arrest a drunken driver who sometime thereafter collided with another motorist;[26] (3) the alleged wrongful death of an intoxicated victim who was hit by an automobile several minutes after a police officer decided not to take him into protective custody;[27] and (4) the failure to enforce an animal control ordinance.[28] The supreme court recently reaffirmed the general principles announced in these cases.[29] The pendulum had begun to swing back toward limiting liability in light of the supreme court's recognition of the great area of exposure that had been created pursuant to the *Commercial Carrier* decision.

Four exceptions have developed to the strict rule of law that a city has no duty to protect a party from the misconduct of third parties: (1) when the governmental entity has a custodial or supervisory relationship with the injured party;[30] (2) when the governmental entity has a duty to the injured party created by statute;[31] (3) when

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25. *See* Reddish v. Smith, 468 So. 2d 929, 930–31 (Fla. 1985).

26. *See* Everton v. Willard, 468 So. 2d 936, 937 (Fla. 1985).

27. *See* Rodriguez v. City of Cape Coral, 468 So. 2d 963, 964 (Fla. 1985).

28. *See* Carter v. City of Stuart, 468 So. 2d 955, 956–57 (Fla. 1985).

29. *See* Vann v. Department of Corrections, 662 So. 2d 339, 340 (Fla. 1995) (approving the district court's decision, which determined that the Department of Corrections may not be "held liable for the criminal acts of an escaped prisoner because no common law duty was owed by the department to protect a particular individual from such potential harm").

30. *See, e.g.*, Lee v. Department of Health & Rehabilitative Servs., 698 So. 2d 1194, 1197–99 (Fla. 1997) (finding that the HRS was not immune from liability for negligent supervision of a severely retarded resident of an HRS facility); Kaisner v. Kolb, 543 So. 2d 732, 733–34 (Fla. 1989) (concluding that a family stopped and detained by police officers for an expired tag was sufficiently in custody to establish a common-law duty of care which precluded sovereign immunity); Harris v. Monds, 696 So. 2d 446, 446 (Fla. 4th Dist. Ct. App. 1997) (stating that a prisoner who sustains injuries while incarcerated was owed a common-law duty of reasonable care based on the nature of the custodial relationship); Grace v. City of Miami, 661 So. 2d 1232, 1233 (Fla. 3d Dist. Ct. App. 1995) (recognizing that once a city begins to "provide a lunch program for children at a city-owned park, it assumes the duty to operate the program safely").

31. *See, e.g.*, Department of Health & Rehabilitative Servs. v. Yamuni, 529 So. 2d 258, 261–62 (Fla. 1988) (stating that HRS has a statutory duty of care to protect children from further abuse when HRS receives reports of child abuse); Simpson v. City of Miami, 700 So. 2d 87, 88 (Fla. 3d Dist. Ct. App. 1997) (concluding that if a police officer arrests a domestic violence injunction violator, then pursuant to Florida Statutes § 741.30(8)(b), the officer has "no discretion under sovereign immunity principles to release the violator" and is "required by the statute to take the arrested violator before a judge").

the governmental actor or entity has actually set in motion the conduct which leads to the injury of the third party, such as initiating a high-speed chase;[32] and (4) when the misconduct occurs on government property and the local government should have reasonably foreseen that the act would occur.[33]

It is instructive to look at how the supreme court has treated the duty issue since *Trianon Park*. In *Kaisner v. Kolb*,[34] the supreme court determined that a county could be liable to a motorist who was pulled over by sheriff's deputies and was injured when he was hit by traffic while standing on the side of the road.[35] The court appeared to conduct a two-part analysis in determining the government's duty to the injured individual.[36] The court first determined that the injured individual was in custody and recognized that historically, a government has been held responsible if a party in custody is injured as a result of governmental negligence.[37] Justice Barkett did not stop after conducting the historical analysis, however, and added a second part to the analysis by stating:

> Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to

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32. *See, e.g.*, City of Pinellas Park v. Brown, 604 So. 2d 1222, 1225–26 (Fla. 1992) (finding that a high speed chase, initiated by law enforcement officers, created a duty of care and waived sovereign immunity); Creamer v. Sampson, 700 So. 2d 711, 712–13 (Fla. 2d Dist. Ct. App. 1997) (holding the allegations that a sheriff pursued a car at high speeds were sufficient to create a duty on the sheriff).

33. *See generally* Jones v. City of Coral Springs, 694 So. 2d 819, 820 (Fla. 4th Dist. Ct. App. 1997); Dennis v. City of Tampa, 581 So. 2d 1345, 1349–50 (Fla. 2d Dist. Ct. App.), *rev. denied*, 591 So. 2d 181 (Fla. 1991) (determining that local government could not be liable for unforeseen misconduct on governmental property and, by implication, suggesting that local government could be liable for foreseeable acts of third parties on governmental property).

34. 543 So. 2d 732 (Fla. 1989).

35. *See id*. at 736–38.

36. *See id*. at 734–36.

37. *See id.* at 734 (citing Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957) ("finding liability when inmate died of smoke inhalation in negligently attended jail"); Department of Highway Safety & Motor Vehicles v. Kropff, 491 So. 2d 1252 (Fla. 3d Dist. Ct. App. 1986) ("finding liability for injury caused by officer's negligence during roadside stop"); Walston v. Florida Highway Patrol, 429 So. 2d 1322 (Fla. 5th Dist. Ct. App. 1983) ("finding liability for injury caused by officer's negligence during roadside stop"); White v. Palm Beach County, 404 So. 2d 123 (Fla. 4th Dist. Ct. App. 1981) ("finding liability for violence and sexual abuse suffered by inmates in jail"); Henderson v. City of St. Petersburg, 247 So. 2d 23 (Fla. 2d Dist. Ct. App. 1971) ("finding liability for injury to police informant after police knew he was in danger for cooperating with authorities")).

> lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.
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> We see no reason why the same analysis should not obtain in a case in which the zone of risk is created by the police.[38]

Subsequent to the *Kaisner* decision, the supreme court had the opportunity to address legal duty in a case involving a nongovernmental defendant. In *McCain v. Florida Power Corp.*,[39] the supreme court determined that a duty is owed to all persons who are within a foreseeable zone of risk created by the tortfeasor's alleged wrongdoing.[40] It is unclear whether this broad test could or should be applied where the tortfeasor is a governmental entity.

The Florida Supreme Court next had the opportunity to address legal duty in a governmental context in *City of Pinellas Park v. Brown*.[41] In *Brown*, law enforcement officers conducted a high-speed chase involving a large number of vehicles on a major urban thoroughfare.[42] This chase resulted in the suspect's vehicle crashing into a bystander's vehicle and killing two innocent people.[43] The supreme court, in a 4-3 decision, determined there was a duty to the innocent bystanders, utilizing the foreseeable zone of risk analysis of *Kaisner* and *McCain*.[44] No mention was made in the opinion of the historical analysis adopted in *Trianon Park* and at least partially utilized in *Kaisner*. Because the court noted that the manner in which the police conducted the chase directly resulted in the injuries,[45] it can be argued that this case does not really fall into the same category of liability as a case involving a local government's failure to deter the misconduct of a third party.

The most recent statement of the supreme court on this issue is found in *Vann v. Department of Corrections*,[46] where the court addressed the issue of governmental liability based solely on the failure of the governmental entity to prevent the criminal acts of an

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38. *Id*. at 735 (citations omitted).
39. 593 So. 2d 500 (Fla. 1992).
40. *See id*. at 503.
41. 604 So. 2d 1222 (Fla. 1992).
42. *See id*. at 1223–24.
43. *See id*. at 1224.
44. *See id.* at 1223, 1225–26, 1228.
45. *See id*. at 1226, 1228.
46. 662 So. 2d 339 (Fla. 1995).

escapee from state prison.[47] The supreme court found that under those circumstances, no duty of care existed towards any individual member of the public.[48] In *Vann*, the supreme court adopted the reasoning of the district court,[49] which distinguished *Kaisner* based on the custodial status of the injured party.[50] The First District Court of Appeal solely utilized the historical analysis of *Trianon Park* in determining the existence of a duty of care to a particular individual.[51] In its decision, the First District cited to section 315 of the Restatement (Second) of Torts, which in pertinent part states, "In addition, there is no common law duty to prevent the misconduct of third persons."[52]

There has begun to be a reaction to the limits of liability established in *Trianon Park* in those cases where the local government's actions constitute more than a mere failure to prevent misconduct, but which are more directly related to the injuries which occur.[53] There is some indication that the pendulum is beginning to swing again. Two recent decisions, *Sams v. Oelrich*[54] and *Bowden v. Henderson*,[55] appear to have expanded the potential liability of local government even further by adopting the *McCain* foreseeable zone of risk analysis in situations where the local government is being held responsible for failing to control the misconduct of third parties.

In *Sams*, the First District Court of Appeal determined that the Alachua County Sheriff's Office could be held liable to a woman injured inside a hospital emergency room by a prisoner attempting to escape from a sheriff's deputy who had brought the prisoner into the hospital for treatment.[56] The court determined that the deputy had created a foreseeable zone of risk by bringing the prisoner into the hospital emergency room, and thus, the deputy owed a special duty to (or had a special relationship with) all the parties in the

47. *See id*. at 340.
48. *See id*.
49. *See id*.
50. *See* State v. Vann, 650 So. 2d 658, 661–62 (Fla. 1st Dist. Ct. App. 1995).
51. *See id*. at 660–61.
52. *Id*. at 660 (citing RESTATEMENT (SECOND) OF TORTS § 315 (1964)).
53. *See, e.g.*, City of Pinellas Park v. Brown, 604 So. 2d 1222 (Fla. 1992); Sams v. Oelrich, 717 So. 2d 1044 (Fla. 1st Dist. Ct. App. 1998).
54. 717 So. 2d 1044 (Fla. 1st Dist. Ct. App. 1998).
55. 700 So. 2d 714 (Fla. 2d Dist. Ct. App. 1998).
56. *See Sams*, 717 So. 2d at 1046, 1048.

room.[57] The court distinguished those cases which held that a governmental entity could not be liable for actions of an escapee because at the time the prisoner caused the injuries, he was still in the custody of the deputy.[58] While the holding in *Sams* is limited to its particular facts and thus may not create a great expansion of tort liability, the reasoning utilized by the court in determining that a duty existed may have a far greater impact. Rather than utilizing the historical analysis employed by the Florida Supreme Court in *Trianon Park* or the dual analysis utilized in *Kaisner*, the *Sams* court determined that a special duty existed by applying the general tort principles of *McCain* and the Restatement (Second) of Torts.[59]

In *Bowden*, the Second District Court of Appeal held that a sheriff's office could be liable to the occupants of a vehicle where a deputy sheriff arrested a driver for driving under the influence, allowed the equally drunk passengers to drive away, and the passengers were later injured in an accident after being pursued by a second deputy sheriff.[60] The district court determined that these people had been in custody at the time of the arrest of the driver, and therefore, a special duty was owed to these people because their release had created a foreseeable zone of risk.[61] It appears impossible to reconcile the holding in *Bowden* with the supreme court's opinion in *Rodriguez v. City of Cape Coral*,[62] where the court determined that no liability existed for an alleged wrongful release which resulted in injury.[63] The Second District in *Bowden* never mentioned the *Rodriguez* case even though the supreme court has never receded from *Rodriguez*. Nor did the Second District mention the historical analysis utilized in *Trianon Park*.

While these cases may indicate some expansion of a local government's liability, the supreme court's decision in *Vann* and the recent district court of appeal decisions in *Laskey v. Martin County Sheriff's Department*[64] and *Austin v. Mylander*[65] indicate that no

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57. *See id*. at 1047.
58. *See id*. at 1047–48.
59. *See id*. at 1047.
60. *See Bowden*, 700 So. 2d at 715–16, 718.
61. *See id*. at 717–18.
62. 468 So. 2d 963 (Fla. 1985).
63. *See id*. at 964.
64. 708 So. 2d 1013 (Fla. 4th Dist. Ct. App. 1998).
65. 717 So. 2d 1073 (Fla. 5th Dist. Ct. App. 1998).

drastic swing has really taken place. In *Laskey*, the Fourth District Court of Appeal determined that the Martin County Sheriff's Department could not be liable to a plaintiff whose "husband was killed in a head-on collision with another vehicle proceeding the wrong way on a limited access interstate highway" for the sheriff's office alleged failure to forward a 911 call concerning the inappropriate driving behavior.[66] *Laskey* utilized the historical analysis established in *Trianon Park*, and determined that the duty to properly maintain the 911 emergency system was a duty owed to the public as a whole and not to any particular individual.[67]

The Fifth District Court of Appeal also utilized the *Trianon Park* historical analysis in *Austin*.[68] There, the court determined that the trial court properly granted a summary judgment in favor of a county sheriff who was sued for the wrongful death of a taxi cab driver.[69] The undisputed facts were that a deputy sheriff had called a taxi cab to take an intoxicated person home, and the intoxicated person killed the taxi cab driver.[70] The plaintiff alleged that the deputy knew that the passenger was a "convicted felon with a history of violence," and therefore, the deputy breached the duty of care owed to the taxi cab driver by placing a dangerous passenger in the taxi.[71] The Fifth District determined that there was no statutory or common law duty of care owed to the plaintiff's deceased husband.[72] Absent a special relationship between the decedent and the sheriff, the county could not be liable.[73] The only way *Austin* can be reconciled with *Sams* is that in *Sams*, the wrongdoer was still in custody.

In summary, the Florida Supreme Court, in *Trianon Park*, appeared to recognize that utilization of the discretionary-operational distinction alone created a wide area of potential liability for local governments in cases involving misconduct by third parties. The supreme court, therefore, adopted the historical analysis from which it has never receded. In *Kaisner*, the supreme court utilized a dual analysis for determining duty, including the historical and foresee-

66. *Laskey*, 708 So. 2d at 1014.
67. *See id.*
68. *See Austin*, 717 So. 2d at 1075.
69. *See id.* at 1075–76.
70. *See id.* at 1074–75.
71. *Id.* at 1075.
72. *See id.* at 1075–76.
73. *See id.* at 1075.

able zone of risk analyses.[74] While the supreme court utilized the *McCain* analysis to determine duty in *Brown*, the case involving a police chase, it has never solely utilized the foreseeable zone of risk test to determine the existence of a duty in a pure third party misconduct case. It is difficult to determine how a foreseeable zone of risk analysis, standing alone, could produce the result reached by the supreme court in *Trianon Park*. Clearly, owners of condominium units are within the foreseeable zone of risk created by negligent code inspections. Therefore, it does not appear that the supreme court would determine that such analysis should be the sole basis for determining duty in pure third party misconduct cases. The *McCain* foreseeable zone of risk analysis, however, has been used by the First District Court of Appeal in a pure third party misconduct case.[75] The Fourth and the Fifth District Courts of Appeal, however, continue to utilize the *Trianon Park* historical analysis in third party misconduct cases.[76] It remains to be seen in which direction the pendulum will swing next.

74. *See supra* notes 34–38 and accompanying text.
75. *See supra* notes 54, 56–59 and accompanying text.
76. *See supra* notes 64–73 and accompanying text.