MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

Held in Room 532, at the Statehouse at 12:00 a. m./~~p. m.~~, on April 4, , 1978.

All members were present except: Representatives Hurley, Hoagland, Heinemann and Mills, who were excused.

The next meeting of the Committee will be held at _____ a. m./p. m., on _____, 19____.

These minutes of the meeting held on through March 28, 1978, 19____ were considered, corrected and approved.

Chairman

The conferees appearing before the Committee were:

Mr. Ernie Mosher, League of Kansas Municipalities
Mr. Neal Shortlidge, League of Kansas Municipalities
Mr. Frank Bien, attorney for the League

The meeting was called to order by the Chairman who explained the League had requested to appear before the Judiciary Committee because of a Supreme Court Ruling (see exhibit) with the hope the Committee might recommend introduction of a bill, which could be introduced through another of the committees.

Mr. Mosher stated it was coincidental, but fourteen different cities had a meeting on April 3rd and they were very concerned with the impact of the decision on Gorrell v. City of Parsons. He distributed a proposed bill for the Committee's consideration. (See Exhibit.)

Mr. Neal Shortlidge noted that city and county units have been immune from lawsuits for acts and ommissions insofar as governmental functions were concerned, but this doctrine has been abolished with the Supreme Court Ruling. He expressed fear for such departments as the Police and Fire Departments because he failed to see any distinction in the various functions under the Ruling. He stated the proposed bill is a "stop-gap" measure for one year only, pointing out that in states where such immunity has been removed there has been a period of time before the effective date, allowing the units to try to insure against suits. He noted the Ruling has immediate effect and they are trying to buy some time.

Rep. Gillmore inquired if there is such insurance available and Mr. Shortlidge explained it depends on the municipality; that the insurance market is decreasing all the time, but it is available when they belong to the League and also they must be a certain size.

The Chairman inquired if the legislature had ever passed such legislation, and Mr. Griggs stated he was not aware of it. Rep. Lorentz suggested everyone is overlooking the key which is "negligence".

Mr. Bien noted that this same thing had happened in Michigan and the Legislature had responded with this kind of a bill, and it had been held constitutional.

The Chairman inquired if there had been any consideration of a joint insurance underwiting arrangement among the municipalities. Mr. Mosher stated they have talked to some communities about it; that there are some groups throughout the country who have been using this concept.

Mr. Bien suggested it would be most helpful to have the tort matter clarified so cities would have some knowledge of their liability so they could begin to budget for it.

The Chairman inquired if the legislature does not act, if the League would be willing to work with an interim committee, and Mr. Mosher assured him they would.

The Chairman told members that the leadership is anxious to hear from committees concerning their feelings about interim studies and asked members to help him set priorities for studies. It was determined that the products insurance pricing should have first priority; juvenile facilities second; and although they could not set priorities felt the following deserve serious consideration: Termination of parental rights, eminent domain, administrative procedures and governmental immunity. The Chairman agreed to write a letter to the Speaker to that effect.

The meeting was adjourned.

4-4

No. 48,509

NED B. GORRELL and ANN J. GORRELL,
Appellants,

v.

CITY OF PARSONS, KANSAS,
Appellee.

SYLLABUS BY THE COURT

1.

The rule that a municipality is not liable for the negligent acts of its officers or employees in the performance of a governmental function is abolished.

2.

A municipality is immune from tort liability only for acts and omissions (1) constituting the exercise of a legislative or judicial function, or (2) constituting the exercise of an administrative function involving the making of a basic policy decision.

Appeal from Labette district court, division No. 3; CHARLES J. SELL, judge. Opinion filed April 1, 1978. Reversed.

Charles F. Forsyth, of Fleming & Forsyth, of Erie, argued the cause and was on the brief for the appellant.

Richard C. Dearth, of Parsons, argued the cause and was on the brief for the appellee.

The opinion of the court was delivered by

MILLER, J.: This is a direct appeal by the plaintiffs, Ned B. Gorrell and his wife, Ann J. Gorrell, from an order of the Labette District Court granting summary judgment to the defendant, the City of Parsons, on its motion. Plaintiffs contend that the trial court erred in entering summary judgment when there were contested issues of fact, and that the court erred in applying the doctrine of governmental immunity.

We deem it necessary to set forth in some detail the factual background, as reflected in the pleadings and the answers to interrogatories which were on file at the time summary judgment was entered.

Dr. and Mrs. Gorrell owned and made their home upon a tract of approximately 12 acres within the city limits of the City of Parsons. Shortly before noon on January 22, 1975, Mrs. Gorrell discovered that several city employees had driven onto her lawn, where they were cutting her trees. Mrs. Gorrell asked them to stop, since they were illegally on her property and they had no right to cut her trees. The men refused to stop, saying that they were following the written orders of their boss. Mrs. Gorrell demanded that they leave her property immediately; the men refused to do so, and continued cutting her trees. Mrs. Gorrell then called the city manager, but was told that he was too busy to talk to anyone that day, and that she should call the park department. She did so, but no one answered the phone. She again called the city manager's office, and was referred to a Mr. Freeburg. She told him what was happening, but got no response. The crew continued to cut plaintiffs' trees.

At midafternoon she reached the mayor. He called the city manager and arranged for the city manager to go to the Gorrell property at five o'clock that afternoon, but he took no action to stop

the city crew from continuing with the destruction of plaintiffs' trees. At five o'clock the city manager appeared at plaintiffs' home, checked a right of way marker, and acknowledged to Mrs. Gorrell that the trees were on her property, not on the right of way, and that the cutting was wrongful. He made various promises.

Thereafter, Dr. and Mrs. Gorrell counted the stumps, secured an estimate of the damage, and wrote to the city manager; there was no immediate response; later, city officials suggested they wait until fall, some nine or ten months after the occurrence. Finally, after much runaround, plaintiffs consulted counsel and learned that they must file a claim within six months. They filed a claim on July 8, seeking $9,236.50 for the 104 trees cut by the city employees on January 22. The City rejected the claim, and this action followed.

The petition, filed July 30, 1975, describes the real estate, alleges ownership, recites the factual background, the damages, the filing and rejection of the claim, and seeks actual damages of $9,236.50, plus punitive damages of $10,000.

The answer--in spite of the admonitions of K.S.A. 60-208 (b) and K.S.A. 60-211--contains a broad general denial of every factual allegation contained in the petition. In addition, it alleges that the petition fails to state a "cause of action" upon which relief may be granted; that the City is immune from this suit by virtue of the doctrine of governmental immunity; and that plaintiffs failed to properly comply with K.S.A. 12-105, as amended, compliance being a condition precedent to bringing an action.

The City filed motions to dismiss and for summary judgment. The motion to dismiss was based, inter alia, upon the contention that plaintiffs' claim failed to comply with K.S.A. 12-105, apparently

on the basis that although the claim stated the date of the alleged occurrence, it failed to state the time of day each tree was felled. We need consider this claim no further, except to state that the statute does not require such detail, and the statement of the date was a patently sufficient statement of the time of the happening, and the City could not be misled by the claim. Cook v. Topeka, 75 Kan. 534, 536, 90 Pac. 244 (1907).

The motion for summary judgment alleged that the acts complained of in the petition were governmental in nature, and that the City is not liable for acts of its officers and employees in the performance of a governmental function under the doctrine of governmental immunity. The City also sought to limit the amount of plaintiffs' prayer to actual damages, since punitive damages were not sought in the claim filed with the City. By their briefs and argument, plaintiffs have now abandoned any claim for punitive damages, and that is no longer an issue.

Interrogatories were answered by plaintiffs, briefs were filed, and the motion for summary judgment was submitted to the trial court. On June 28, 1976, the court granted the City's motion for summary judgment, and entered judgment in favor of the City. In its Memorandum of Decision, the court said:

> "Considering the facts of the case presented by the pleadings in the light most favorable to the plaintiff, it is apparent that the plaintiff's theory for recovery of damages is that this is an action (in tort) for the wrongful, willful and wanton conversion and destruction of plaintiff's property by the employees of the defendant for which plaintiff demands both actual and punitive damages.

"The defendant's allegation that the acts complained of in plaintiff's Petition are governmental in nature is not controverted; and there is no allegation on the part of the plaintiff that the defendant was acting in a proprietary capacity rather than a governmental capacity. Therefore, the Court finds that the defendant's employees were engaged in the performance of governmental functions.

"The law in Kansas is well settled by a long line of cases that in the absence of a statute imposing liability a city is not liable in tort for the negligence or misconduct of its officers or employees in the performance of governmental functions. [Citing cases.]

"Accordingly, the Court finds that the defendant's motion for Summary Judgment should be granted. . . ."

We acknowledge that it has long been the rule in this state that a municipality is not liable for the negligent acts of its officers or employees in the performance of a governmental function, unless such liability is expressly imposed by law. Exceptions engrafted onto this general rule include the imposition of liability (1) where the city creates or maintains a nuisance; (2) where its negligent and wrongful acts occur when it is acting in a proprietary capacity; (3) where it negligently fails to keep its streets reasonably safe for public use; and (4) where it has purchased liability insurance to cover the causal negligence. Grantham v. City of Topeka, 196 Kan. 393, 397-398, 411 P. 2d 634 (1966); Bribiesca v. City of Wichita, 221 Kan. 571, 561 P. 2d 816 (1977); Sly v. Board of Education, 213 Kan. 415, 516 P. 2d 895 (1973); Culwell v. Abbott Construction Co., 211 Kan. 359, 506 P. 2d 1191 (1973); Gardner v. McDowell, 202 Kan. 705, 451 P. 2d 501 (1969); Paul v. Topeka Township Sewage District, 199 Kan. 394, 430 P. 2d 223 (1967); Grover v. City of Manhattan, 198 Kan. 307, 424 P. 2d 256 (1967); Rose v. Board of

Education, 184 Kan. 486, 337 P. 2d 652 (1959); Steifer v. City of Kansas City, 175 Kan. 794, 267 P. 2d 474 (1954); Rhodes v. City of Kansas City, 167 Kan. 719, 208 P. 2d 275 (1949); Wray v. City of Independence, 150 Kan. 258, 92 P. 2d 84 (1939); and Eikenberry v. Township of Bazaar, 22 Kan. 556 (2d ed. 389) (1879). The origin and history of the immunity doctrine, its adoption and application in Kansas, and the exceptions created to temper the harshness of its application, are discussed in detail by Chief Justice Fatzer in Brown v. Wichita State University, 217 Kan. 279, 291, 292, 540 P. 2d 66 (1975), modified on reh. 219 Kan. 2, 547 P. 2d 1015 (1976), app. dis. 429 U.S. 806, 50 L. Ed. 2d 67, 97 S. Ct. 41 (1976). We need not repeat that discussion here.

It is interesting to note, however, that prior to statehood, a contrary view was expressed by the Territorial Supreme Court. Associate Justice Joseph Williams, speaking for a unanimous court in City of Leavenworth v. Casey, 1 Kan. (2d ed.) 544, 549 [McCahon *124, 130] (1860), said:

> ". . . The [city's] charter does not place her beyond the reach of responsibility for acts of commission or omission done or left undone, by her or her agents, by which injury or wrong may accrue to the persons or property of individuals within her corporate jurisdiction. Such is the theory of our government. A corporation is an artificial body created by law, which, as well as a natural body or person, is amenable to the law. Like others of a similar character, existing and acting by virtue of her charter provisions as a corporation, she is capable of suing and being sued in actions at law. In view, then, of the act of incorporation of the city, and the law of such incorporations, as established

by the uniform current of judicial decision, we hold that such a body corporate is legally and justly amenable to the law in redress of wrongful acts done by her or her agents, either willfully or through negligence, to the injury of other persons or their property. . . ."

The doctrine of governmental or sovereign immunity, as noted in Brown, supra, and in Carroll v. Kittle, 203 Kan. 841, 847, 457 P. 2d 21 (1969) is of judicial origin. The legislature enacted a general governmental immunity statute, K.S.A. 46-901, et seq., following our decision in Carroll, but the provisions of that act are inapplicable to municipal governments. K.S.A. 46-902. The immunity of municipalities, then, rests upon judicial decision and not upon the constitution or statutory enactment.

We have expressed our dissatisfaction with the governmental immunity doctrine and its inequities in Brown and Carroll. In Brown, we said:

"The doctrine of governmental immunity is an historical anachronism which manifests an inefficient public policy and works injustice upon everyone concerned. The doctrine and the exceptions thereto operate in such an illogical manner as to result in serious inequality. Liability is the rule for negligent or tortious conduct, immunity is the exception. But when the tortfeasor is a governmental agency immunized from liability, the injured person must forego his right to redress unless within a specific exception. Equality is not achieved by artificial exceptions which indiscriminately grant some injured persons recourse in the courts and arbitrarily deny such relief to others. . . ." (217 Kan. at 297.)

Likewise, the distinction between governmental and proprietary functions provides no sound basis for dispensing or denying justice. The observation by Justice (now Chief Justice) Schroeder in Wendler v. City of Great Bend, 181 Kan. 753, 758, 316 P. 2d 265 (1957), illustrates the inequity:

> ". . . Shadowy distinctions between 'governmental' functions and 'proprietary' affairs . . . have been used to decide cases, all without much rhyme or reason."

Turning to the case at hand, and applying--or attempting to apply--the governmental-proprietary distinction to the outrageous conduct of the City disclosed by the record before us, it would appear that plaintiffs' tort action would not lie if the destruction was wrought by a repair crew from the city street department; it would lie if the crew worked for the municipal light plant; it would not lie if the crew worked for the city sewer department; it would lie if the crew came from the city gas department; it would not lie if the crew came from the park department or the zoo. Possible illustrations and variations are endless. We note that the record before us does not disclose the city department or agency, if any, by which the tree-cutters were employed. The City's unverified motion alleges that "the acts complained of in plaintiffs' petition are governmental in nature . . ." The claim is not further explained.

Property is as completely destroyed, people are as seriously injured, losses are as great, whether caused by a street department employee, a municipal light plant employee, a sewer department employee, a gas serviceman, or a park, zoo, or sanitation worker. We can see no just reason for granting immunity to the municipality in the one instance and denying it in the other. Certainly the resulting impact on the injured person is not in anywise reasoned or fair.

We conclude that the rule that a municipality is not liable for the negligent acts of its officers and employees in the performance of a "governmental" function should be abolished. It does not promote justice, and serves no rational purpose.

In its stead, we hold that municipalities are immune from tort liability only for acts and omissions constituting the exercise of a legislative or judicial function, or constituting the exercise of an administrative function involving the making of a basic policy decision. This rule, adapted from Restatement (Second), Torts §895 C (1973 Tent. Draft) does not establish liability for acts or omissions which are otherwise privileged or are not tortious. Instead, it places municipalities, for the most part, on an equal footing with individuals and corporate entities so far as responsibility for injuries or damage caused by negligence is concerned. We believe this rule will better serve the citizens of this state.

All prior opinions of this court in conflict with this decision are overruled.

The judgment of the district court is reversed.

BILL NO. _____

By _____

AN ACT relating to claims against local units of government; amending K.S.A. 46-902, and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 46-902 is hereby amended to read as follows: 46-902. (a) Nothing in ~~section 1 of this act~~ K.S.A. 46-901 shall apply to or change the liabilities of local units of government, including (but not limited to) counties, cities, school districts, community junior colleges, library districts, hospital districts, cemetery districts, fire districts, townships, water districts, irrigation districts, drainage districts and sewer districts, and boards, commissions, committees, authorities, departments and agencies of local units of government. Liabilities of such local units of government shall be determined as provided in subsection (b) of this section.

(b) ~~The provisions of section 1 of this act shall not create any liability not now existent according to law, nor~~ Except as may be otherwise provided by statute or for actions based on nuisance or negligent failure to correct street defects, local units of government shall be immune from liability and suit for torts committed by officers or employees of such local unit of government when engaged in a governmental function. The provisions of this section shall not effect, change or diminish any procedural requirement necessary for recovery from any local unit of government.

Sec. 2. K.S.A. 46-902 is hereby repealed.

Sec. 3. The provisions of this act shall expire on July 1, 1979.

Sec. 4. This act shall take effect and be in force from and after its publication in the official state paper.

The minutes for April 24 and 26, 1978 (with attachments) appear at the front of the minutes as simply an addendum. They are informational only, because the deadline for meetings of the Judiciary Committee is past. They have not been approved.

Minutes for the 1978 session appear after the index.