MINUTES OF THE Joint House/Sentate COMMITTEE ON Judiciary

Held in Room 519, at the Statehouse at 8:30 a. m./~~p. m.~~, on April 24, 1978.

All members were present except:

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

These minutes of the meeting held on _____, 19____ were considered, corrected and approved.

E. K. Kerr

Chairman

The conferees appearing before the Committee were:

Mr. Payne Ratner, Jr.
Mr. Ernie Mosher, League of Kansas Municipalities
Mr. Frank Bean, Legal Counsel for the League
Mr. Ed Horne, Manhattan City Attorney
Mr. Fred Allen, Kansas Association of Counties
Mr. Harry Felker, Topeka Park Commissioner
Mr. Bud Cornish, Kans. Ass'n. of Property and Casualty Insurors
Mr. Mark Bennett, American Insurance Association
Mr. Jerry Palmer, President, KTLA
Rev. Harold Knight, Chanute
Mr. Jim Wallace, Independent Insurance Agents
Mr. Harlan Knight, Neodesha

The meeting was called to order by Senator Elwaine Pomeroy who stated the joint committee would be looking at a bill which will be introduced by the Senate Ways and Means Committee later in the morning and then assigned to the Judiciary Committee. The bill is intended to provide immunity for local governmental units for a period of one year, and is in response to a Supreme Court decision (Gorrell vs. City of Parsons). The bill was requested by the League of Municipalities and others. (See attached copy of proposed bill and Supreme Court case.)

Mr. Ratner told the joint committee he was not appearing on behalf of any group but only as a former member of the Legislature who was serving at the time the original bill was passed. He stated he felt the governmental immunity doctrine had a reason and a place, but that was at least a century ago; that he does not disagree with the Supreme Court decision. He explained he remembered the leadership asking the legislature to pass a bill because they were concerned about the fiscal impact if it was not done. They guaranteed a study, which study was accomplished, but nothing ever resulted and no one seems to know anything about the recommendations therefrom. He urged that members look toward a long term solution rather than some temporary measure as was previously done.

Mr. Ernie Mosher testified the League as well as the Association of Counties had asked for the introduction of the bill under consideration because the immediate impact of the Supreme Court decision was a major concern to many governmental units; that a year's moratorium would give them an opportunity to seek insurance coverage and budget for possible claims. (See printed statement.)

Rep. Heinemann stated that there was a study four years ago which resulted in the drafting of legislation which was passed. He inquired if there was any problem with resurecting that proposal. Mr. Mosher stated that proposal did basically what this bill requests. He further stated that the League is probably going to change its policy; that they had advocated the "closed end" approach and this is essentially "open end". He stated that the Budget Committee during the summer expected to come up with a Tort Claims Procedures Act but ran out of time, but that there had been some bill drafts.

Rep. Brewster noted the House committee had looked at this proposal and several members had problems with the "self destruct" aspect, and asked if this approach is valid. Senator Simpson noted it had happened in the tax area. Rep. Brewster stated he feels it is different when it comes to liability and tort; that he doubts the legislature should attempt to bind subsequent legislative sessions.

Senator Gaines expressed doubt about the constitutionality of such a proposal, but noted the cities are coming in the spirit of compromise and he hoped attorneys throughout the state would take the position that since the cities were compromising they would do so also.

Mr. Ed Horne urged members to accept the concept of the proposed bill because cities need time to deal with their fiscal problems as well as search for insurance coverage. Senator Simpson asked what would happen if the legislature does nothing; if they would be back next year asking for still more time. Mr. Horne stated if they are not able to resolve their problems within one year he feels they will have abrogated their responsibility. He stated that Manhattan already has some insurance coverage and they are already seeking more, but that other smaller cities don't and in some cases it is simply not available. He stated right now they pay $30,000 for one million general liability with limited coverage on automobiles.

Mr. Fred Allen told the Committee that counties and other local units recognize the general change in trends; that he has had many inquiries concerning availability of insurance but that budgeting for the cost is also a factor.

Mr. Harry Felker testified that he supports the proposal; that they are not asking that liability be excused but urged relief until a tort claims bill can be enacted. He stated that if they don't have insurance they will necessarily need to shut down some of the recreation programs and it would appear that even community centers, tennis courts, ball diamonds and parks could pose some serious liability problems. He stated that since the legislature had passed a one mill levy for recreation programs throughout the state he hated to see that go for insurance premiums instead of its intended purpose.

Senator Pomeroy inquired how many claims had occurred in the past year and Mr. Felker stated since he had been in office (three years) there had been one major claim and it goes to court on May 22nd, but there have been a number of minor claims which have been paid. He explained some things have happened where claims probably would have been filed but attorneys have generally told clients that suit could not be brought because of the immunity doctrine.

Rep. Brewster suggested there is a question of governmental activities or proprietary. Mr. Felker stated they are trying to figure that out as well; that it is difficult to know where you can draw the line if one charges fees or lets others run programs on city property.

Mr. Bud Cornish stated his group supports a state tort claims act which they feel would be a fair compromise between immunity and liability.

Mr. Mark Bennett stated his organization supports the League in its request for the proposed bill; that they would like to see an interim study on the entire scope of immunity and feels this bill would give adequate time for such a study.

Mr. Jerry Palmer testified that the KTLA opposes the enactment of this proposal. He pointed out that in the Kittle case the courts allowed the legislature time to develop solutions but in the Parsons case there was no invitation for the legislature to act. He stated he feels the legislature should not do anything at such a late hour.

Rep. Brewster told the members he had been advised that a study of this subject has been authorized.

The Rev. Harold Knight appeared in opposition to the proposed bill, explaining he has recently filed suit against the Chiefs of Police of Neodesha and Larned because he feels the individuals are using immunity for their own personal gain through drug traffic and prostitution and other illegal activities.

Senator Gaines protested that the Rev. Knight's testimony was not pertinent to the matter at hand and suggested that if he had a legitimate complaint and the local prosecutor refused to act he should retain competent counsel to represent him in his case. The Rev. Knight stated that people's rights are being abused and since the people are the government, his testimony should be heard. Senator Pomeroy requested Rev. Knight to make his remarks brief.

Mr. Jim Wallace testified that his group is in favor of giving a year to secure coverage. He stated his people have never trusted immunity and that many cities, counties and schools have purchased insurance. He stated that insurance is available; that he feels companies have a moral obligation to provide it. Further, he stated he feels removal of immunity will have no effect on rates but it will affect the premium because the units will be buying more.

Mr. Harlan Knight of Neodesha testified that he opposes the bill which is being considered; that he has personally encountered occasions when governmental immunity has prevented his individual rights. He expressed the opinion that without such immunity, individuals would enjoy more responsive government.

Senator Pomeroy told conferees that the matter would be taken under consideration. The House members were excused.

SENATE BILL NO. _____

By Committee on Ways and Means

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 effect,~~ Except as may be otherwise specifically provided by statute and except for causes of action based upon nuisance and, in the case of cities, actions based upon negligent failure to correct defects in streets, 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 affect, change or diminish any procedural requirement necessary for recovery from any local unit of government, nor shall it grant any immunity to a local unit of government when engaged in a proprietary function.

New Sec. 2. The provisions of this act shall expire on July

1, 1979.

Sec. 3. K.S.A. 46-902 is hereby repealed.

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

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.

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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.

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League of Kansas Municipalities
Kansas Government Journal

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April 24, 1978

To the Members of the Senate Committee on Judiciary

The Kansas Supreme Court on April 1, in the case of Gorrell v. City of Parsons, drastically limited the longstanding rule that a municipality is immune from tort liability in the performance of a governmental function. We urgently request this committee to recommend for passage the bill, to be introduced later this morning by the Senate Committee on Ways and Means, to restore governmental immunity for local governments by legislative act until July 1, 1979, thus permitting time for a comprehensive interim study of the matter and subsequent legislative action.

Members of this committee will recall that the legislature responded to a similar situation in 1970, following the 1969 Carroll v. Kittle decision, by the enactment of K.S.A. 46-901, which disclaims liability on the part of state government for any tort action, regardless of whether it might be termed "governmental" or "proprietary", unless otherwise provided by statute. The Ways an Means bill differs in that (1) all previously existing liability of municipalities would continue, including liability for proprietary functions, and (2) the legislative grant of immunity for local governmental functions would cease on July 1, 1979.

We wish to emphasize that, under the bill, local units of government would continue to be liable for torts when provided by statute or under previously existing common law, i.e., actions based on nuisance or negligent failure to correct street defects. In other words, the sole intent of the bill is to maintain for about one year the situation which existed immediately prior to the Parsons court decision. We believe the provisions of subsection (b) of the bill adequately "freezes" the conditions which existed prior to April 1. To quote from the Parsons case. "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." (citing cases)

At a meeting on April 12, a group of 22 city, county, school and insurance representatives met to discuss the implications of the Parsons decision. Frankly, we don't yet know all of the probable ramifications. We have been in contact with other states which faced similar situations and know that adequate insurance became difficult to obtain, existing policies were cancelled or premiums increased dramatically. Whether this will happen in Kansas, we simply don't know. We have been advised by some insurance company and agency representatives that they would be supportive of the one-year deferment provided by the bill.

While many local governments now carry insurance policies frequently labeled "general public liability", there are apparently many exceptions as to the coverage of such policies . Whether such existing policies are now adequate under the Parsons decision is uncertain. For example, the court held municipalities immune from tort liability for acts or omissions "constituting the exercise of an administrative function involving the making of a basic policy decision." The meaning of this phrase, however, is not clear to us, nor, we believe, to insurance companies.

By establishing a new "immunity" doctrine, we believe the court created a whole new set of uncertainties which should be dealt with by legislative enactment. Beyond uncertainty regarding liability exposure and the fiscal implications of the decision on local units, in terms of insurance costs, legal defense expenditures and additional claims, we are concerned about the public policy implications of the decision on governmental programs and actions. For example, should a city, county or school district now lock up its park, recreation and playground activities at all times when there is not adequate supervision, because of its new vulnerability to lawsuits?

We should advise you that the League, together with the Kansas Association of Counties and Kansas Association of School Boards, has joined the City of Parsons in requesting a rehearing of the Parsons decision. Our objective at a rehearing would be directed toward determining the possible retroactive effect of the decision. Are local units of government now liable for tortious acts involving a "governmental" function which occurred (subject to the notice of claims statute and the statute of limitations) in the past? For example, are cities now liable for sewer backups which occurred during the past two years? We assume that they are, unless the decision is modified on rehearing such that it would not apply retroactively, as the court did for the state in the case of Carroll v. Kittle in 1969. We believe that only the supreme court may resolve this question — and it is a very important question.

To restate the matter, we hope that the 1978 Legislature will resolve the prospective application of the immunity doctrine abrogation for the coming year, and that the supreme court will resolve the retroactive aspects.

We recognize that the timing of the Parsons decision did not leave adequate time for the legislature to consider what we believe to be the ultimate solution — a comprehensive tort claims act. We hope that such legislation will result from an interim study this summer followed by enactment during the 1979 legislative session. We think such important public policy decisions as this matter should be made by the legislature and not the courts. In the meantime, we urgently request your support of the bill to achieve a one-year moratorium so that the state of Kansas and its local governments can orderly and systematically deal with the issue of the tort liability of governmental units.