0/a 1-12-84 orig

IN THE SUPREME COURT OF THE STATE OF FLORIDA

AZER J. EVERTON, JR.,

Appellant,

vs.

MARION WILLARD, Individually and d/b/a WILLARD'S PAINTING COMPANY, PINELLAS COUNTY SHERIFF'S DEPARTMENT AND PINELLAS COUNTY,

Appellees,

and

ANTON TRINKO, etc. et al.,

Appellants,

vs.

MARION R. WILLARD, Individually and d/b/a WILLARD PAINTING, STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, DEPUTY C. W. PARKER, PINELLAS COUNTY SHERIFF'S DEPARTMENT, and PINELLAS COUNTY,

Appellees.

Case No. 63-,440

FILED

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ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

Case Nos. 81-2081 and 81-2085

AMICUS CURIAE BRIEF ON BEHALF OF
STATE OF FLORIDA
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

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I.

INTRODUCTION

State of Florida Department of Highway Safety and Motor Vehicles, appears as Amicus Curiae for the purpose of assisting the Court in making its determination on a question of tremendous importance to law enforcement agencies, and indeed all citizens, in Florida.

This brief is filed in support of Appellees C. W. Parker, Pinellas County Sheriff's Department, and Pinellas County.

The Statement of the Case and Facts in the brief of Appellee Pinellas County Sheriff's Department is adopted in this brief.

II

QUESTION ON APPEAL

MAY A POLICE OFFICER AND HIS EMPLOYING AGENCY BE HELD LIABLE IN TORT FOR THE OFFICER'S EXERCISE OF HIS DISCRETION OF WHETHER OR NOT TO TAKE AN INDIVIDUAL INTO CUSTODY?

III

ARGUMENT

Since the rejection of the "general duty"--"special duty" doctrine of of Modlin vs. City of Miami Beach, 201 So.2d 70 (Fla.1967) by the court in Commerial Carrier Corporation vs. Indian River County, 371 So.2d 1010 (Fla. 1979), the courts, when faced with a question of governmental liability, have tended to give short shrift to the issue of the existence vel non of a duty owed to the Plaintiff and plunge headlong into the quagmire of the operational level--planning level test. This the court below did. Believing that the proper role of amici curiae is to bring before the court issues and arguments which might not otherwise be presented to it, the Department suggests that the Court reexamine the Modlin doctrine.

One of the fundamental elements of actionable negligence is the existence of a duty owed by the person charged with negligence to the person injured. See 38 Fla. Jur. 2d. Negligence s.10 and cases cited thereunder. The court below considered the issue of duty in the context of the court's decision in Commercial Carrier, thusly:

> "If it were not for the subsequent enactment of section 768.28, Florida Statutes (1973), and the resulting decision in Commercial Carrier, we could simply affirm on the basis of Evett v. City of Inverness, 224 So.2d 365 (Fla.2d DCA 1969), for the factual situations are amazingly similar. This court there found the City of Inverness not liable for the actions of its police officer on the 'general duty'--'special duty' doctrine of Modlin vs. City of Miami Beach, 201 So.2d 70 (Fla.1967), because Modlin required a 'special duty' to the injured party. This required the Evett court to affirm the dismissal of the complaint against the City of Inverness because any duty

> of the city's police officer was owed to the public in general and not specifically to the plaintiff in that case. However, in Commercial Carrier our supreme court has held that the subsequent enactment of section 768.28 abolished the Modlin 'general duty'--'special duty' doctrine as it affects governmental immunity." Everton vs. Willard, 426 So.2d 996, 998 (Fla. 2d DCA 1983). (Emphasis supplied.)

Of course, the lower court was correct in its characterization of this Court's rejection of the Modlin doctrine as being based upon the waiver of sovereign immunity by Section 768.28, Florida Statutes. The Court stated in Commercial Carrier at 1015:

> "Regardless, it is clear that the Modlin doctrine is a function of municipal sovereign immunity and not a traditional negligence concept which has meaning apart from the governmental setting. Accordingly, its efficacy is dependent on the continuing vitality of the doctrine of sovereign immunity. If this be so, does the Modlin doctrine survive notwithstanding the enactment of section 768.28? We think not." (Emphasis supplied.)

However, the Department would respectfully assert that the Court was erroneous when it characterized the decision in Modlin as one based upon sovereign immunity.

In Modlin the court considered and rejected the claim that the municipal corporation was entitled to claim sovereign immunity under the circumstances of the case, stating:

> "Returning now to the merits of the case at hand, it follows that if the respondent city is to escape liability, it will have to be other than by the path of municipal tort immunity". Modlin, supra, at 74.

Thus, Modlin was based not on sovereign immunity, but on traditional negligence law applied to a governmental tort liability context. See Judge Hubbart's dissent in Cheney vs. Dade

County, 353 So.2d 623 (Fla.3rd DCA 1977).

If the Modlin holding was not based on the doctrine of sovereign immunity, then it follows that it was not abrogated by the enactment of Section 768.28, Florida Statutes. Judge Armstead made this point very well in his dissent in The Manors of Inverrary XII Condominium Association, Inc. vs. Aterco-Florida, Inc., ______So.2d ________, 8FLW 2377, 2379, 2380 (Fla.4th DCA 1983):

> "Section 768.28, Florida Statutes (1975), simply waived the defense of sovereign immunity for the state, its agencies and subdivisions. There must still be a duty owed, a duty violated, and damages resulting therefrom, in order for there to be tort liability on the part of the government. Modlin simply holds that in the case of government building inspections there is no duty owed, the breach of which would give rise to tort liability. Other jurisdictions have so construed similar statutes. For example the Minnesota Supreme Court has held:
>
>> 'However, these statutory provisions merely removed the defense of immunity. They did not create any new liability for a municipality. In order to recover against the city, appellants must show a breach of some duty owed them in their individual capacities and not merely a breach of some obligation owed the general public.
>>
>> The purpose of a building code is to protect the public. This is well stated in 7 McQuillin, Municipal Corporations (3 ed.) s.24.507,p.523: ***The enactment and enforcement of building codes and ordinances constitute a governmental function. The primary purpose of such codes and ordinances is to secure to the municipality as a whole the benefits of a well-ordered municipal government, or, as sometimes expressed, to protect the health and secure the safety of occupants of buildings, and not to protect the

> personal or property interests of individuals.'
>
> Building codes, the issuance of building permits, and building inspections are devices used by municipalities to make sure that construction within the corporate limits of the municipality meets the standards established. As such, they are designed to protect the public and are not meant to be an insurance policy by which the municipality guarantees that each building is built in compliance with the building codes and zoning codes. The charge for building permits is to offset expenses incurred by the city in promoting this public interest and is in no way an insurance premium which makes the city liable for each item of defective construction in the premises.
>
> Hoffert v. Owatonna Inn Towne Motel, Inc., 199 N.W. 2d. 158 (Minn. 1973). Other jurisdictions, including the State of Washington, have reached the same conclusion. See Georges v. Tudor, 556 P.2d 564 (Wash. App. 1976). Cf. Halvorson v. Dahl, 574 P.2d 1190 (Wash. 1978).
>
> The state of the law in Florida at the time the legislature abolished the defense of sovereign immunity was, pursuant to the Modlin decision, that there was no responsibility, in the case of public officials such as building inspectors, that would give rise to liability. This absence of responsibility did not rest on the defense of sovereign immunity. If that is correct then it should be apparent that the legislature, by abolishing the defense, did not intend to create a legal duty that did not then exist. The legislature simply left the case law on this issue intact".

On the issue of whether a statutory waiver of sovereign immunity creates new duties, see also I & B Development Co. Inc. vs. King County ____ P.2d____ (Wash. 1983). In addition to finding that the "general duty" - "special duty" doctrine did not survive the enactment of Section 768.28, the Court found it to be "circuitous reasoning". However, the Department believes it to be

a logical starting place for an analysis of liability in a governmental setting.

The nature of the duties of public officials, especially police officials, are different from those of private persons. No private person owes to the public the kind of general duty to preserve the peace that is owed by law enforcement officials.

It is in the interest of a sound public policy for the Court to find no liability for a police officer's exercise of discretion not to arrest. To allow a jury to look over the shoulders of a policeman and second guess his decision not to arrest could lead to two results, each equally devastating to good law enforcement.

The first result would be a tendancy to arrest on something less than probable cause. It would be reasoned by the officer that if he is to be held liable for failure to arrest, he may as well err upon the side of caution and arrest upon mere suspicion. Of course, this would lead to increased liability for false arrest and a lowering of morale because of a "dammed if you do, dammed if you don't" mentality.

On the other hand, an officer could elect to ignore all but the most blatant violations to avoid being put in the position of having to make a decision whether or not to arrest. The affect on law enforcement is easy to predict.

In addition, the cost of defending suits brought by persons injured by drunk drivers, speeders and other law breakers, whether such suits were meritorious or not, would prove ruinous to the already overloaded budgets of law enforcement agencies.

A law enforcement officer must be able to exercise his judgment fearlessly. Effective law enforcement demands no less,

and law enforcement officers deserve no less.

CONCLUSION

Based upon the argument contained herein, the State of Florida Department of Highway Safety and Motor Vehicles, as amicus, in support of the position of C. W. Parker, Pinellas County Sheriff's Department, and Pinellas County, respectfully submits that a police officer and his employing agency should be held liable in tort for the officer's exercise of his discretion by whether or not to take an individual into custody, and requests the Court to so rule.

Respectfully submitted,

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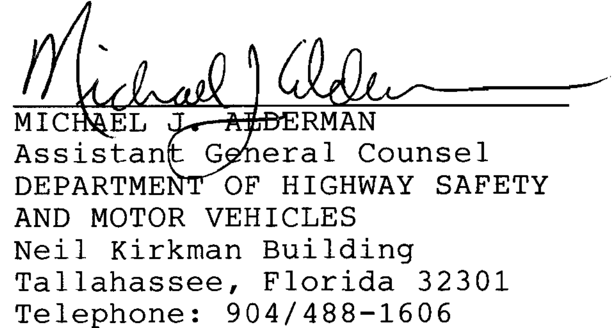
General Counsel



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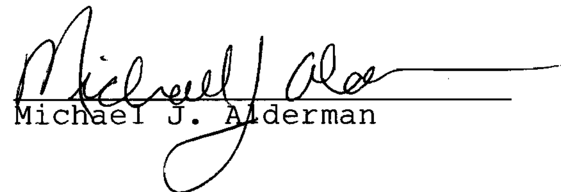
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been forwarded by U.S. mail to DANIEL C. KASARIS, Esquire, Yanchuck, Thompson and young, P. O. Box 4192, St. Petersburg, Florida 33731; RICK MATTSON, Esquire, Mattson and McGrady, P. O. Box 14373, St. Petersburg, Florida 33719; MARK E. HUNGATE, Esquire, P. O. Box 210, St. Petersburg, Florida 33731; ROBERT K. HAYDEN, Esquire, 800 Court Street, Clearwater, Florida 33516; and GARY DUNLAP, 315 Court Street, Clearwater, Florida 33516, this 3rd day of November, 1983.



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