O/A 1-12-84 or7

IN THE SUPREME COURT FOR THE STATE OF FLORIDA

CASE NO: 63,440

FILED

OCT 3 1983

SID J. WHITE
CLERK, SUPREME COURT
By ______ Chief Deputy Clerk

AZOR 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.

APPEAL FROM THE SECOND DISTRICT,
STATE OF FLORIDA

APPELLANTS, ANTON TRINKO, etc., et al.
and AZOR J. EVERTON, JR.

INITIAL BRIEF OF APPELLANTS

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QUESTION PRESENTED

Is a Deputy Sheriff's negligent failure to conduct a field sobriety test upon a person who drives erratically, staggers, smells of alcohol, and admits to having consumed alcoholic beverages a planning level function for which the County Sheriff's Department may claim sovereign immunity?

STATEMENT OF FACTS AND CASE

On June 22, 1979, at approximately 2:35 a.m., RENEE TRINKO was killed and AZOR J. EVERTON, JR., was severely injured in an automobile accident at the intersection of Bellair Road and Lake Avenue in Largo, Florida. Defendant Marion R. Willard had been driving while intoxicated and ran a red light, striking Ms. Trinko's vehicle broadside (R 386).

Earlier that evening, Defendant Willard had been drinking alcoholic beverages at the Double-R Bar and Stage Stop Lounge, and had smoked marijuana (R 266). At approximately 2:25 a.m., Deputy C.W. Parker saw Willard make two illegal U-turns against the red light at a very dangerous intersection, running over the concrete median in the process (R 338).

Deputy Parker stopped Defendant Willard to issue him a citation for an improper turn. Deputy Parker smelled alcohol on Willard's breath (R 342) and noticed that Willard was staggering as he attempted to walk while exiting his car (R 45). The Deputy asked if Willard had consumed any alcoholic beverages and Willard replied that he had (R 45). The Deputy did not, however, take any further action to determine whether Defendant Willard was driving while intoxicated (R 46).

A friend of Defendant Willard, who had been following Willard at the time of the stop, offered Willard a ride home. Deputy Parker successfully discouraged this, however, and allowed Willard to drive on (R 350). A few short minutes later RENEE TRINKO was killed and AZOR J. EVERTON, JR. was severely injured, when Willard ran a red light. Mr. Everton brought suit in his own behalf and RENEE TRINKO'S father and personal representative, Anton Trinko, brought a separate action. The two actions were later consolidated.

Defendants C.W. Parker and the Pinellas County Sheriff's Department moved to dismiss the Plaintiffs' claim against them on the grounds of sovereign immunity (R 457). Said Motion was granted with prejudice by the trial court (R 465-466). The Second District Court of Appeals affirmed and subsequently denied rehearing. Everton v. Willard, 426 So. 2d 996 (Fla. 2d DCA 1983). This appeal then ensued.

ARGUMENT AND CITATION OF AUTHORITY

A DEPUTY SHERIFF'S NEGLIGENT FAILURE TO CONDUCT A FIELD SOBRIETY TEST UPON A PERSON WHO DRIVES ERRATICALLY, STAGGERS, SMELLS OF ALCOHOL, AND ADMITS TO HAVING CONSUMED ALCOHOLIC BEVERAGES IS AN OPERATIONAL LEVEL FUNCTION FOR WHICH THE COUNTY SHERIFF'S DEPARTMENT MAY NOT CLAIM SOVEREIGN IMMUNITY.

Since 1957, Florida has been a leader in abolishing sovereign immunity from tort liability for governmental agencies. Hargove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957). Since then, a majority of jurisdictions have either abolished or modified the governmental immunity rule. Note, The Discretionary Function Exception to Government Tort Liability, 61 Marquette Law Review 163 (1977).

In the landmark decision of Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), the Supreme Court, per Justice Sundberg, held that despite the broad waiver of immunity contained in Section 768.28, certain "discretionary" governmental functions remained immune. The reasoning was that the wisdom involved in certain governmental decisions should not be subjected to second-guessing by judges or juries. The court adopted the analysis set forth in Johnson v. State, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968), to differentiate between "planning" level decisions,

to which immunity remains attached, and "operational" level decisions, for which sovereign immunity has been waived by the legislature. Planning level functions are those requiring basic policy decisions, while operational level functions are those that implement policy. Commercial Carrier, supra, at 1021.

Although the Johnson court stated that "when there is negligence, the rule is liability, immunity is the exception", 69 Cal.2d 782, 798, 73 Cal. Rptr. 240, 251, 447, P.2d 352, 363 (1968), it is not clear whether the Florida courts have adopted such a position. (See dissent by Justice Sundberg in which Justice Adkins concurred, Dept. of Transp. v. Neilson, 419 So.2d 1071, 1079 (Fla. 1982).) In any event, a case-by-case analysis must be made to determine which governmental functions are immune. Commercial Carrier, supra, at 1022.

The Johnson analysis begins with a preliminary test set forth in Evangelical United Brethren Church v. State, 67 Wash.2d 246, 407 P.2d 440 (1965). This preliminary test consists of four questions, all of which must be clearly and unequivocally answered in the affirmative for the challenged act, omission or decision to be classified, with a reasonable degree of assurance, as a "planning level" activity. Id. at 445.

Appellants herein challenge Deputy Parker's failure to follow generally accepted procedure in the detection of crime by failing to at least administer a field sobriety test upon a motorist who drove erratically, staggered, smelled of alcohol, and admitted to having consumed alcoholic beverages. Appellants further challenge Deputy Parker's failure to allow the obviously intoxicated motorist to be driven home by a friend who had stopped to offer a ride. It should be noted that this Honorable Court need not examine the

deputy's decision not to arrest the obviously intoxicated motorist because a clear distinction exists between actually taking a suspect to the station, i.e. "arresting" him, and questioning, frisking, or asking him to perform a field sobriety test, i.e. "detecting" a crime. LA FAVE, WAYNE R., ARREST, the Decision to take a Suspect into Custody, p.4; Little, Brown and Company (1965). Therefore, since this matter may be resolved upon reviewing the deputy's negligence in detecting the crime, the question of his negligent failure to arrest need not be considered. To further clarify, selective enforcement is not the basis of this appeal.

The first question in the Evangelical test is whether the challenged act, omission, or decision necessarily involves a basic governmental policy, program, or objective. Appellants concede that this question may be answered in the affirmative in that the deputy's actions necessarily involved the basic governmental policy objective of keeping drunk drivers off the county's highways.

The second question is whether the questioned act, omission, or decision is 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. This question may also be answered affirmatively in that if law enforcement officers consistently failed to adequately detect the crime of driving while intoxicated, the objective of keeping the county's highways free of deadly drunk drivers could not possibly be attained.

Third, does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the deputy involved? This question cannot be clearly and unequivocally answered in the

affirmative. When a deputy sheriff encounters a driver who is obviously intoxicated, no basic policy decisions need to be made. The deputy should routinely perform some type of test to determine whether the detained motorist is a threat to the health and safety of himself and others who may be travelling on the county's highways. The basic policy decisions have already been made by the legislature and the upper echelons of the Sheriff's department. The answer to the third question posed above is therefore in the negative.

Fourth, does the deputy possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? This question may also be answered in the negative. The deputy has no lawful authority to ignore the laws of the State. Nor does he have lawful authority to negligently fail to follow routine investigative procedures when faced with a known danger such as an intoxicated driver. To the contrary, Deputy Parker had an affirmative duty to investigate and detect crime as a protector of the public's interest in making the county's highways safe from drunk drivers. Question four must therefore undoubtedly be answered in the negative.

Although the four Evangelical test questions cannot be clearly and unequivocally answered in the affirmative, (thereby indicating that sovereign immunity does not apply herein), the Johnson analysis is not yet complete because the four-pronged test is only a "useful tool" for analytical purposes. Commercial Carrier, supra, at 1022. Further inquiry pursuant to Johnson is therefore required.

Besides the four-pronged Evangelical test, the Johnson analysis also includes a consideration of various other factors as a means of deciding whether the deputy's acts or omissions constitute planning as opposed to operational

functions. These factors include the importance to the public of the function involved, the extent to which government liability might impair free exercise of the function, and the availability to individuals affected of remedies other than suits for damages. Commercial Carrier, supra, at 1021.

The importance of keeping the highways free of intoxicated drivers cannot be understated. Thousands of innocent lives are lost on the nation's highways each year because of drunk drivers. Florida's recently enacted and extremely tough drunk driving laws are an express indication of the public's position on this matter. In order for these laws to have the desired effect upon highway safety, they must be implemented by law enforcement officers. Hence it is extremely important to the public that law enforcement officers conduct a reasonable investigation in order to detect the known dangerous crime of driving while intoxicated. If the law enforcement officer chooses not to conduct a reasonable investigation of a known danger, a jury should be permitted to determine whether the action he actually took was reasonable under the circumstances.

A finding of liability will not impair the free exercise of the deputy's duty under the circumstances alleged herein. We are not here faced with a situation where a decision must be made in a split second. Deputy Parker had ample time and reason to at least administer a field sobriety test, but he neglected to do so. Imposition of liability in the case sub judice will only mean that when a law enforcement officer is faced with a known danger and fails to follow customary or otherwise reasonable procedures, he may be held liable for any damage proximately resulting therefrom.

It is quite likely that imposition of liability herein will increase the effectiveness of law enforcement officers by making them aware that they may

be held liable for ignoring a known danger which subsequently causes injury. Malpractice awards have neither impaired the free exercise of a medical doctor's duty, nor have they impaired the free exercise of an attorney's duty. Both doctors and lawyers may be held liable for failure to follow customary or otherwise reasonable procedures and so, too, should law enforcement officers, especially when confronted with a known danger in a non-emergency situation.

Finally, there are simply no adequate remedies available besides an action in tort where a deputy's neglect of duty causes death or serious bodily injury. Appellees suggest that the Plaintiff could file a claims bill, but one would not expect the legislature to grant an award in a case where the government has no liability by virtue of the doctrine of sovereign immunity. Why even adhere to a limited sovereign immunity doctrine if the legislature will freely grant claims bills anyway? Why not just abolish sovereign immunity altogether, once and for all?

The above analysis makes clear that under the analytical approach adopted in Commercial Carrier, Deputy Parker's negligent failure to follow customary or otherwise reasonable procedure was an operational function to which sovereign immunity does not apply. This is entirely consistent with the often-repeated principle that one who undertakes to serve the public and thereby induces reliance must perform his task in a careful manner. This principle was first announced by the United States Supreme Court in Indian Towing v. United States, 350 U. S. 61, 76 S.Ct. 122 (1955), was later adopted by the Florida Supreme Court in Commercial Carrier, supra, and has often been followed by the District Courts of Appeal. Cf. Collom v. City of St. Petersburg, 400 So.2d 507 (Fla. 2d DCA 1981); Neilson v. City of Tampa, 400

So.2d 799 (Fla. 2d DCA 1981); and Jones v City of Longwood, 400 So.2d 1083 (Fla. 5th DCA 1981).

The conclusion reached herein is also consistent with the Florida Supreme Court's post - Commercial Carrier decisions regarding sovereign immunity. In the Neilson trilogy, Dept. of Transp. v. Neilson, 419 So.2d 1071 (Fla 1982); Ingham v. Dept. of Transp., 419 So.2d 1081 (Fla. 1982); and City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982), the Court, per Justice Overton, held that a complaint is sufficient to state a cause of action if it alleges a known trap or dangerous condition for which there was no proper warning. This standard was subsequently reiterated in Ralph v. City of Daytona Beach, ___ So.2d ___ (Fla. 1983), and Dept. of Transp. v. Webb, 8 FLW 323 (Fla. 1983). Application of this standard to the instant case is simple. The amended complaint does not allege a failure to warn of a known danger because it would be impossible to warn all other motorists that a drunk driver is on the road. The amended complaint does allege, however, that the deputy was negligent in that he was faced with a known danger and failed to follow customary or otherwise reasonable police procedures, thereby proximately causing the damage complained of. Therefore, application of the Neilson test reveals that the amended complaint is sufficient to state a cause of action herein.

Appellants further assert that this matter can be easily disposed of on the grounds that the deputy's decision not to at least allow the intoxicated motorist to be driven home by a willing acquaintance was not a "considered decision". This is so because Deputy Parker had not conducted a field sobriety test and therefore did not have enough facts available to make a "considered decision". According to Johnson, supra, a "considered decision" is one which

consciously balances risks and advantages. A decision which is not "considered" may be summarily disposed of as an operational level function, and the entire Johnson analysis set forth above need not be reached. Therefore, it should be nearly impossible to determine the issue of sovereign immunity on a motion to dismiss because the government must show that a "considered decision" was made. Although this method of disposing of sovereign immunity cases was apparently utilized in Bellavance v. State, 390 So.2d 442 (Fla. 1st DCA 1980), cert. den., 399 So.2d 1145 (Fla. 1981), it is unclear whether it has been accepted by the Florida Supreme Court. See, eg. Justice Sundberg's dissent in Neilson, supra, 419 So.2d at 1080. With the instant case the Court has before it an excellent opportunity to either adopt or reject the preliminary "considered decision" test.

The only post - Commercial Carrier Florida case with facts similar to the case at bar is Weissberg v. City of Miami Beach, supra. There a uniformed off-duty police officer was dispatched to direct traffic around a Southern Bell Telephone worksite. An accident occurred while the officer was resting in the shade on the side of the road. The Weissbergs brought suit against both the City of Miami Beach and Southern Bell. Following Commercial Carrier, the Third District Court of Appeal, per Judge Nesbitt, reversed the trial court's summary judgment in favor of the city. Judge Nesbitt's opinion rejected the City's contention that the police officer was engaged in a planning function by stating that there is "no difference between malfunctioning traffic devices and an inattentive police office whose failure to regulate and direct the flow of traffic may have led to this accident. ....Both are simply operational level activities". 383 So.2d at 1159.

Appellants assert that there is no difference between a police officer who fails to regulate and direct the flow of traffic and one who fails to at least administer a field sobriety test when he encounters an erratic driver who staggers, smells of alcohol and admits to having consumed alcoholic beverages. Both are operational functions for which sovereign immunity has been waived by Section 768.28, Florida Statutes (1979).

OTHER AUTHORITY

Other states and the federal courts have had no success in simplifying the means by which governmental acts are characterized for purposes of sovereign immunity. Payton v. United States, 679 F.2d 475 (5th Cir. 1982), is illustrative. In Payton, the Plaintiff's decedent was murdered by a dangerous psychotic mental patient who was negligently released. The issue was whether a cause of action was stated under the Federal Tort Claims Act, 28 USC §1346(b) and 2671 - 2680 (1976), or whether the governmental acts were exempt as a "discretionary function" pursuant to 28 USC §2680(a) (1976). The trial court dismissed for lack of jurisdiction because it found the governmental acts to be "discretionary".

Judge Hatchett's opinion included the following comment on the problems in defining "discretionary" functions:

> The drafters of the Act, however, failed to define the term "discretionary function". This omission is understandable in light of the fact that the courts have struggled for nearly three decades to provide such a definition, with limited success. We will not pretend to succeed where our predecessors have failed in providing succinct definition to the term "discretionary function". Id. at 479.

The Court then applied an array of federal precedent and found that the government's negligence was not protected by the shield of sovereign immunity. The court concluded that execution of discretionary decisions were

nondiscretionary acts, whether termed operational, ministerial, or clerical. Id at 480.

The Arizona courts have recently taken a step backward in the realm of sovereign immunity. In Ryan v. State, 656 P.2d 597 (Ariz. 1982), the Arizona Supreme Court stated that:

> We hope to avoid the semantic legerdemain involved in applying a "discretionary acts" exception to state liability for negligent acts. We deem an ad hoc approach to be most appropriate for the further development of the law in this field. Id at 599.

The court overruled Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969), which had applied the special duty - general duty dichotomy. The court then cited the 1963 case of Stone v. Ariz. Hwy Comm'n., 93 Ariz. 384, 381 P.2d 107, as a new starting point for analysis. There the court stated that "... where negligence is the proximate cause of injury, the rule is liability and immunity is the exception". 93 Ariz. at 392, 381 P.2d at 107.

The Arizona high court also rejected the governmental - proprietary distinction, but cited the Florida Supreme Court cases of Neilson, supra, Collom, supra, and Commercial Carrier, supra, for their sound judicial reasoning. The court concluded that governmental immunity is a defense only when its application is necessary to avoid a severe hampering of a governmental function or thwarting of established public policy. 656 P.2d at 600.

An even more radical change in the law of sovereign immunity has occurred recently in Ohio. Perplexed and overburdened with the necessity of deciding whether immunity applies on a case-by-case basis, the Ohio Supreme Court, in Haverlack v. Portage Homes, Inc., 442 N.E.2d 749 (Ohio 1982), abolished sovereign immunity for municipalities. In so doing, the court held that the defense of sovereign immunity is not available, in the absence of a

statute providing immunity, to a municipal corporation in an action for damages allegedly caused by the city's negligence in the performance or nonperformance of its functions.

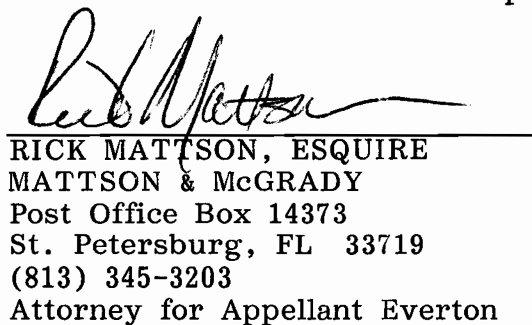
It would therefore appear that unless this Honorable Court decides to abolish sovereign immunity as was done in Ohio, Florida's law on the subject is as well developed as any. The reasoning developed over the years is in need of minor clarification, but not major revision, as the Second District Court of Appeal has seen fit to do herein. Indeed, it appears that the Second District opinion, Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983), creates an exception to the reasoning of Commercial Carrier, supra. This will only serve to create a great deal more confusion in an area that the Florida Supreme Court has worked long and hard to clarify. Judge Ervin of the First District Court of Appeal has recently made the following comment with regard to that exception: "... If so, I think this is a very dangerous precedent, and one that could create even greater difficulties in attempting to locate the line between the discretionary - operational levels of activity, if the officer exercises his discretion in disregard of a known danger." Smith v. Dept. of Corrections, 432 So.2d 1338, 1341 (Fla. 1st DCA 1983), (Ervin, Judge, specially concurring.)

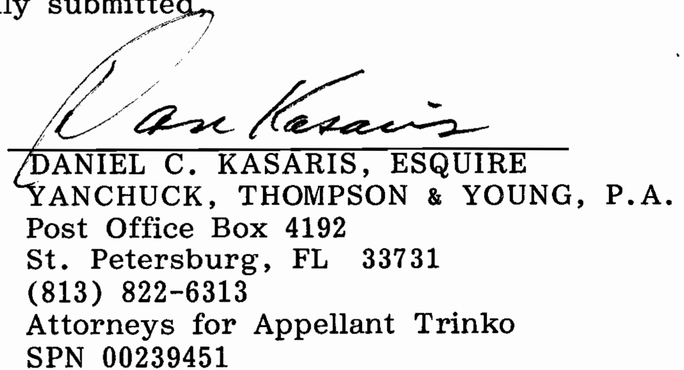
Because the instant matter can be decided as urged herein by applying Florida's law of sovereign immunity without further confusing it by creating unnecessary exceptions, the decision of the Second District Court of Appeal should be reversed.

CONCLUSION

For the reasons set forth herein, Appellants Anton Trinko and Azor J. Everton, Jr. urge this Honorable Court to quash the decision of the Honorable Second District Court of Appeal and to reverse the decision of the trial court which granted Appellees' Motion to Dismiss, with prejudice.

Respectfully submitted,





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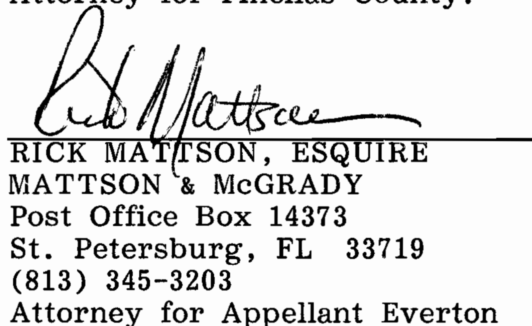
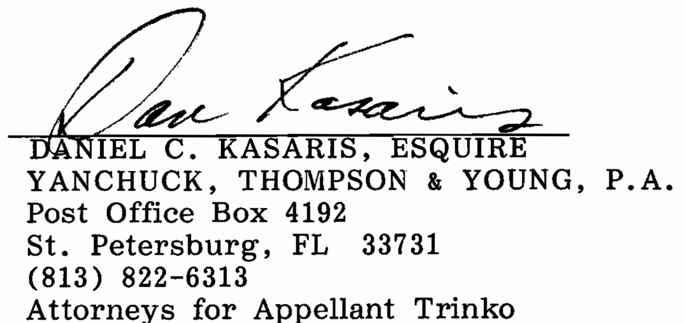
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy has been furnished this 29th day of September, 1983, to: Robert K. Hayden, Esq., 800 Court Street, Clearwater, Florida, Attorney for Willard; Mark Hungate, Esq., and James B. Thompson, Esq., Post Office Box 210, St. Petersburg, Florida, Attorneys for Sheriff's Department; and, W. Gary Dunlap, Esq., 315 Court Street, Clearwater, Florida, Attorney for Pinellas County.





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