IN THE SUPREME COURT FOR THE STATE OF FLORIDA

CASE NO: 63,440

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.

REPLY BRIEF OF APPELLANTS

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PREFATORY REMARKS

The Complaints in this matter were dismissed with prejudice by the trial court. By making such a ruling the trial court has indicated that under even the most favorable view of the facts, the Appellants could not plead a cause of action against the Appellees. The Appellants therefore included a statement of facts in the initial brief to allow the Court to determine whether any cause of action may possibly arise from those facts.

The Appellees have seen fit to include contrasting "facts" in the Answer brief. Those "facts" are not presented in a light most favorable to the Appellants and should therefore be disregarded by this Honorable Court as mere surplusage.

ARGUMENT

THE DECISION IN COMMERCIAL CARRIER WAS BASED UPON SOUND JUDICIAL REASONING AND SHOULD NOT BE ABANDONED HEREIN.

From the outset Appellees attempt to confuse the issues by characterizing the decision sued upon as a "quasi-judicial exercise of discretionary judgment." This characterization, along with the quote taken out of context from Marbury v. Madison, 1 CRANCH 137, at 170 (1803), if read literally, would hold all executive officers harmless from all wrongful acts because every decision made by such officers necessarily involves discretion. There can be no decision-making process absent some discretion to decide which alternative course of action or inaction should be followed. The proper question is whether the decision can be characterized as involving planning or policy making discretion as opposed to an operational type of discretion.

The Appellees then draw a distinction between the principle of sovereign immunity and the general duty-special duty doctrine set forth in Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967). The Appellees attempt to persuade the Court that it should revive the general duty-special duty doctrine and to thereby create an obstacle to governmental liability which is separate and apart from the principle of sovereign immunity. Thus, under the approach advocated by Appellees, a two-tiered analysis would be necessary. First, a Plaintiff would be required to show that the governmental act sued upon was the result of an operational decision. In addition, Plaintiffs would have the burden of showing that a special duty was owed to the injured party by the governmental entity in question.

This two-tiered approach suggested by Appellees is unacceptable for a number of reasons, the most compelling of which is public policy. The legislature enacted Fla. Stat. 768.28 in an effort to expand the scope of governmental liability. (Why else abolish sovereign immunity?) The Appellees' two-tiered approach would severely restrict the scope of governmental liability in that the general duty-special duty doctrine is much more restrictive than the planning-operational dichotomy. Thus, the Appellees' approach is directly contrary to public policy in that it seeks to restrict the scope of governmental liability much further than the legislature had intended.

Restrictions upon the scope of governmental liability are matters which are best left in the hands of the legislature. Indeed, the legislature has already acted in this area by limiting the amounts which may be awarded to victims of the government's torts. F. S. 768.28(5). Since the legislature has already acted to limit governmental exposure to tort damages there is no need for this Honorable Court to go further and create an additional limitation. In addition, if governmental entities desire even greater limitation of liability, they could simply purchase insurance.

Besides being contrary to public policy, the revival of the general duty-special duty doctrine would fly in the face of its severe criticism and complete abolition by this Court in Commercial Carrier v. Indian River Co., 371 So.2d 1010 (Fla. 1979). There the Court stated that "Modlin and its ancestry and progeny have have no continuing vitality subsequent to the effective date of section 768.28". Id at 1016. The Court gave a number of reasons for abandoning Modlin, including the fact that its reasoning is

circuitous in that it results in a duty to none where there is a duty to all. Id at 1015.

Further, while this Honorable Court has been a leader in clarifying the law relative to governmental liability, Appellees seek to further complicate the analysis by urging this Court to add a second tier to the approach developed in Commercial Carrier. This two-tiered analysis therefore doubles the amount of complex judicial scrutiny required and is therefore not suited for practical application. One of the main problems the Florida Courts have had with the Modlin doctrine is that it was too difficult to apply. To now compound the question of governmental liability by adding the general duty-special duty test to the operational-planning test would be simply ludicrous.

Finally, this Court should look through the distinction drawn by Appellees between the principle of sovereign immunity and the general duty-special duty doctrine. The general duty-special duty doctrine is nothing more than an outdated test to determine whether the sovereign should be held immune from suit. As this Court stated in Commercial Carrier, "...the Modlin doctrine is a function of municipal sovereign immunity and not a traditional negligence concept which has meaning apart from the governmental setting." at p. 1015. If this were not so, a drunk driver could be said to have only a general duty to all other motorists and if he injured someone he would not be held liable unless the injured party could show some special relationship to the drunk driver as well as detrimental reliance upon the drunk driver. It is therefore clear that the special duty-general duty doctrine was laid to rest in

favor of a more practical approach in Commercial Carrier, and it should not be resurrected here.

The Appellees also argue that law enforcement officers should be immune from suit by virtue of the doctrine of judicial immunity. (Ans. brief at 19) The doctrine of judicial immunity is a creature of common law which has developed separate and apart from sovereign immunity principles. 48A C.J.S. §86 et seq. In fact, the doctrine of judicial immunity was held to be unaffected by the enactment of the waiver of sovereign immunity statute. Berry v. State, 400 So.2d 80 (Fla. 4th DCA 1981). The judicial immunity protective shield also encompasses prosecuting attorneys, 79 ALR 3d 882, et seq., but has not previously been extended to protect police officers.

The purpose of judicial immunity is to preserve the integrity and independence of the judiciary and to insure that the administration of justice may be independent and based on free and unbiased convictions. 48A C.J.S. at 690. Further, a judge's errors should be corrected on appeal, rather than by an action for damages. Id. at 691.

Public policy has never favored the extension of judicial immunity to police officers. Police officers are not judicial officers, nor are they even officers of the court. Imposition of liability upon negligent police officers will have no effect upon the integrity and independence of the judiciary. Further, imposition of liability upon negligent police officers is consistent with the object of the judicial immunity doctrine in that the possibility of liability will cause police officers to be more unbiased in their law enforcement activities.

Another reason to reject Appellees' argument for extending judicial immunity to police officers is that they have never before raised such an argument in the entire course of these proceedings. It is elementary that an appellate court will not consider issues not presented in the courts below. Dover v. Worrell, 401 So.2d. 1322 (Fla. 1981).

Appellees' final arguments are directed toward the planning vs. operational dichotomy set forth in Commercial Carrier. In that regard, Appellants would rely upon the analysis set forth in the Initial Brief filed herein.

CONCLUSION

Public policy is so strong with regard to drunk drivers that even judicial discretion has been severely limited by the legislature's enactment of mandatory minimum sentences. In order for such public policy to be effectively carried out, police officers who are faced with the known danger of an intoxicated motorist should conduct a sufficient investigation to determine whether that motorist is fit to drive. Hence, when an officer confronts a motorist who drives erratically, staggers, and admits to drinking alcoholic beverages, he should routinely conduct a field sobriety test. If the officer fails to require such a test, he does so at his own peril.

According to the analysis set forth in Commercial Carrier, Deputy Parker's failure to require a field sobriety test was an operational level function. The Commercial Carrier decision was based upon sound judicial reasoning and should not be abandoned herein. Hence, Appellants urge this Honorable Court to reverse the decisions of the courts below and to remand this cause to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy has been furnished this 1st day of December, 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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