O/a 9-5-84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,268

DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

IVIA JEAN NEWSOME,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

REPLY BRIEF OF PETITIONER DEPARTMENT OF CORRECTIONS

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STATEMENT OF THE CASE AND FACTS

Respondent's statement of the facts contains a number of assertions that are not supported by the evidence. While it is recognized that because a summary judgment was entered in favor of DC, the record must reveal no genuine dispute of material fact in order for that summary judgment to be reinstated by this Court. However, this rule of appellate review certainly does not entitle Respondent to distort the evidence to create the illusion of a conflict where none exists in reality. In pointing out the following disagreements with Respondent's recital of the facts, some of which may be insignificant, Petitioner does not intend thereby to admit the materiality of the facts referred to.

Respondent states that prior to being committed to DC, Dixon had a "long history of juvenile offenses." Nowhere in the portion of the record cited (R. 80-129) is there anything to substantiate such a description of Dixon's juvenile record. No details at all of the extent or nature of Dixon's juvenile criminal history can be gleaned from the record (R. 107).

Contrary to Respondent's assertion, Dixon was not convicted of two armed robberies. Rather, one of his convictions was for robbery with a weapon (R. 120) and the other was for grand theft (R. 125-127); there was no claim of a weapon being involved in the theft (R. 123).

Respondent states as "facts" that Dixon had twice assaulted fellow inmates while on loan to DOT. These "facts" are, in reality, inferences based on flimsy evidence that do

not support such a conclusion. Respondent refers to a pair of Administrative Segregation Reports in Dixon's inmate file (R. 94, 96). What these reports reveal is that nearly a year prior to his escape Dixon was put into confinement "pending further investigation into possible charge of unarmed assault" as a result of a fight with another inmate (R. 94), and that on another occasion he was confined "pending an investigation of assault" as he had been "implicated as having been possibly involved"(R. 96).

The fact that an Administrative Segregation Report is not evidence of a determination of guilt; nor is it even evidence of an offense having been charged is further apparent from the directions on the form:

> A report of Administrative Segregation is to be completed on each inmate placed in Administrative Segregation except those cases pending action by the Disciplinary Committee in which a Disciplinary Report[1] Form DC-1 is initiated.

Consequently, Respondent's conclusion that Dixon assaulted two inmates is totally unfounded. Furthermore, there is no basis for the conclusion that the alleged assaults occurred on a DOT work crew. One report expressly states that the assault in question occurred in a dormitory (R. 96), and the other report gives no indication as to where that fight took place (R. 94).

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[1]A "Disciplinary Report" is a formal charge of a violation of an institutional rule of conduct. Fla.Admin.Code Rule 33-3.08(2)(i).

Respondent states that Joe Butler, Dixon's classification officer, recommended the reduction of Dixon's custody from medium to minimum[2]. Yet, there is no question that the decision was made by Dixon's three member classification team (R. 41, 47).

Respondent has cleverly misconstrued the record by asserting as a "fact" that HCI had a policy to not assign to DOT crews inmates convicted of violent crimes. What the record reveals, however, is something subtly, yet crucially, different. The HCI superintendent was asked whether there were any types of inmates that are almost always, and any that are definitely not, assigned to DOT (R. 217). He responded that it was their "preference to send inmates that have committed property crimes and not crimes of violence" and they would "refrain from sending, particularly, inmates with sexually related offenses out in the community" (R. Id.). The plain import of the Superintendent's answer is not, as Respondent contends, that there is a policy against putting an inmate convicted of a violent crime on a DOT detail. Rather, the Superintendent was saying that the inmates chosen first for DOT crews are those with property crimes rather than crimes of violence and that those with sex crimes are definitely not sent out on those crews. Whether an inmate who had committed a violent crime was assigned to DOT depended on the interplay of a number of factors taken into consideration by the inmate's classification team (R. 48, 59-60, 210, 217, 239-40, 243).

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[2]It is DC's position that the facts surrounding Dixon's custody reclassification are totally irrelevant here as there was no connection between that action and the assignment to a DOT crew as argued page 12, infra.

Similarly, Respondent's conclusion that is was contrary to official policy to place an inmate with DOT who had past disciplinary difficulties is based upon a misreading of an answer in a deposition of a DC official in Tallahassee. In describing the type of inmate that would be a good candidate for assignment to a DOT squad, this official stated that if an inmate had a disciplinary incident, he would not be put on a crew to work outside the institution (R. 59-60). Reading that statement in context with the rest of the record, however, it is apparent that what was meant by that statement was that if an inmate was being disciplined for having committed an infraction of the prison rules, he was not, at that time, sent out on a DOT crew. The witness clearly did not mean that a single rule violation would disqualify an inmate from being ever assigned to DOT work, as very few inmates maintain that clean of a record (R. 243). There is no hard and fast rule as to the number or frequency of disciplinary incidents which would exclude an inmate from consideration for a DOT detail (R. Id.). Institutional behavior is simply one of the many factors considered when making work assignments (R. 48, 243).

ISSUE I

WHETHER DC IS VICARIOUSLY LIABLE FOR THE ALLEGED NEGLIGENCE OF DOT IN SUPERVISING INMATES WORKING FOR DOT

Respondent argues that under Section 945.11(1), Florida Statutes (1979), DC was required to directly supervise Dixon when he was outside the confines of the correctional institution as a

laborer for DOT. Respondent's conclusion cannot be squared with the unequivocal language of the District Court of Appeal in its opinion in this case:

> We are mindful of the holding of this court in State Department of Health v. O'Neal, 400 So.2d 28 (Fla. 1st DCA 1981), ... in which we held § 945.11 was not a legislative mandate that DOC employees "directly supervise" the inmates while at the work detail.

Newsome v. Department of Transportation, 435 So.2d 887, 888 n.2 (Fla. 1st DCA 1983). No amount of strained reasoning can make that statement a rejection of the O'Neal court's conclusion as to the meaning of the supervision requirement in Section 945.11, as Respondent contends. Rather, the court reaffirmed its prior interpretation that "under supervision of" does not, in this context, mean direct supervision. In so doing, the court has approved DC's long-standing construction of the statute to permit another governmental entity to assume the immediate supervisory authority over inmates loaned to that entity for public works purposes. An agency's interpretation of a statute which it is charged with administering is "entitled to great weight" and should "not be overturned unless clearly erroneous." E.g. Fort Pierce Utilities Authority v. State Public Service Commission, 388 So.2d 1033, 1035 (Fla. 1980); State ex rel Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823, 828 (Fla. 1973). In light of the fact that the legislature has authorized DC's contract with DOT, Ch. 79-212, § 1, Item 1213A, Laws of Fla.,

and that the First District Court of Appeal has twice stated that DC complies with Section 945.11 by providing only overall administrative supervision, it is somewhat presumptuous of Respondent to urge that DC's construction of the statute is "clearly erroneous". Equally without merit, is Respondent's contention (without a single citation of authority) that DC's interpretation of the statute should not be given any weight because there is no statutory scheme which DC has been assigned the responsibility of administering and enforcing. Apparently, Respondent doesn't consider the program whereby inmates may be put to productive work on public projects to require administration of any substance. The number of persons involved and the details of the contract between DOT and DC on the subject (R. 30-38) belie any such suggestion.

Since Section 945.11 does not mandate DC's direct supervision of inmate laborers on public works, the only way DC can be liable for any negligence in the immediate supervision of Dixon is if DOT is deemed to have been DC's agent or if DC had a statutorily imposed "definite obligation" to handle the direct supervision, under the rationale of Mastrandrea v. J. Mann, Inc., 128 So.2d 146 (Fla. 3rd DCA) cert. denied 133 So.2d 320 (Fla. 1961). Respondent implies that this Court should not consider the applicability of the legal theory espoused in Mastrandrea to the case at bar because DC never claimed below that DOT was its independent contractor. It is true, DC did not make such an allegation, nor is DC asserting that here.

It is DC's position that DOT is the "employer" as a consequence of the contract for inmate labor. Furthermore, apparently Respondent is confused as to pleading requirements. It was not Defendant DC's burden to affirmatively allege, or otherwise argue, that Defendant DOT was not its employee. Respondent, as Plaintiff below, had the burden of alleging that DOT was DC's agent, if that was her contention. She did not do so. Having failed to make that claim to the trial court, Respondent should not be heard to argue it here. See, E.g., Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). On the other hand, Petitioner is free to present any points in support of the judgment appealed from, regardless of whether or not they were considered below. See, E.g., Applegate v. Barnett Bank, 377 So.2d 1150 (Fla. 1979).

If the Court chooses to consider Respondent's argument that DOT was DC's agent, it should nevertheless be rejected as Respondent's reasoning was faulty. If the purpose of the contract between DOT and DC had been to provide security guards for inmates, then Respondent would be correct that the question before the Court would be whether DOT was an independent contractor or an employee of DC. However, that was not the situation. The purpose of the contract was "to provide meaningful work for DC inmates to the extent practical, provide a portion of the labor force required for the DOT to carry out its maintenance activities throughout the state"(R. 30). It was simply one of the conditions of that contract that DOT would assume custodial responsibility for the inmates while they were outside the institution (R. 31). By delegating

this custodial duty to DOT, DC did not become DOT's employer. A hypothetical might help to better illuminate this point: Assume an entertainment company contracted with a performing arts school to obtain students for use in a theatre production during regular school hours and the school conditioned the contract on the company assuming responsibility for the safety of the students. Would the school then be considered the employer and the theatre company either an employee or an independent contractor of the school because the school had temporarily delegated to the company its duty to care for the children? We think not. In that situation, it would be the company which would have the status of employer and the school would be either an employee or an independent contractor. DC, here, is like the school in the hypothetical, and DOT, like the entertainment company, was the employer.

Having determined that DOT was not DC's employee, and, therefore, that respondeat superior is inapplicable, if it is determined that DC's duty to directly supervise inmates was delegable, under Mastrandrea, then there is no basis on which to hold DC vicariously liable. Respondent bootstraps her argument that Section 945.11 imposes the necessary "definite obligation" to make the duty "nondelegable" onto her position that the statute mandates direct supervision by DC. In logic, if Respondent's mandatory duty argument fails, so goes her contention that the duty was nondelegable. As previously discussed, the statute has been construed by the First District Court of Appeal in O'Neal and Newsome to only require general administrative, not direct, supervision by DC employees.

Since the statute has been construed in this manner it is difficult to follow Respondent's reasoning that it, nevertheless, imparts to DC a "definite obligation" to personally handle the function of immediate custody.

There is certainly nothing in the legislative history to indicate that it was intended that the ultimate responsibility for on site custodial care remain with DC. To the contrary, the 1978 and 1979 appropriations acts and the statutes authorizing DOT's use of inmates are indicative of the legislative confidence in DOT's ability to handle that role. Ch. 78-401, § 1, Items 1209A & B, Laws of Fla.; Ch. 79-212, § 1, Item 1213A, Laws of Fla.; § 344.171(3), Fla. Stat. (1983); § 337.11(3), Fla. Stat. (1983); § 958.09(4), Fla. Stat. (1983).

Furthermore, the important policy reasons present in the Mastrandrea case for deeming the duty in question there to be nondelegable do not exist here. Holding the general contractor in Mastrandrea ultimately responsible for compliance with the building code served the public purposes of preventing the circumvention of the code requirements and of ensuring the availability of resources for the payment of any fine or judgment arising out of a violation. In contrast, there is nothing to be gained by making DC vicariously liable for the negligence of DOT. Imposing vicarious liability certainly would not be an efficient manner of ensuring that inmates are properly supervised on the crews. Inasmuch as there are two state agencies involved, the problem of improper supervision (if it exists) could be directly addressed by legislation. Additionally, DOT is, of course, just as capable of paying any

potential judgment as DC is, and the money would come from the same pot, the State treasury, regardless of whether or not DC has vicarious liability.

Respondent makes a somewhat hysterical policy argument that if the duty to directly supervise inmates is deemed to be delegable in this situation it could set a precedent whereby havoc could ensue by agencies shifting their responsibilities to other agencies unequipped for the tasks. This imaginative scenario fails to take into account the obvious -- that the delegation of responsibility in the instant case has been expressly authorized by statute. Respondent's disagreement with the wisdom of that authorization by the legislature is not a proper basis for keeping DC in this suit.

Finally, despite the plain words of Section 958.09(4), Florida Statutes (1979) that DC could "contract with other public ... agencies for the ... community supervision of youthful offenders," Respondent disputes that the statute authorized DC's delegation of direct supervision of Dixon to DOT. There is certainly no legal basis for Respondent's argument that Section 958.09(4) did not authorize DC's action because at the time DC entered into the contract DC did not "intend" to be exercising its power under that statute. It would seem to be self evident that the law has effect without regard of the parties' intentions. Respondent is also in error in equating the "community supervision" of Section 958.09(4) with the "community control program" of Section 958.10, Florida Statutes (1979). The fact that the provision for "community supervision"

is included in the statute entitled "extension of limits of confinement," § 958.09, Fla. Stat. (1979), rather than in one of the statutes having "community control program" in its title, §§ 958.08, 958.10, 958.15, Fla. Stat. (1979), is evidence that the terms are not interchangeable. Unlike the community control program which is a form of parole governed by court sentence, there are no express restrictions on DC's use of "community supervision." Therefore, Section 958.10 is additional authority for DOT's assumption of custody of Dixon.

ISSUE II

WHETHER THE DECISION TO ASSIGN INMATE DIXON TO A DOT CREW WAS AN IMMUNE PLANNING LEVEL FUNCTION

Although Respondent goes on to argue that the assignment of Dixon to a DOT crew was not an immune function, on page 11 of its Brief on the Merits,Respondent states that if DC did not breach a statutorily imposed duty "then the DOC breached no duty--and, because there can be no liability absent the breach of a duty, the DOC cannot be liable to Ms. Newsome (whether it is immune from suit or not). The propriety of the District Court's conclusion in this case must therefore stand or fall solely upon the propriety of its reading of §945.11." This argument appears to be an express abandonment of Respondent's position that her assault was caused by DC's negligence in putting Dixon on the DOT squad. Based on this waiver, if the Court agrees with DC's position that it did not have a statutory obligation to directly supervise Dixon, then DC is entitled to have its summary judgment reinstated, without further review of the sovereign immunity

issue. If Respondent is correct in her interpretation of Section 945.11, the Court should, nevertheless, decide the sovereign immunity question, as the trial court's ruling would, nevertheless, constitute a partial summary judgment.

Respondent's argument that the decision to assign Dixon to DOT was not immune is based in large measure on the contention that DC did not follow its own policies in making the assignment. As previously noted in the statement of facts, contrary to Respondent's assertion, Dixon's placement did not violate any established policies. Respondent points out numerous alleged technical irregularities in the process by which Dixon's custody was reduced from medium to minimum. The Court should not be taken in by this ploy to cloud the issues. The manner in which Dixon's custody classification was changed to minimum has absolutely no relevance to this suit. First of all, the issue of the connection between the custody reduction and the DOT assignment and the issue of the failure to promulgate classification rules were not raised at the trial court level. Having been raised for the first time on appeal, these issues should not be considered by this Court. Dober v. Worrell, supra. Furthermore, Respondent's claim that the record supports an inference that the DOT assignment was connected to the custody reduction is nothing more than wishful thinking. A minimum custody classification was not a prerequisite for DOT squad eligibility (R. 33, 162). As Respondent recognizes, Dixon himself worked for DOT while he was medium custody (R. 40, 94, 96). Nor was being classified minimum custody an assurance of placement with DOT, as only 28 out of the 378 inmates at HCI, most of whom are

minimum custody, work on DOT crews (R. 37, 58, 217). Since it cannot be said that but for being minimum custody, Dixon would not have been put on the DOT crew, the Court should decline Respondent's invitation to focus on the details of the change in Dixon's custody.

The primary thrust of Respondent's argument on sovereign immunity is that the assignment of Dixon to a DOT crew was operational in nature as it may not have been a "considered decision" under Bellavance v. State, 390 So.2d 422 (Fla. 1st DCA 1980), review denied, 399 So.2d 1145 (Fla. 1981). With all due respect to the First District Court of Appeal, it is DC's position that the decisions in Bellavance and Smith v. Department of Corrections, 432 So.2d 1338 (Fla. 1st DCA 1983) were wrong in that the analysis was not consistant with Evangelical United Brethren Church v. State, 407 P.2d 440 (Wash. 1965) adopted by this Court in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). As Judge Booth's dissent in Bellavance makes evident, there is simply no way to distinguish that case from Evangelical, and the Smith decision falls in the same category. Bellavance and Smith rely on the analysis used in Johnson v. State, 447 P.2d 352 (Cal. 1968), which held that in claiming sovereign immunity a state agency would have to prove that it reached a considered decision, by consciously balancing all the relevant factors. Id. at 361 n.8. This "considered decision" requirement would have the effect of eliminating the possibility of summary judgment as such facts would inevitably be in dispute. This is clearly not the law in this state where numerous cases have been decided on the basis of sovereign immunity by way of motion to dismiss or sovereign immunity.

See, E.g., Harrison v. Escambia County School Board, 434 So.2d 316 (Fla. 1983).

Respondent's contention that sovereign immunity doesn't apply because of this case falls within the "known dangerous condition" exception Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1950), and its progeny, also cannot withstand scrutiny. The complaint did not contain an allegation of a failure to warn of a known dangerous condition (R. 1-2), therefore the argument fails on that ground alone. In the Harrison decision, this court left no doubt that a plaintiff is required to plead specific facts demonstrating that a known dangerous condition was created; vague generalities won't do. The complaint and the record in this case are utterly devoid of any facts that would constitute such a showing. Respondent's argument on this point confuses a known danger with a forseeable danger. They are not one and the same. A "known" danger is, by definition, one that is forseeable. However it does not follow that any danger which is forseeable is therefore "known". The example of the highway curve given in Neilson demonstrates a situation where there is a forseeable risk of injury from a condition -- the curve; yet, the curve's existance, without more, would not constitute a known dangerous condition. The record in this case may contain sufficient evidence on which to go to a jury on the question of forseeability, but there is no basis for a finding of a known dangerous condition.

CONCLUSION

Based on the foregoing arguments and authorities in addition to those appearing in DC's initial brief, DC prays that the summary judgment entered by the trial court in DC's favor be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JOEL D. EATON, Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Suite 1201, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130-1780 and WAGNER, CUNNINGHAM, et al., 708 Jackson Street, Tampa, Florida 33602 this 26th day of June, 1984.

PAMELA LUTTON-SHIELDS