w/o o/a

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 2 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION,

Petitioner,

vs.

PATRICIA L. BRYAN, as personal representative for DAVID BRYAN, Deceased,

Respondent.

CASE NO. 64,464

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The Petitioner, Department of Business Regulation, Appellee in the District Court of Appeal, and Defendant in the trial court, will be referred to as DBR or Petitioner. Respondent, Patricia L. Bryan, Appellant in the District Court of Appeal, Plaintiff in the trial court, will be referred to as Bryan, Respondent or Plaintiff.

POINT I

DBR ENJOYS SOVEREIGN IMMUNITY IN THIS CASE

Bryan, in her answer brief, relies on the opinion, below, and does little to counter the argument made in DBR's Initial Brief. Bryan simply argues that the First District was correct because its opinion was bottomed on an application of this Court's decision in Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979), and because of its "common-sense" approach to construction of the Elevator Law. Given the obvious state of flux in which the law of sovereign immunity finds itself at the moment in Florida the tack Bryan takes in this case in her brief is exceedingly narrow. More damaging to Bryan's position is that the First District's application of Commercial Carrier and its construction of the Elevator Law have been seriously undermined, if not destroyed, by the United States Supreme Court's most recent decision on the immunity issue: United States v. S. A. Empresa de Viacao Area Rio Grandense (Varig Airlines), 52 U.S.L.W. 4833 (June 19, 1984).

Before addressing the light the U. S. Supreme Court's decision sheds on the issue, DBR stands on its Initial Brief as to the following points: The First District failed to conduct further inquiry after answering the four questions of the Commercial Carrier test. Such an inquiry may have led to different results. See Bellevance v. State, 390 So.2d 422,

424 (Fla. 1st DCA 1980). This case does involve the exercise of the state's police power. It is hornbook law that police power is the sovereign right of the state to enact laws for the protection of lives, health, morals, comfort and general welfare. Burnsed v. Seaboard Coastline Railroad Co., 290 So.2d 13 (Fla. 1974). Plainly, the enactment of the Elevator Law constitutes exercise of the police power and it cannot be seriously argued otherwise. Therefore, the three cases with which the opinion below conflicts point the way to reversal of the First District in this case, Huhn v. Dixie Insurance Company, ___ So.2d ____, (Fla. 5th DCA, May 17, 1984), notwithstanding. The three cases are Neumann v. Davis Water and Waste, Inc., 433 So.2d 559 (Fla. 2nd DCA 1983); Everton v. Willard, 426 So.2d 996 (Fla. 2nd DCA 1983); and, Carter v. City of Stuart, 433 So.2d 669 (Fla. 4th DCA 1983). Just as in these three cases the state agents, be they police officers, dog catchers or elevator inspectors, must exercise judgment and discretion when called upon to exercise police power in the making of an enforcement decision. It is this type of judgment that was used by the building inspector in Trianon Park v. City of Hialeah, 423 So.2d 911 (Fla. 2rd DCA 1983). If the Court reverses Trianon it should reverse Bryan.

The position of DBR that the elevator inspector's enforcement decision involves discretionary judgment and is therefore immune governmental activity has been strengthened

immeasurably by Varig Airlines. In Varig the U. S. Court of Appeals for the Ninth Circuit had "viewed the inspection of aircraft for compliance with air safety regulations as a function not entailing the sort of policymaking discretion contemplated by the discretionary function exception [to the Federal Tort Claims Act, authorizing certain suits in tort against the federal government.]" 52 U.S.L.W. 4834. The Supreme Court, however, disagreed.

The Court analyzed Dalehite v. United States, 346 U.S. 15 (1953), a decision used by this Court in Commercial Carrier, above, at 1021, to aid in the distinguishment of discretionary and non-discretionary activities. The Court in Varig stated it is the nature of the conduct rather than the status of rank of the actor that governs whether the act is immune. 52 U.S.L.W 4837. Thus it does not matter that the elevator inspector is at the bottom of the totem pole in enforcement of the elevator law. What counts is that his decision to initiate the enforcement process is a discretionary act involving judgment. In Varig the Court stated in this respect, "[W]hatever else the discretionary function may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." Id.

In Varig the U. S. Supreme Court construed congressional intent in enacting the discretionary function exception

to the Federal Tort Claims Act. In this case and the other sovereign immunity cases beginning with Commercial Carrier, this Court has been faced with delineating a constitutional exception, based on separation of powers, to the legislature's waiver of sovereign immunity in Section 768.28, Florida Statutes.*

In either case the bottom line rationale is the same and it is one that goes to the heart of government. "It is neither desireable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort." Varig, 52 U.S.L.W. at 4836, quoting from a statement of Assistant Attorney General Francis M. Shea, Hearings on H.R. 5373, and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 28, 33 (1942). Congress enacted the discretionary function exception to protect the Government from liability that would seriously handicap effecient government operations. This Court should no less now. Just as the federal government should be immune from suit for judgmental enforcement decisions made by federal

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* The Supreme Court points out that had Congress not enacted the discretionary exception, it was believed it would have been created by judicial construction. United States v. S. A. Empresa de Viacao Area Rio Grandense (Varig Airlines), 52 U.S.L.W 4833, at 4836 (June 19, 1984).

inspectors of airlines for compliance with air safety requlations so should DBR be immune from suit for judgmental enforcement decisions made by state inspectors of elevators for compliance with the Elevator Safety Code. The First District should be reversed.

POINT II

THE FIRST DISTRICT ERRED IN REVERSING THE TRIAL COURT'S DISMISSAL OF THE AMENDED COMPLAINT.

Bryan's argument in Point II of her answer brief, that she should have been allowed to once again amend her complaint, is not responsive to Point II in DBR's initial brief. Nor did the First District address the issue since it ruled that the Amended Complaint was sufficient to state a cause of action. Bryan addresses most of DBR's Point II argument in Point I of her answer brief by arguing that the First District was correct in holding DBR is under a duty to ensure elevator safety.

DBR continues to stand by its argument in Point II of the initial brief that DBR, while required to inspect elevators, is under no duty to ensure elevator safety. Again the recent U. S. Supreme Court in Varig Airlines is illuminating.

In Varig the Court stressed that in the Federal Aviation Act of 1958 Congress directed the Secretary of Transportation to promote the safety of civil aircraft. This promotion was to take two routes: one, the establishment of minimum standards for manufacturers and, two, the discretionary promulgation of rules for inspections. "Congress emphasized, however, that air carriers themselves retained certain responsibilities to promote [public air safety]" Varig, 52 U.S.L.W. at 4835.

The analogy is clear. Nowhere in Chapter 599, Florida Statutes, (1979), the Elevator Law, does the Florida Legislature declare DBR to be the ensurer of elevator safety. Instead,

it expressly leaves that duty to the owner of the elevator or his agent. "The owner or his duly appointed agent shall be responsible for the safe operation and proper maintenance of the elevator . . . after it has been approved by the division and placed in service." Section 399.01(6)(b), F.S. (1979).

Just as in Varig the governmental entity is required only to promote safety in a field regulated by the entity. It is not the ensurer of safety. The trial court was correct in dismissing the Amended Complaint for failure to state a cause of action. The First District should be reversed if this Court finds it necessary to reach the issue of the sufficiency of the Amended Complaint.

CONCLUSION

The Department of Business Regulation enjoys sovereign immunity in this case. For this reason the First District should be reversed. If this Court affirms the First District on the immunity issue, the First District should be reversed, nonetheless, because the Amended Complaint failed to state a cause of action in negligence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner was furnished by U. S. Mail to the following attorneys of record this 29th day of June, 1984.

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