B-5

IN THE SUPREME COURT OF FLORIDA

CITY OF DAYTONA BEACH,
a municipal corporation,

Petitioner,

vs. CASE NO. 64,773

HELEN B. PALMER, as
Personal Representative of
the Estate of William
Gregory Palmer, Jr., deceased,

Respondent.

FILED
SID J. WHITE
MAR 8 1984
CLERK, SUPREME COURT
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RESPONDENT'S INITIAL BRIEF
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An appeal from the District Court of Appeal
Fifth District of Florida
Case Number 83-416

FRED S. DISSELKOEN, JR., ESQ.
DUFFETT, SEPS AND AKERS
120 East Granada Boulevard
Post Office Box 2633
Ormond Beach, FL 32074
904-672-0420
ATTORNEYS FOR RESPONDENT

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PREFACE

The Respondent, HELEN B. PALMER, as Personal Representative of the Estate of William Gregory Palmer, Jr., Deceased, will be referred to herein as "Palmer."

The Petitioner, CITY OF DAYTONA BEACH, will be referred to herein as "the City."

The Amicus Curiae, FLORIDA LEAGUE OF CITIES, INC., will be referred to herein as "the League."

STATEMENT OF THE CASE AND OF THE FACTS

On September 12, 1981, a fire broke out in the building within which Palmer leased office space. As a result of that fire, virtually all of Palmer's office equipment, library and professional records were destroyed. Palmer v. City of Daytona Beach, 443 So.2d 371 (Fla. 5th DCA 1983).

Palmer filed suit against the City on July 29, 1982, to which a motion to dismiss was filed and granted. Palmer then filed an Amended Complaint alleging, inter alia:

(a) a duty on the City to extinguish the fire, while minimizing property damage;

(b) a failure to comply with standard firefighting practices;

(c) a failure on the part of the City's platoon commander to exercise proper decision making and supervisory skills;

(d) causal relationship;

(e) resulting damages.

This Amended Complaint was dismissed, with prejudice, by the trial court on March 1, 1983.

Palmer appealed to the Fifth District Court of Appeal, which Court reversed the dismissal, Palmer, supra, but certified to this honorable Court the question: can a city

be held liable in tort to a property owner for damages caused by the negligent acts of the city's firefighters in combating a fire? 443 So.2d at 372.

Based thereupon, the City has taken this appeal.

ARGUMENT

POINT: A CITY CAN BE HELD LIABLE IN TORT TO A PROPERTY OWNER FOR DAMAGES CAUSED BY THE NEGLIGENT ACTS OF THE CITY'S FIREFIGHTERS IN COMBATING A FIRE

Fire!

Having left the room, you return to find that the grease in the frying pan in which your freshly-caught fish are frying has ignited. Promptly you dial "911" and your city fire department dispatches a firefighting crew to your home. Into your home they charge, dragging with them a high-pressure fire hose which they turn on the raging grease fire. Naturally, this does nothing but scatter the flames since a grease fire should be smothered, you remember from high school. After the last embers of your half-destroyed home are eternally doused, the crew offers its deepest apologies for the error, rolls up the hose and returns to the fire house. You sadly call a contractor and your insurance agent, hoping your loss is covered. Then, you think, I'll call my lawyer, too, because maybe I can sue the city for the error.

Can you? Yes-provided that this honorable Court agrees with the Fifth District Court of Appeal opinion in Palmer v. City of Daytona Beach, 443 So.2d 371 (Fla. 5th DCA 1983), and answers the certified question with a resounding yes.

The foregoing is merely one example of the situations

from which the City seeks insulation from liability. This, Palmer strongly believes, is an insulation warranted neither by law nor by justice. If a city's firefighters do not follow standard practices in fighting a fire, why should the city be able to hide behind the shield of sovereign immunity and let the innocent property owner suffer the consequences?

In the case at bar, Palmer has lost ".... virtually all of his office equipment, library and professional records." 443 So.2d at 371. The loss was caused by the City's breach of standard firefighting practices. Id. We agree with the League that this case is one of first impression in this Court.

The City and the League essentially set forth three positions as their support for a negative response to the certified question - the lack of a duty to Palmer, the "parallel function doctrine," and the theory of firefighting as a "planning/discretionary" function. Palmer will deal with those positions in the order just set forth.

I. Duty owned to Palmer

In order to say that the City had no duty to exercise reasonable care with respect to Palmer's property, both the City and the League delve well back into Florida's legal history.

The League goes back to City of Miami v. Oates, 152

Fla. 21, 10 So.2d 721 (1942), a case dealing with the old governmental-corporate dichotomy. Therein, this Court found to be corporate functions - and thus subject to liability - all those which specifically and peculiarly promote the safety of the citizens. 10 So.2d at 723. Thus Palmer believes, contrary to the League's position, that firefighting was meant to be included within the "corporate" functions and the city thereby subject to liability for its negligent performance.

We are taken back to Steinhardt v. Town of North Bay Village, 132 So.2d 764 (Fla.3d DCA 1961), by the City. Somehow, the City sees great significance in Steinhardt and and identity with the case at bar. Perhaps we need new glasses, but this writer fails to see the comparison. Palmer is clearly asserting negligence in firefighting on the part of the City's firefighting employees. No person disputes that assertion. Chief Judge Pearson, in Steinhardt, however, stated without equivocation that the plaintiffs therein did not "... complain of the negligence of a municipal employee but of the failure to properly provide a city service." 132 So.2d at 767. Thus ends the similarity with Palmer's case!

From Steinhardt, the City takes the natural leap to Wong v. City of Miami, 237 So.2d 132 (Fla. 1970). We say natural, because this also is a case dealing with an allegation of failure to properly provide a city service, police

protection in a riot situation in Wong. Therefore, to have consistency with Steinhardt, this Court in 1970 found no liability upon Miami. Neither of the cases deal with an employee's negligence as does the case at bar.

The City argues that it has no duty to exercise reasonable care in providing fire protection under Wong. That is true to the point of deciding where to station firefighters, how many trucks to dispatch to a fire, etc. That does not, under any stretch of the imagination, extend to saying that once the attack on the fire is under way, no standard of reasonable care attaches.

It appears that the City and the League would have this Court say that the duty owed, if any at all, is solely to the general public and not to Palmer. This type of theory is characterized by some, this Court noted in Commercial Carrier Corp. v. Indian River Cty., 371 So.2d 1010, 1015 (Fla. 1979), as resulting in a duty to none when there is a duty to all. Thereafter this Court rejected that theory.

The Fourth District, in its opinion in Manors of Inverrary XII v. Atreco-Florida, 438 So.2d 490 (Fla. 4th DCA 1983) cited with favor to the Washington case of Georges v. Tudor, 16 Wash.App. 407, 556 P.2d 564 (Wash.App. 1976). Therein, tort liability was premised upon an existing or developed relationship between the injured party and the city

employees. The Manors court also referred to J & B Development Co. v. King County, 29 Wash. App. 942, 631 P.2d 1002 (Wash. App. 1981), the latter which opinion stated that "[a] duty owed to the public generally is also a duty owed to individual members of the public." 631 P.2d at 1008.

We agree with the City that its firefighters did not have a duty to protect Palmer from all hazards. But we feel the law is in support of the idea that it had a duty to do its job right when it arrived at the scene of this and every other fire.

II. Parallel Function Doctrine

Leaving duty, the City and the League next argue that the City has no liability because

1. Fla.Stat. § 768.28(1)(1983) waives immunity under circumstances in which a private person would be liable, and

2. there is no parallel for firefighting under which a private person would be liable.

We respectfully differ.

First of all, we believe the Florida Legislature intended the City's firefighters to be included within the scope of the waiver statute. Our reasoning is based on the fact that Fla. Stat. § 768.28(9)(b)(1983) states that volunteer firefighters are to be deemed "employees" in Fla.Stat. § 768.28(9)(a)(1983). Are we not on solid ground to then say that nonvoluteer,

full-time municipal firefighters are also "employees" for whose negligent acts sovereign immunity is waived? We think so.

Secondly, we feel that there is a firefighting parallel in private enterprise. The two primary cases of the City and the League are Chandler Supply Co. v. City of Boise, 660 P.2d 1323 (Idaho 1983) and Dalehite v. U.S., 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953).

As to Chandler, we simply agree with the dissent of Chief Justice Donaldson. Neither he, nor we, see any plausible reason to accord immunity to an activity which could conceivably be performed by a private entity. As an example of private firefighting entities, we mention those at major speedways and airports.

As to Dalehite, it has been rejected by the United States Supreme Court in both Indian Towing Co. v. U.S. 350 U.S. 61, 100 L.Ed. 48, 76 S.Ct. 122 (1955) and Rayonier, Inc. v. U.S., 352 U.S. 315, 1 L.Ed.2d 354, 77 S.Ct. 374 (1957). Both of these cases interpret the Federal Tort Claims Act, which is almost identical to the Florida act with respect to the language under consideration. Commercial Carrier Corp. v. Indian River Cty., 371 So.2d 1010, 1016 (Fla. 1979).

Of particular significance is the Rayonier opinion, because it dealt with alleged negligent firefighting. The

bottom line of the holding is that the Government was "....liable to petitioners for the Forest Service's negligence in fighting the forest fire ...." 352 U.S. at 318. The only thing remaining was a determination of Washington law.

Certainly, then, private firefighting is a possibility at major events, etc., negligence in which would subject the provider to liability. The same should be, and is, true of municipal firefighters.

III. Planning/Discretionary Function

Finally, the City and the League argue that firefighting is a discretionary function within the Commercial Carrier Corp., supra, test. Hardly.

A. Does the challenged act necessarily involve a basic governmental policy, program or objective?

Yes, it does - firefighting.

B. Is the questioned act 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?

No, it does not. There is no way that one fire is going to change a whole fire department's course.

C. Does the act require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

We do not believe it does.

Oh, do we ever hear the cries, however!

It's not fair to second guess!

What are standard firefighting practices?

The primary purpose is to stop the fire from spreading further.

Enough!

To answer the certified question in the affirmative does not require second guessing of firefighters. We are only saying that in any fire setting, there are some choices available which are valid tactics and others which are not. Only if the latter is chosen would there be liability. If the bases are loaded, you can play for the man at the plate or go for a double play, but you sure do not issue an intentional base on balls!

As to what are standard practices, we submit they are what is taught in the 240-hour course required by Fla.Stat. § 633.35(1)(1983), which all firefighters must take if they want to work for more than one year. Fla.Stat. § 633.35(2)(1983).

To say that the primary purpose of a firefighter is to keep a fire from spreading is not only ludicrous, it is illegal. To say that if you try to save one property you endanger all does not make good common sense. But we do

know what the primary responsibility of a firefighter is. That responsibility is

1. the prevention and extinguishment of fires;

2. the protection of life and property;

3. the enforcement of ... fire prevention codes ...

Fla.Stat. § 633.30(1)(1983).

Thus there is no policy judgment to carry out. A firefighter simply carries out his statutory duty in accordance with required training. If he fails to do so, liability attaches.

D. Does the governmental agency involved possess the requisite constitutional, statutory or lawful authority to make the challenged act?

Yes, it does.

With the test of Commercial Carrier supporting liability, we believe four recent cases support that position.

In Weissberg v. City of Miami Beach, 383 So.2d 1158 (Fla. 3d DCA 1980), there was actionable negligence for a police officer's direction of traffic.

Building inspections were the basis for actionable negligence in Trianon Park Condominium v. City of Hialeah, 423 So.2d 911 (Fla. 3d DCA 1983) and Manors of Inverrary XII v. Atreco-Florida, (Fla. 4th DCA 1983).

Certainly, firefighting is important to a city. So is

the inspection of buildings and the direction of traffic. For any of these activities, a standard of care should be imposed, for without it, who protects the public? Why train firefighters if they can disregard their training with no thought for the consequences? Liability, we respectfully suggest, will give much thought for the consequences and result in better, more efficient service to the taxpayers.

> ...[T]he appropriate standard of care (for firefighters) is the same standard of care applied in the cases of policemen, engineers, architects, deputy sheriffs, attorneys and others engaged in professions requiring the exercise of technical skill. The test is whether he performed his service in accordance with the skill usually exercised by others in his profession in the same general area.
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> Am. Employers Ins. v. Honeycutt Furniture Co., 390 So.2d 255, 261 (La. App. 1980).

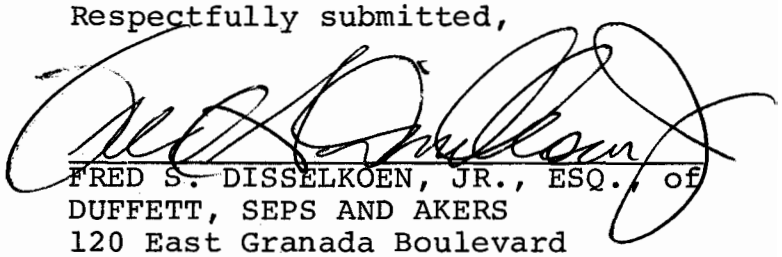
As to the fears of bankruptcy, there lies the statutory limit of liability as well as the availability of insurance. If the whole burden of a loss caused by the negligence of a firefighter were to fall on the innocent taxpayer, it may leave him destitute or grievously harmed. Rayonier, supra, 352 U.S. at 320.

Thus it is Palmer's firm belief that the existing law, as well as justice itself, requires an affirmative answer to the question certified to this honorable Court.

CONCLUSION

This honorable Court should answer the question certified to it in the affirmative.

Respectfully submitted,



FRED S. DISSELKOEN, JR., ESQ., of
DUFFETT, SEPS AND AKERS
120 East Granada Boulevard
Post Office Box 2633
Ormond Beach, FL 32074
904-672-0420
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Alfred A. Green, Jr., Esq., P.O. Box 5566, Daytona Beach, FL 32018; to Frank B. Gummey, III, Esq., P.O. Box 551, Daytona Beach, FL 32015; to James R. Wolf, Esq., General Counsel, and to Harry Morrison, Jr., Esq., Assistant General Counsel, Florida League of Cities, Inc., P.O. Box 1757, Tallahassee, FL 32303, this 7th day of March, 1984.

ATTORNEY