IN THE SUPREME COURT OF FLORIDA

CITY OF DAYTONA BEACH, a municipal corporation,

Petitioner,

vs.

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

Respondent.

CASE NO. 64-773

D.C.A. CASE NO. 83-416

# REPLY BRIEF OF PETITIONER ON THE MERITS

ALFRED A. GREEN, JR., ESQUIRE
Post Office Box 5566
Daytona Beach, Florida 32018

FRANK B. GUMMEY, III, ESQUIRE
Post Office Box 551
Daytona Beach, Florida 32015

Attorneys for Petitioner City of Daytona Beach

# I N D E X

## C A S E S  C I T E D



## S T A T U T E S  C I T E D

## ARGUMENT

In the first paragraph of her Brief, Palmer describes a situation wherein a property owner sustains damage by reason of flagrant negligence on the part of city firefighters. Palmer then queries:

> "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?"

The reasons why there can be no recovery in Palmer's worst-case scenario may be found in Florida Statute 768.28 and Florida appellate decisions both before and after the enactment thereof.

When the Legislature enacted Florida Statute 768.28 it intended to waive sovereign immunity of municipalities for liability of torts, but only to the extent specified in the act. There is nothing in this statute which imposes tort liability where none existed prior to its enactment. Therefore, it is appropriate to consider appellate decisions in Florida and elsewhere to determine whether there is any common law liability under the facts of our case.

The only Florida case which either of the parties hereto have been able to bring to the attention of this Court involving the liability of firefighters is Steinhardt v. Town of North Bay Village[1] wherein plaintiffs claim to have sustained damage by reason of negligence on the part of city firefighters in fighting a fire. The trial judge found "that the Complaint failed to state a cause of action because a municipality is not liable for a tort arising out of the insufficient manner in which its fire department proceeds in fighting

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1. Steinhardt v. Town of North Bay Village, Fla., 132 So. 2d 764

fire." (Underlining ours.)

In her Brief, Palmer says that this case does not apply, but we believe that it does. In support of this belief we quote to this Court the following language in the Steinhardt decision:

> "it is not alleged that the city has failed to provide a fire department; rather, it is urged that it provided an ineffective one insofar as the needs of the plaintiffs were to be met." (Underlining ours.)

We leave it to this Court to decide whether or not this language applies to the instant case.

We also refer this Court once again to the decision of the Third District Court of Appeal in Wong v. City of Miami[2] wherein it was held:

> "At common law, governmental unit has no responsibility for damage inflicted upon its citizens or property as a result of riot or unlawful assembly.
>
> Common law in Florida has not been abrogated by any statute." (Underlining ours.)

This decision, which was affirmed by this Court, is all the authority necessary to establish that there can be no liability for negligence on the part of city firefighters unless there was liability at common law.

We have cited in our Brief decisions from the States of Delaware, Idaho, and Indiana all of which hold that there is no liability on the part of a municipality for negligence on the part of its firefighters. These decisions are consistent with Steinhardt, the only Florida decision involving this question. No good reason is given in Palmer's Brief as to why the rationale and holding of these decisions

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2. Wong v. City of Miami, Fla., 229 So. 2d 659

should not be applied to the facts of the instant case.

The waiver of immunity provided for in Florida Statute 768.28 is not absolute. On the contrary, said statute provides that there should not be liability on the part of the state unless a private person would be liable to the claimant in accordance with the general laws of the state. This is the so-called "parallel function doctrine."

Palmer attempts to escape the effect of this language in the statute by quoting language therein relating to volunteer firefighters. What this has to do with the facts of the instant case we can not understand. Florida Statute 768.28(9)(b) has to do only with limitation of liability of State employees to actions in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. This section of the statute has nothing whatsoever to do with the waiver of immunity contained in §768.28(1) of this statute.

Palmer also chooses to ignore Chandler Supply Co. v. City of Boise[3] and Delehite v. United States[4] both of which are directly in point.

As to Chandler, it is not enough to simply agree with a dissent. The facts in Chandler are very similar to those in the instant case and we submit this decision should be followed.

Also, we can not agree with Palmer that the hiring of firefighting entities at a major speedway and airport is evidence of a "firefighting parallel in private enterprise." If this were so, the hiring of security guards by malls and industrial plants would be parallel to

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3. Chandler Supply Co. v. City of Boise, 660 P. 2d 1323 (Idaho 1983)
4. Delehite v. United States, 346 U.S. 15, 97 L.Ed. 1427, 73 S. Ct. 956 (1953)

police protection provided by agencies of the state. This contention makes no sense whatsoever.

As to Delehite, the United States Supreme Court specifically said in this decision that the normal rule is "an alleged failure or carelessness of public firemen does not create private actionable rights." This is clear enough and the cases cited by Palmer in her Brief do not refute the effect thereof.

The truth is that the thrust of Palmer's argument is that it would be unfair for her to sustain her own loss where such loss was caused by the negligence of city firefighters.

The possibility that an individual would sustain loss by reason of negligence of the state is specifically considered in Commercial Carrier Corp. v. Indian River County[5] when this Court said (P.1018):

> "The Court recognized that the legislative, judicial and purely executive processes of government, including discretionary acts and decisions within the framework of such processes, can not and should not be characterized as tortious. Public policy and maintenance of the integrity of our system of government necessitates this immunity however unwise, unpopular, mistaken or neglectful a particular decision or act might be." (Underlining ours.)

By this language this Court recognized that there would be instances where the individual would not be permitted to recover damages despite negligence on the part of a state agency. The reason for this is that there are some functions of government so basic and important to the general public that the right of the public to delivery thereof without fear of judicial second-guessing must out weigh the right of the individual to recover for his personal loss.

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5. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979)

Palmer is in effect contending that once the City here undertook to fight the fire on Palmer's property, every other act on the part of City firefighters was "operational" in nature for which the City could be held responsible. This same contention was made and approved in Neilson v. Department of Transportation[6] wherein the Second District Court of Appeal said:

> "Once a government decides to act, whether out of obligation or free choice, it must act responsibly and reasonably under the existing circumstances and in accordance with acceptable standards of care and common sense."

In Department of Transportation v. Neilson[7] this Court disagreed with the foregoing statement by the Second District Court of Appeal and quashed the Order of said court. In so holding this Court said:

> "In the latter, absolute immunity attaches to 'policy making, planning, or judgmental functions.' (371 So. 2d at 1020). The underlying premise for this immunity is that it can not be tortious conduct for a government to govern. Our decision recognized that there are areas inherent in the act of governing which can not be subject to suit and scrutiny by judge or jury without violating the separation of powers doctrine."

See also City of Hammond v. Cataldi[8] wherein it was also contended that once the initial decision to fight the fire had been made all subsequent actions were ministerial. In rejecting this contention, the Indiana court said:

> "We disagree with the Cataldis' analysis that once the decision was made to fight the fire, all further actions were ministerial. First, the definitions of a discretionary duty include the determination of how an act should be done. Adams v. Schneider, supra. Second, the actions alleged to be negligent required the exercise of judgment by the fire department and by the fire fighters."

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6. Neilson v. Department of Transportation, 376 So.2d 296 (Fla. 2d D.C.A. 1979)
7. Department of Transportation v. Neilson, Fla., 419 So.2d 1071
8. City of Hammond v. Cataldi, 449 N.E.2d 1184 (Ind.App.3 Dist. 1983)

Both the Neilson and Cataldi decisions support our contention that decisions made by firefighters as to how a fire should be handled are "planning" in nature and the city is immune from liability therefor.

In her Brief[9] Palmer also contends that a city should be held liable for failure of its firefighters to comply with standard practices established by statute. This exact same contention was made in Neilson wherein it was contended that "failure to comply with standards and criteria for design, construction, and maintenance of public roads and highways * * * subjects governmental entities to suit."

This contention was specifically rejected by this Court when it said:

> "We further reject the contention that the failure to comply with standards and criteria for design, construction, and maintenance of public roads and highways established pursuant to sections 335.075 and 316.131 (renumbered 316.0745), Florida Statutes (1975), subjects governmental entities to suit."

By analogy, this language is applicable here and there is no liability on the part of a governmental entity for failure to comply with standards established by the Legislature for firefighters.

To sum up, we respectfully submit this Court should answer the question certified by the Fifth District Court of Appeal in the negative for the following reasons:

1. At common law, a property owner can not recover for damages sustained by reason of negligence of city firefighters because the decision of a city to provide fire protection does not create a duty

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on the city running to each and every citizen to protect them from all hazards.

2. Fire protection provided by a city has no parallel in the private sector and, therefore, the City can not be held liable to Palmer under the parallel function doctrine provided for in F.S. 768.28.

3. Decisions made by city firefighters in fighting a fire are "planning"--not "operational"--and the city is immune from liability therefor under the decision of this Court in Commercial Carrier.

## CONCLUSION

For the reasons stated, we respectfully submit the question certified to this Court for its decision as being of great public importance should be answered in the negative.

Respectfully submitted,

ALFRED A. GREEN, JR., ESQUIRE
Post Office Box 5566
Daytona Beach, Florida 32018
(904) 252-5581

FRANK B. GUMMEY, III, ESQUIRE
Post Office Box 551
Daytona Beach, Florida 32018
(904) 258-3194

Attorneys for Petitioner City of Daytona Beach

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U. S. mail, to Fred S. Disselkoen, Jr., Esquire, Post Office Box 2633, Ormond Beach, Florida 32075-2633, attorney for Respondent; James R. Wolf, Esquire and Harry Morrison, Jr., Esquire, Florida League of Cities, Inc., Post Office Box 1757, Tallahassee, Florida 32302, this 23rd day of March, 1984.

ALFRED A. GREEN, JR., ESQUIRE
Post Office Box 5566
Daytona Beach, Florida 32018
(904) 252-5581

Attorney for Petitioner City of Daytona Beach