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IN THE SUPREME COURT

STATE OF FLORIDA

BARBARA URSIN, Plaintiff/Petitioner, -vs- LAW ENFORCEMENT INSURANCE COMPANY, LTD., a foreign corporation, FLORIDA SHERIFFS' SELF-INSURANCE FUND, AUBREY ROGERS, individually and as Sheriff of Collier County, Florida, AL BEATTY, individually and as Deputy Sheriff of Collier County, Florida, and, GEORGE SNIDER, individually and as Deputy of Collier County, Florida, Defendants/Respondents.	Case No: 65, 523

REPLY BRIEF OF PETITIONER

APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA

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TOPICAL INDEX FOR BRIEF

CITATION OF AUTHORITIES

SUMMARY OF ARGUMENT

I

The Complaint states a cause of action for which sovereign immunity has been waived in § 768.28 Fla. Stat., under the criteria set forth in Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979).

The four pronged analysis set forth in that case is a "useful tool" for determining whether the challenged governmental act falls within the exempt "planning" category or the non-exempt "operational" category, not a separate test. Respondents have property conceded that the challenged acts here are operational. Therefore, there is no immunity pursuant to Commercial Carrier, supra.

A finding of liability in this case would have no significant impact on the basic course or direction of the trustee program. It would merely require that employees exercise reasonable care in carrying out these policies and operating this system.

II

The Supreme Court should abolish or severely restrict the judicially created exemption from the legislature's waiver of sovereign immunity. The Legislature intended that its waiver be restricted only by the limitations which are specifically set forth in § 768.28 of Fla. Stat. Although the challenged acts

here clearly do not fall within the exemption for "planning" activities, experience has shown that the approach adopted in Commercial Carrier, has created such confusion and uncertainty in the law, that the marginal value of the additional immunity provided is outweighed. The Legislature, specifically entrusted by Florida Constitution with these matters, provides a better forum for such decisions.

III

The Court should not amend § 768.28 as requested by Respondents. Respondents complaint that § 768.28 is "overly broad" and request to adopt the "discretionary function exemption" found in the Federal Tort Claims Act are arguments which should be addressed to the Legislature.

The authorities cited by the Respondents address the validity and interpretation of laws which our Legislature has declined to enact.

ARGUMENT I

THE COMPLAINT STATES A CAUSE OF ACTION FOR WHICH SOVEREIGN IMMUNITY HAS BEEN WAIVED IN SECTION 768.28 FLORIDA STATUTES UNDER THE CRITERIA SET FORTH BY THIS COURT.

Respondents, in their Answer Brief, completely misapprehend the principles set forth in Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979). The Court, in that case, specifically adopted the analysis of Johnson v. State, 447 P.2d 352 (1968), to distinguish between those governmental activities which would fall within the judicially created exemption from the legislature's waiver of immunity, and those which would not.

> In order to identify those functions, we adopt the analysis of Johnson v. State, supra, which distinguishes between the "planning" and "operational" levels of decision-making by governmental agencies. In pursuance of this case-by-case method of proceeding, we commend utilization of the preliminary tests iterated in Evangelical United Brethren Church v. State, supra, as a useful tool for analysis. Commercial Carrier Corporation v. Indian River County, supra, at 1022.

The Court correctly perceived that the four pronged analysis found in Evangelical United Brethren Church v. State, 407 P.2d 440 (1965), would throw light upon the basic question of whether the challenged government act took place at the immunized planning level for the non-immunized operational level. Since the

Respondents concede (properly) that the acts of making BAUMGARDT, a trustee, and assigning him to kitchen detail, were operational decisions, the analysis ought to end there with the conclusion that, under the Commercial Carrier Corporation decision, these acts are not protected by sovereign immunity.

The Respondents attempt to separate the two, which cannot be done logically, but requires the Respondents to equivocate between the merely operational challenged acts involving making BAUMGARDT a trustee and the basic planning level policy decision regarding the trustee system.

For instance, examining the second prong of the Evangelical four prong test, it cannot reasonably be denied that denying one particular inmate, BAUMGARDT, trustee status would not change the course or direction of the trustee program. Nothing about the trustee program nor its policies or objectives are challenged in this case, only the particular decision to include BAUMGARDT as one of the trustees. BAUMGARDT, a mentally disordered sex offender, whose prior record included convictions for rape, kidnapping and robbery had eighteen (18) years to go on a twenty (20) year prison sentence (R.6). He was only temporarily transferred to the Collier County Jail for a Circuit Court hearing. His inclusion was in no way integral to the trustee system itself.

Respondents assert that, were this court to allow the imposition of liability in this case, the Court's decision would

result in the "curtailment of the trustee program" (page 9 of Respondent's Brief) and such a decision ".... would essentially end the trustee program for all practical purposes." (page 8 of Respondent's Brief). These assertions are absurd. A decision by this Court holding that the Respondents do not enjoy immunity from the challenged acts and omissions would simply allow a Collier County jury the opportunity to decide if the challenged acts here constitute negligence. As long as the Sheriff and the Defendant Deputies in this case acted as reasonably cautious law enforcement personnel under like circumstances, there would be no judgment against the Respondents. The jury would not be second guessing the existence of the trustee program, but the jury would be deciding if it was reasonable to place BAUMGARDT in the trustee program. The common law recognizes the duties which law enforcement officials must perform and takes those into account in setting the standard of care. Reed v. City of Winter Park, 253 So.2d 475 (Fla. 4th DCA 1971), City of Miami v. Horne, 198 So.2d 10 (Fla. 1967).

Furthermore, a favorable decision for the Appellant by this Court would not, under any stretch of the imagination, mean the end to the Collier County trustee program. The Sheriff and his Deputies would simply have to use reasonable care in deciding who should be placed in the trustee program.

Respondent closes out his first argument with a warning that allowing liability in this case would "involve the Court in

spelling out jail policies", which is equally untrue. No policy decision is involved here at all. The policy on which the jury would be instructed is a policy which is already part of the common law by which all of us, including the Respondents, are governed: "one who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled, is under a duty to exercise reasonble care to control the third person to prevent him from doing such harm". § 319, Restatement 2d of Torts.

The Respondents dire warnings are especially ironic given the fact that the Courts have become heavily involved spelling out jail policies in order to protect the prisoners where they have found overcrowded conditions, unsanitary conditions, non-hygienic toilet facilities, lack of light and fresh air, chilly temperatures, inadequate medical care, a staff inadequate to insure inmates safety, lack of recreational opportunities, lack of educational opportunities, long hours of idleness, and lack of contact with the outside world. (See generally 41 Fla. Jur. 2d, Prison and Prisoners § 50 and cases cited therein). Respondents' actual argument must be that the Court should be completely prohibited from having any jurisdiction over jail personnel to protect people such as the Petitioner who are innocent of any crime. With this proposition, Petitioner profoundly disagrees.

By Respondents' own admission, the acts challenged in Petitioner's Complaint do not fall within those planning level

acts which the Court exempted from the legislature's waiver of immunity in Commercial Carrier Corporation v. Indian River County, supra. These challenged acts are "... specific individual act(s) which simply (do) not rise to the character of a 'basic policy evaluation'" and therefore immunity is waived." Bellavance v. State, 390 So.2d 422 (Fla. 1st DCA 1980), pet. for rev. den. 399 So.2d 1145.

ARGUMENT II

THE SUPREME COURT SHOULD ABOLISH OR SEVERLLY RESTRICT THE JUDICIALLY CREATED EXEMPTION FROM THE LEGISLATURE'S WAIVER OF SOVEREIGN IMMUNITY.

Respondents, having conceded that the challenged acts in this case were "operational", go on in their next argument to argue vigorously for the continued vitality of the planning/operational distinction. This is also inconsistent with their final argument that the Court should adopt the Federal "discretionary function" exemption rejected by the Florida Legislature, without the "planning" restriction.

Petitioner has shown that under the Commercial Carrier standard, they have stated a cause of action. However, Petitioner urges and has urged that this standard has proved unworkable for Courts and litigants and should be abandoned in favor of a simple following of the statutory waiver of sovereign immunity restricted only by the limitations as set forth in the statute itself. In Petitioners view, the alternative outlined in her initial Brief followed by the Washington Supreme Court is less preferable, but would at least provide clearer boundaries to the judicial exemption from this waiver and hopefully reduce the tremendous uncertainty which now exists in the law in this area.

The Respondents speculate, without authority or support, that the legislature omitted the "discretionary function" exemption

from § 768.28 Fla. Stat., because "no other reasonable alternative was available and, in essence, the area was left open for future development and was intended to be judicially interpreted" (page 16 of Respondent's Brief). Of course, the California Supreme Court decision of Johnson vs. State, supra, was "available" for seven years prior to the effective date of our statute. There is no reason, and none are offered by the Respondents, why the legislature could not have simply specified an exemption for "planning-level" functions, if in fact they intended to create such an exemption in addition to those specifically enumerated.

The Legislature spelled out its intent very clearly in the statute:

> In accordance with s.13 Art. X State Consitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions, to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. § 768.28(1) Fla. Stat. (1977). (emphasis supplied)

This language simply does not permit the interpretation which the Respondents suggest.

Petitioner recognizes that the Court's decision to create a judicial exemption for "planning level activities", was carefully considered and based on legitimate concerns. The Court also recognized the deficiencies inherent in this approach. Commercial Carrier, supra, at 1021. Petitioner respectfully suggests that experience has shown that the deficiencies of this approach, the confusion and unpredictability in the law and the invitation to further judicial encroachment on legislative areas, outweighs the rather limited advantage of providing further immunity in addition to the numerous safeguards specifically included by the legislature. In retrospect, it is also suggested that the policy decision regarding the extent to which governmental act should be subjected to tort liability, is a matter which our Florida Constitution has entrusted to the Legislature and that this is a preferable forum to resolve such policy matters on a broad basis with specific safeguards.

The remainder of Respondents' Argument II has already been met in Petitioner's initial Brief and merits no further discussion.

ARGUMENT III

THE COURT SHOULD NOT AMEND SECTION 768.28 FLORIDA STATUTES AS REQUESTED BY RESPONDENTS.

Respondents boldly state that § 768.28 Fla. Stat. is an "overly broad" waiver of sovereign immunity and requests the Court to enact "some restriction" on it. Respondents specifically request the Court to adopt the restriction contained in 28 U.S.C. § 2680(a) of the Federal Tort Claims Act, the exemption for discretionary functions, which the Legislature specifically considered and rejected.

While Petitioners have pointed out the problems with previous judicial invasion of this legislative function by the exemption already created, Respondents seek to compound the problem and further invade the legislative function. Plainly, the argument made to the Court in Argument III should properly be addressed to the legislature. From the point of view of the judicial branch, "we are not authorized to amend statutes under the guise of statutory construction in order to achieve results thought desirable by the Court or the litigants." Florida Farm Bureau Mutual Insurance Company v. Quinones, 409 So.2d 97, 99 (Fla. 3rd DCA 1982).

Respondents here make even more outlandish dire predictions regarding the consequences if they are held responsible for

assigning BAUMGARDT to trustee kitchen detail. Somehow, as a result of this decision, prison inmates will no longer be paroled with the result that "the overcrowding problem that now plagues the system would be increased ten-fold and the system would cease to function." (Respondents' Brief at page 25). Of course it is already too late to prevent this holocaust since the Legislature has abolished parole (for all persons convicted of crimes on or after October 1, 1983). §721.001(8) Fla. Stat. (1983).

Respondents correctly point out that one of the decisions cited in Petitioner's Brief, Payton v. United States, 636 Fed.2d 132 (5th Circ. 1981), was reversed on rehearing en banc by the Fifth Circuit Court of Appeal. Payton v. United States, 679 Fed.2d 475 (1982). The Federal Court of Appeal now holds that parole decisions (which are significantly different than the challenged acts here), are immunized by the specific discretionary function exemption which is part of the Federal Tort Claims Act and which was rejected by our legislature.

The Respondents further cite Martinez v. California, 444 U.S. 277, 62 L.ed. 2d 481, 100 S. Ct. 553 (1980). This decision upholds the State Legislature's right to provide immunity for parole officers decisions. Id., at 488. Certainly, if the legislature chooses to do so, it may make actions such as those taken by the Respondents here immune. It can also choose to waive sovereign immunity on behalf of the Respondents, and that is what our legislature has in fact done.

The final decision cited by Respondents is Dalehite v. United States, 346 U.S. 15, 97 L.ed. 1427, 73 S.Ct. 956 (1953). This case is cited for the proposition that under the discretionary function exemption, immunity filters down to the acts of subordinates in carrying out or implementing policy. Id., 346 U.S. at 35-36. This Court specifically declined to follow the Dalehite approach to implementation of policy in Commercial Carrier Corporation v. Indian River County, supra, at page 1021 (footnote 13).

Respondents' proposed amendment to § 768.28 Fla. Stat. should not be enacted by the Court.

CONCLUSION

The challenged acts of the Respondents are clearly operational level activities and entitled to no exemption from the § 768.28 Fla. Stat., waiver of sovereign immunity.

The decision of the Florida Second District Court of Appeal should be reversed and this cause remanded to the trial court for further proceedings in this case.

Respectfully submitted,

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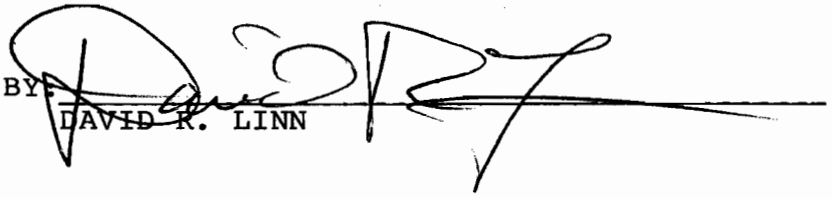
BY: 
DAVID R. LINN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the above and foregoing Brief have been furnished by United States Mail to the Honorable SID J. WHITE, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and a true and correct copy has been furnished by United States Mail to GAIL SMITH-SWEDMARK, Attorney for Respondents, Post Office Box 669, Tallahassee, Florida 32302-0669, this 29th day of March, 1985.

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