IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,602

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Petitioner,

vs.

STELLA YAMUNI, as adoptive mother, next friend and guardian of SEAN YAMUNI, a minor,

Respondent.

ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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REPLY BRIEF OF PETITIONER ON THE MERITS

ARGUMENT

Absence of an Underlying Common Law or Statutory Duty of Care to the Individual Plaintiff and Discretionary Nature of the Activities of HRS

The first step in determining whether HRS is immune from liability in this case is the proper categorization of the functions of HRS pursuant to this Court's analysis in Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985). Plaintiff erroneously contends that HRS' liability in this case "was not predicated on the exercise of powers and duties involving the enforcement of the laws regarding child abuse and the protection of the public." (Plaintiff's answer brief, p. 17). In an attempt to support her argument, plaintiff seeks to focus on one incident in this case, that

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is, HRS' alleged failure to provide protective supervision of the minor plaintiff pursuant to the court order which states that Sean's mother agreed to submit to supervision by HRS. However, plaintiff cannot change the nature of HRS' activities in this case simply by focusing on one aspect of these activities. HRS' functions in this and other cases involve the entire process of receipt, investigation, evaluation, and decision-making regarding child abuse complaints-- all with the ultimate goal of promoting the enforcement of the laws against child abuse, and the protection of the children and the general public of the state from the consequences of such abuse. The court order is simply one step in the process; certainly plaintiff would agree that the functions of HRS in regard to Sean Yamuni neither began nor ended with the court order.

Moreover, plaintiff's attempt at this point in the proceedings to focus attention on the court order cannot change the "bottom line" contention of plaintiff's lawsuit, which is expressed in plaintiff's amended complaint, to the effect that "due to the Defendant's negligence and breach of statutory obligation . . ., the said minor Plaintiff was permitted to remain in the care and custody of third parties known to the Defendant to be dangerous and previously abusive of the Plaintiff . . .". (R. 54-55). Plaintiff's lawsuit was not limited to the contention that HRS failed to comply with the court order, and, contrary to plaintiff's suggestions,

this is not a case wherein HRS has been sued for the alleged negligent custodial supervision of a child.

The cases relied on by the plaintiff wherein HRS has been sued for its alleged negligent supervision of a child or other person in HRS' custody are thus readily distinguishable. See, e.g., Zink v. Department of Health and Rehabilitative Services, 496 So.2d 996 (Fla. 5th DCA 1986);[1] Miller v. Department of Health and Rehabilitative Services, 474 So.2d 1228 (Fla. 1st DCA 1985). The supervision of children or other persons in one's custody is a function performed by private entities as well as by governmental bodies. However, the investigation, evaluation, and decision-making regarding child abuse complaints, including the ultimate decision as to whether to attempt to remove a child from the custody of its natural parent, are not functions performed by private entities, but instead are closely analogous to the activities performed by the police in investigating the alleged commission of a crime. See, M.H. By and Through Callahan v. State, 385 N.W.2d 533, 537 (Iowa 1986). The Florida courts have distinguished between operational, supervisory activities and

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[1]The Zink case is also readily distinguishable on its facts. The opinion does not reflect that HRS raised the defense of sovereign immunity, but instead indicates that HRS raised factual defenses, such as a lack of knowledge of the allegedly dangerous situation. The opinion therefore simply indicates that HRS' defenses create factual disputes which preclude the entry of summary judgment on behalf of the defendant.

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other functions of governmental entities; compare . . . Newsome v. Department of Corrections, 435 So.2d 887 (Fla. 1st DCA 1983), pet. for review denied, 459 So.2d 314 (Fla. 1984), (governmental entity held liable for negligence in failing to properly supervise prisoner in its custody) with . . . Reddish v. Smith, 468 So.2d 929 (Fla. 1985) (governmental entity immune from liability for alleged negligence in classification and assignment of prisoner to minimum security facility).

The case law relied on by plaintiff recognizes a distinction between the supervision of children in the custody of the governmental entity or in a foster home, and the decision-making as to whether to remove a child from the custody of its natural parents. See, Barnes v. County of Nassau, 108 A.D.2d 50, 487 N.Y.S.2d 827, 830 (1985). The New York court in Barnes cites the case of Rittscher v. State, 352 N.W.2d 247, 251 (Iowa 1984), wherein the Iowa court held that a cause of action against the governmental entity was not stated by a complaint alleging that social services personnel negligently failed to place a child in a foster home, but instead "negligently left [the child] exposed to her inadequate mother." See also, M.H. By and Through Callahan v. State, 385 N.W.2d 533 (Iowa 1986) (there is no common law or statutory cause of action against State Department of Human Services for alleged negligence in failing to take steps to remove children from home of abusive or inadequate parent).

As her second point, plaintiff argues that HRS is not immune from liability in this case because HRS "undertook" to investigate the allegations of child abuse in this case. (Plaintiff's answer brief, p. 19). The problem with this argument is that it completely undermines the four-category analysis promulgated by the Court in Trianon in those circumstances where the governmental officers take any action on behalf of an individual or group. For example, in Trianon the plaintiff, condominium association, sued the city for the alleged negligence of its building inspectors in inspecting and certifying a building which subsequently proved to have serious structural defects. The inspectors had "undertaken" to do the inspection, but allegedly had done it in a negligent manner. In holding that the city was immune from liability for the activities of the building inspectors, the Court considered the nature of the activity, rather than whether the inspectors had undertaken to act. This same reasoning is reflected in other recent landmark decisions of the Court on sovereign immunity. See, e.g., City of Daytona Beach v. Palmer, 469 So.2d 121 (Fla. 1985) (City sued for alleged negligence of its fire-fighters in attempting to extinguish a fire on plaintiff's premises; city held not liable because of the absence of a common law duty of care to individual property owners to provide fire protection services.) Significantly, the Palmer case is directly analogous to the case at bar on this point because in Palmer, as well as in the case at

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bar, the governmental employees "undertook" to perform services for a specific individual, and yet the Court held that there was no common law duty or cause of action on behalf of that individual. See also, M.H. By and Through Callahan v. State, 385 N.W.2d 533 at 536 (Department of Human Services not liable for alleged negligence in failing to remove children from home of abusive parent even where defendants "took affirmative action by initiating and conducting investigations of child abuse reports regarding the specific plaintiffs.").

Plaintiff's third point is that even if the Court concludes that HRS' activities involved the enforcement of the law and the protection of the public safety, HRS is not immune from liability because it owed Sean a "special duty" to use reasonable care. Plaintiff relies on dicta in Everton v. Willard, 468 So.2d 936, 938 (Fla. 1985), regarding the possible existence in certain cases of a "special relationship" between an individual and a governmental entity. HRS submits that the "special duty" doctrine was put to rest in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979),[2] and thus Commercial Carrier must be harmonized with Everton on this point, resulting in a very narrow interpretation of the "special relationship" concept. After discrediting the special duty doctrine in Commercial Carrier, and

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[2]In Trianon, the Court specifically states that it is not receding from Commercial Carrier. 468 So.2d at 923.

redefining in Commercial Carrier and Trianon the factors which must be considered in determining whether a governmental action is subject to tort liability, the Court surely could not have intended, by its language in Everton, the broad interpretation of the "special relationship" concept advocated by the plaintiff.[3]

The language in Everton upon which plaintiff relies suggests one particular instance wherein a special relationship may exist and may give rise to liability, that is, where an individual has voluntarily assisted the police in the apprehension of a dangerous criminal, and has been placed in jeopardy due to such assistance [citing Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958)]. The Court in Schuster held that in such a case, a "reciprocal duty" arises for the protection of the individual in question. 5 N.Y.2d at 81, 154 N.E.2d at 537, 180 N.Y.S.2d at 270. The Court noted that "[i]f it were otherwise, it might well become difficult to convince the citizen to aid and co-operate with the law enforcement officers (citations omitted)." 5 N.Y.2d at 81, 154 N.E.2d at 537, 180 N.Y.S.2d

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[3]In Trianon, the Court confirmed that its decision in Commercial Carrier "reject[ed] the general duty/special duty dichotomy contained in Modlin v. City of Miami Beach." 468 So.2d at 918.

at 269. Clearly, the policy reasons for recognizing a special relationship in such a case are not applicable to the case at bar.

Plaintiff contends that the court order singled Sean out as a person in need of special protection and created a special duty owed by HRS. However, since detention petitions request an adjudication as to whether the child should be detained in HRS' custody or remanded to the custody of a parent, a court order will be issued in response to most detention or dependency petitions, and many such orders may provide for future supervision by HRS. Thus, the existence of the court order does not create a truly unique relationship between HRS and Sean, but instead reflects a procedure that is likely to exist in a substantial number of the abuse cases reported to HRS.

Rodriguez v. City of Cape Coral, 468 So.2d 963 (Fla. 1985), approving 451 So.2d 513 (Fla. 2d DCA 1984), strongly suggests that there is no special relationship between HRS and Sean which would impose liability on HRS. Rodriguez holds that a governmental entity is immune from liability for its officer's decision not to take a person into protective custody, even where a controlling statute provides a mandatory duty to do so. It is noteworthy that the Court's decision in Rodriguez was based on the Everton case, and yet the Court in Rodriguez did not find that a special relationship existed. 468 So.2d at 964; See also, City of Orlando v. Kazarian, 481

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So.2d 506 (Fla. 5th DCA 1986) review denied, 491 So.2d 279 (Fla. 1986); Leibman v. Burbank, 490 So.2d 218 (Fla. 4th DCA 1986); M.H. By and Through Callahan v. State, 385 N.W.2d 533 at 536 (Court rejects "special relationship" argument in case against State Department of Human Services for its alleged negligence in failing to remove children from home of abusive mother and her boyfriend, despite existence of reports and investigation undertaken on behalf of said children).

Plaintiff contends that section 827.07, Florida Statutes (1979) evinces "the legislative intent to impose on HRS a duty owed to Sean." (Plaintiff's answer brief, p. 25). As evidence of this purported intent, plaintiff submits the following: 1) that HRS is "the agency with prime responsibility for improving child abuse prevention efforts"; 2) that section 827.07 is intended to benefit abused or neglected children; and 3) that section 827.07 imposes on HRS certain mandatory duties. (Plaintiff's answer brief, pp. 25-28) HRS responds that, pursuant to this Court's decisions in Trianon and Rodriguez, where essentially the same factors were present, the existence of these factors does not demonstrate the requisite intent to give rise to a statutory right of recovery.

In Trianon, the plaintiff contended that by enacting Chapter 553, (the building code) the legislature established "a statutory duty on the part of governmental entities to inspect construction projects for the protection of individual

citizens as well as the general public." 468 So.2d at 921. The Court, however, held that "[n]othing contained in Chapter 553 evinces an intent to give individual citizens a statutory right of recovery for the government's negligent inspection of their property." 468 So.2d at 922. The Court reached this conclusion despite the fact that, as in the case at bar, the following factors were present: 1) the governmental entity had the prime responsibility for performing the activities in question; 2) the statutory provision served to benefit the plaintiff as well as others who occupied the same group; and 3) the statute in question imposed on the governmental employees certain mandatory duties.

The same reasoning and result are reflected in Rodriguez v. City of Cape Coral, supra. In Rodriguez, the statute in question required that a police officer provide protective custody for any person who was intoxicated in a public place and appeared to be incapacitated. See, § 396.072(1), Fla. Stat. (1977). The intent of the statute was clearly to protect a specific class of individuals, that is, intoxicated persons, from a particular harm, that is, injury resulting from their inebriated condition. Nevertheless, the Court rejected the plaintiff's contention that the statute created a duty and consequent right of recovery on the part of any individual. See also, M.H. By and Through Callahan v. State, 385 N.W.2d 533 at 536-537 (no statutory duty of care or right of recovery created by statute governing duties of Department

of Human Services in investigating and acting upon reports of child abuse).

Plaintiff erroneously asserts that HRS is precluded from relying on the language of section 827.07(7)[4] as an expression of the legislative intent that section 827.07 in its entirety does not create a statutory right of recovery. HRS' argument regarding the legislative intent expressed in section 827.07(7) is independent from any reliance on this provision as a separate statutory grant of immunity, and is part of HRS' sovereign immunity argument, arising from the language of the Court in Trianon regarding statutory intent. As was stated in HRS' initial brief on the merits, since the decision in Trianon was not issued until after the entry of final judgment in the trial court and the denial of HRS' post-trial motions, HRS could not rely on the Court's reasoning in Trianon regarding statutory intent until HRS took its appeal to the district court.

Additionally, plaintiff's contention that the immunity provision of section 827.07(7) applies only to private persons fails to address the language of section 768.28(5), Florida Statutes (1979), and this Court's ruling in Trianon, that

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[4]Section 827.07(7), Florida Statutes (1979) provides as follows: "IMMUNITY FROM LIABILITY -- Any person, official, or institution participating in good faith in any act authorized or required by this section shall be immune from any civil or criminal liability which might otherwise result by reason of such action."

governmental entities can only be held liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." § 768.28(5) Fla. Stat. (1979); see, Trianon, 468 So.2d at 917. According to this principle, since private persons are not liable for their good faith participation in certain activities described by section 827.07, then HRS also is not liable for its good faith participation in activities under the statute.

In response to plaintiff's reliance on several cases from other jurisdictions, HRS relies on the recent case of M.H. By and Through Callahan v. State, 385 N.W.2d 533 (Iowa 1986). In Callahan, the court discusses and rejects each of the major points raised by plaintiff in her answer brief. Moreover, the facts of the case are substantially similar to those at bar, and the reasoning of the Court is equally applicable to this case.

A complaint was brought on behalf of three children against the state, its Department of Human Services, and certain department employees, alleging, among other things, that the defendants were negligent in "delaying the removal of the children from the home of an inadequate and abusive parent." 385 N.W.2d at 534. Among the specific acts of negligence alleged against the defendants were the failure to follow-up reports of abuse, and the failure to provide "follow-up supervision." 385 N.W.2d at 535.

The lower court granted a motion to dismiss the negligence counts against the defendants, and the plaintiffs appealed. The Supreme Court of Iowa affirmed, holding that there was neither a common law nor a statutory duty to the plaintiffs which would give rise to a cause of action.

As in the case at bar, the plaintiffs contended on appeal that a common law duty arose because the defendants "repeatedly took affirmative action by initiating and conducting investigations of child abuse reports regarding the specific plaintiffs." 385 N.W.2d at 536. Plaintiffs in Callahan also argued that such activity created a "special relationship" between the plaintiffs and the Department. Id. However, the court rejected both of these arguments on the ground that the nature of the conduct in question simply did not give rise to an action in tort against a governmental entity.

The court in Callahan also specifically rejected the argument that a statutory duty of care or right of recovery was created by the statute governing the Department's duties in child abuse cases. Noting that certain sections of the statute "did . . . explicitly establish [certain] civil causes of action" (for example for the "wrongful dissemination of child abuse information" and the "knowing failure by specified parties to report a suspected case of child abuse") the court reasoned that "legislative intent is expressed by both inclusions and exclusions; express reference to one thing implies the exclusion of others." 385 N.W.2d at 537. Thus,

the statute did not express the requisite legislative intent to give rise to a statutory right of recovery for the acts alleged by the plaintiff, since "[i]f the legislature wanted to recognize other statutory violations that would produce civil liability, it would have so indicated." Id. This reasoning is applicable to the case at bar, since section 827.07, Florida Statutes (1979) establishes criminal penalties for the knowing failure by specified parties to report a suspected case of child abuse, and for the wrongful dissemination of child abuse information, but does not establish a civil cause of action for the alleged negligent conduct of HRS in this case. See, § 827.07(18)(a) and (b), Fla. Stat. (1979).

A final noteworthy ruling in Callahan involves the discretionary nature of the activities of the DHS caseworkers. The court noted that the statute in question contained somewhat conflicting instructions. That is, although the purpose of the statute was to protect children from abuse, including abuse from a parent, the statute also instructed the Department to attempt to eliminate the need to remove the child from his home. In the words of the court "the department and its employees receive divergent instructions - to protect the child but make a reasonable effort to keep him or her in the home. Such a decision requires department employees to engage in a delicate balancing of interests." 385 N.W.2d at 537. (Emphasis supplied) The HRS statute contains similar

"divergent instructions," and therefore the reasoning of the Court in Callahan as to the discretionary nature of these activities is equally applicable to the case at bar. See, § 827.07(1) and (10)(b)(3) and (4), Fla. Stat. (1979).

CONCLUSION

The Court should answer the certified question in the negative, quash the decision of the Third District Court of Appeal, and remand the case with directions to enter a directed verdict in favor of the defendant HRS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner was mailed to GEORGE, HARTZ & LUNDEEN, P.A. and DANIELS AND HICKS, P.A., Attorneys for Respondent, 2400 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132-2513, this 13th day of February, 1987.

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