SUPREME COURT OF FLORIDA

RANDALL JERROLD VANN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FAYE LAMB VANN,

Appellant,

v.

CASE NO: 85,415

STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS,

Appellee.

BRIEF OF THE APPELLANT, RANDALL JERROLD VANN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FAYE LAMB VANN, DECEASED

APPEAL FROM THE DISTRICT COURT OF APPEAL, STATE OF FLORIDA, FIRST DISTRICT
CASE NO: 94-00015

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PRELIMINARY STATEMENT

The Appellant, Randall Jerrold Vann, as personal representative of the Estate of Faye Lamb Vann, was the Plaintiff below and will be referred to as "Vann". The Appellee, State of Florida, Department of Corrections, was the Defendant below and will be referred to as "DOC" or the "Department". The entire record is made up of a stipulated number of exhibits (see explanation below) which are numbered Plaintiff's Exhibit 1 through 35; Defendant's Exhibit 1 through 20; and pleadings identified in the Index to the Record which are consecutively numbered. References to the record will therefore be to Plaintiff's Exhibit ("P.Ex.") and a number, Defendant's Exhibit ("D.Ex.") and a number, or to the pleading and its appropriate page number, i.e., "Complaint, Record page 1-11." Where applicable, a page number from within the exhibit will be added. Also, testimony from deposition transcripts (which are listed as either Plaintiff's or Defendant's exhibits) will include name of the witness and the appropriate page citations.

STATEMENT OF THE CASE

The Appellants are the personal representatives and/or survivors of Faye Lamb Vann, a woman murdered by an inmate who had been in the control of DOC. (Complaint, Record page 4). The Appellee is the Department of Corrections (DOC), an agency of the State of Florida responsible for, inter alia, the custody and

control of prisoners within the State correctional system. (Complaint, Record page 4).

The action below was based on a Complaint for damages filed by the Estate of Faye Vann. (Complaint, Record pp. 1-11). The Complaint was last amended (Third Amended Complaint) in June, 1992. (Third Amended Complaint, Record page 53-84). DOC answered the complaints, asserting affirmative defenses including sovereign immunity. (Answer, Record pages 12-15). DOC then moved for dismissal and for summary judgment on the issues of duty of care and sovereign immunity. (DOC Motion to Dismiss, Record pages 166-170; DOC Motion for Summary Judgment, Record pages 25-36). Both motions, which raised issues of law, were denied by the trial court. (Order, Record pages 163-165).

A trial date of October 25, 1993 was set by the trial court, however, on September 24, 1993, the parties entered into a Stipulation (attached hereto as Appendix I) agreeing as follows:

1. That DOC continues to deny any negligence on its part and asserts the action is barred under the doctrine of sovereign immunity, notwithstanding; and
2. That the record would consist of certain enumerated documents, deposition transcripts and exhibits; and
3. That the Plaintiff would rescind its demand for a trial by jury, instead agreeing that the court could determine the matter based on the evidence in the stipulated record; and

4. That the parties reserved their objections as to the propriety and admissibility of the evidence in the record; and

5. That damages if negligence was found to exist, were established at $150,000.00.

Pursuant to the Stipulation, the court below (on the basis of the record presented to the Court and agreed to by the parties) entered its Final Judgment (Attached hereto as Appendix II) on December 14, 1993 in favor of the Plaintiff, awarding the stipulated amount of damages. The DOC then appealed the Final Judgment and the Orders denying DOC's motions for summary judgment and dismissal to the District Court of Appeal, First District, State of Florida styled CASE NO. 94-15 State of Florida, Department of Corrections, Appellant v. Randall Jerrold Vann, as personal representative of the Estate of Faye Lamb Vann, Deceased.

On April 1, 1994, the DOC filed it's Amended Initial Brief with the First District Court of Appeal. On May 3, 1994, Vann filed his Answer Brief with the First District Court of Appeal. On May 27, 1994, the DOC filed it's Reply Brief with the First District Court of Appeal.

On February 9, 1995, the First District Court of Appeal filed it's opinion which reversed the trial court's judgment against the DOC in the amount of $150,000.00. In that opinion, the First District Court of Appeal stated that no common law duty existed between the DOC and the decedent (Mrs. Vann) and, therefore, it is unnecessary to reach the issue of whether DOC's actions were

operational or discretionary. (Attached hereto as Appendix III). Additionally, the First District Court of Appeal certified to this Honorable Court the following question to be of great public importance:

WHETHER THE STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS, MAY BE HELD LIABLE AS A RESULT OF THE CRIMINAL ACTS OF AN ESCAPED PRISONER? (See Appendix III, Pages 9-10).

STATEMENT OF THE FACTS

The Appellant, Randall Jerrold Vann, as the personal representative of the Estate of Faye Lamb Vann, submits these facts to this Honorable Court:

DONALD DAVID DILLBECK

When Donald David Dillbeck was six (6) years old, he was adopted by Mr. and Mrs. Dillbeck. (P.Ex.22, p.2551). Mr. and Mrs. Dillbeck raised him from the time he was six (6) years old until he was fifteen (15) years old. (P.Ex.22, p.2553). When Donald Dillbeck was fifteen (15) years old, he attempted to steal a CB radio out of Mr. Phillip Reeder's Chevrolet Blazer truck in Anderson, Indiana on March 30, 1979. (P.Ex.35, Madison County, Indiana Case - Complaint Report). Mr. Reeder caught Donald Dillbeck in the act of attempting to steal his CB radio out of his Chevrolet Blazer truck. (P.Ex.35, Madison County, Indiana Case - Complaint Report). Donald Dillbeck had a lock back knife in his pocket and when Mr. Reeder attempted to take him inside his house in order to call the police, Donald Dillbeck pulled his knife out and stabbed Mr. Reeder in the chest and ran away. (P.Ex.35, Madison County, Indiana Case - Complaint Report). As a result of that attack, Mr. Reeder filed the charges of attempted murder, trespassing and theft against Donald Dillbeck. (P.Ex.35, Madison County, Indiana Case Complaint Report).

Two (2) weeks after Donald Dillbeck had stabbed Mr. Reeder in the chest in Anderson, Indiana, he arrived in Ft. Myers, Florida. (P.Ex.23, p.2206-2207). At Ft. Myers, Florida, Donald Dillbeck was in an automobile in a parking lot at Ft. Myers Beach, Florida. (P.Ex.23, p.2208). On the night of April 11, 1979, a Lee County Deputy Sheriff approached Donald Dillbeck in his car and asked Donald Dillbeck for identification. (P.Ex.23, p.2208). Since Donald Dillbeck did not have any identification, Donald Dillbeck then attempted to run away from the Deputy Sheriff and the Deputy Sheriff grabbed Donald Dillbeck with both of them ending up on the ground. (P.Ex.23, p.2208). Donald Dillbeck was able to get the officer's weapon out of his holster and Donald Dillbeck shot the officer at close range with two (2) consecutive shots. (P.Ex.23, p.2208). Donald Dillbeck was then apprehended and arrested by the Lee County Sheriff's Office on April 12, 1979 at Ft. Myers Beach, Florida. (P.Ex.23, p.2207) On April 12, 1979, Deputy Schmitt advised Donald Dillbeck of his miranda rights and Donald Dillbeck confessed to the murder of Deputy Hall the previous night at the time of his arrest at Ft. Myers Beach, Florida. (P.Ex.23, pp.2206-2208).

On June 6, 1979, Donald Dillbeck was sentenced to life imprisonment with a mandatory twenty-five (25) year sentence for the premeditated 1st Degree murder of Deputy Hall of the Lee County Sheriff's Department. (P.Ex.19, p.1).

THE DEPARTMENT OF CORRECTIONS OF THE STATE OF FLORIDA

On June 13, 1979, the DOC received Donald David Dillbeck into their custody. (P.Ex.19, p.1). On June 16, 1979, Donald Dillbeck was transferred to Sumter Correctional Institution, a maximum security prison of the DOC. (P.Ex.19, p.1). According to the DOC records, Donald Dillbeck did not receive any disciplinary reports while at Sumter Correctional Institution. (P.Ex.19, p.1). In December of 1980, DOC received a notice from the state of Indiana that the charges of attempted murder, trespassing and theft were pending against Donald Dillbeck for the 1979 stabbing of Mr. Reeder in Indiana. (P.Ex.19, pp.1-2). However, the Indiana charges were not pursued by the state of Indiana against Donald Dillbeck. (P.Ex.19, pp.1-2).

In November of 1982, Donald Dillbeck was transferred from Sumter Correctional Institution to Zephyr Hills Correctional Institution, a maximum security prison of the DOC, in order that he might participate in additional programs available at that institution. (P.Ex.19, p.2). On February 7, 1983, Donald Dillbeck attempted to escape from Zephyr Hills Correctional Institution but was caught between the fences. (P.Ex.19, p.2) Concerning said escape attempt, Donald Dillbeck stated, "The dorm door was unlocked; I went out and over the fence and got caught in razor wire on the second fence. I wanted to leave as things started getting me down." (P.Ex.18, p.2018). Donald Dillbeck plead guilty to attempted escape and he was sentenced to one (1) year and one

(1) day to run consecutively with his sentence for the murder of Deputy Hall. (P.Ex. 18, p.2018; P.Ex.19,, p.2).

In May of 1983, Donald Dillbeck was transferred back to Sumter Correctional Institution. (P.Ex.19, p.2). On January 7, 1984, Donald Dillbeck was transferred from Sumter Correctional Institution to Baker Correctional Institution for one (1) week of law clerk training. (P.Ex.19, p.2). Donald Dillbeck was then transferred from Baker Correctional Institution back to Sumter Correctional Institution. (P.Ex.19, p.2).

On August 19, 1984, Donald Dillbeck stabbed inmate Paul Nixon with a homemade knife which was approximately fifteen (15) inches in length with the handle of the knife wrapped in tape and shoelace tied to the handle. (P.Ex.18, pp.2176-2177). The DOC Disciplinary Committee, based on Donald Dillbeck's own admission of guilt, found Donald Dillbeck guilty of armed assault and it was recommended that Donald Dillbeck be placed in disciplinary confinement for a period up to ninety (90) days. (P.Ex.18, p.2178). Donald Dillbeck claimed that Paul Nixon had been pressuring him for money and sexual favors and that he attacked him with a knife in order to scare him off. (P.Ex.18, p.2177). There was no record of Donald Dillbeck seeking DOC staff assistance prior to the armed assault of Paul Nixon. (P.Ex.19, Exhibit #2).

On March 18, 1985, Donald Dillbeck was drunk with an alcohol blood level of .20 to .30. (P.Ex.18, p.2205). Donald Dillbeck admitted to being drunk and stated that he had drunk approximately five (5) cups of homemade wine. (P.Ex.18, p.2205). Donald

Dillbeck was found guilty of intoxication and was recommended to be placed on the disciplinary squad for up to ninety (90) days. (P.Ex.18, p.2207).

In January of 1986, Donald Dillbeck was transferred from Sumter Correctional Institution to Avon Park Correctional Institution. (P.Ex.19, p.2). That transfer order cites a "management problem" as the reason for the transfer. (P.Ex.19, p.2). However, the progress report concerning said transfer stated that the transfer was due to the changes in the youthful offender program criteria. (P.Ex.19, p.2).

In September of 1988, Donald Dillbeck was transferred from Sumter Correctional Institute to Desoto Correctional Institution, a maximum security prison of DOC, with two (2) other inmates for an investigation of a possible escape attempt. (P.Ex.19, p.2). On the DC 14 form which DOC classification officers use regularly, it is noted that the September 9, 1988 transfer from Sumter Correctional Institution to Desoto Correctional Institution is because Donald Dillbeck was a "security risk". (P.Ex.19, Exhibit #1, p.2).

On September 15, 1988, Donald Dillbeck was transferred from Desoto Correctional Institution back to Avon Park Correctional Institution with no further action taken on the investigation concerning a possible escape attempt by Donald Dillbeck. (P.Ex.19, p.2). DOC has no record of the investigation of that September of 1988 possible escape attempt and no one associated with that

investigation has any recollection of the circumstances. (P.Ex.19, p.2).

From June 13, 1979 until May 11, 1989, (approximately ten (10) years) Donald Dillbeck was kept in close custody by the DOC. (P.Ex.19, p.2). Close custody is the most secure custody that an inmate can be placed. (P.Ex.19, p.2). The classification of custody is close, medium and minimum, with close being the most secure and minimum the least secure. (P.Ex.19, p.2).

Donald Dillbeck requested a transfer to Quincy Vocational Center in order to be trained as a cook and a baker. (P.Ex.19,p.3). Furthermore, Donald Dillbeck stated that the reason he wanted to be transferred to Quincy Vocational Center was to enable him to receive visits from family members who lived in the panhandle. (P.Ex.18, p.2288). In fact, Donald Dillbeck did not have any family members who lived in the panhandle of Florida. (P.Ex.18, p.2032). Mr. and Mrs. Dillbeck had moved from Indiana to Florida and lived five (5) miles from Avon Park Correctional Institution in order to allow them to conveniently visit him at Avon. (P.Ex.18, pp.2003, 2032). Mr. Albritton stated that he reviewed Donald Dillbeck's inmate file information as well as the Quincy Vocational Center profile. (P.Ex.4, pp.7-8). James Prevatt, Assistant Superintendent of Avon Park Correctional Institution, reviewed and approved the transfer of Donald Dillbeck to Quincy Vocational Center. (P.Ex.7, pp.6-7). DOC Personnel clearly failed to follow the DOC rules and procedures. (P.Ex.24, D.Ex.7). Had DOC reviewed Dillbeck's file, they would have known

he was lying. (P.Ex.18, pp.2003, 2032). The file clearly shows that his parents lived close to Avon Park and his file clearly showed regular visits by family members to see Donald Dillbeck at Avon Park. (P.Ex.18, pp.2003, 2032).

On February 6, 1990, Donald Dillbeck was transferred from Avon Park Correctional Institute to Quincy Vocational Center. (P.Ex.19, p.3). After Donald Dillbeck was transferred to Quincy Vocational Center, he never attended the cook school there. (P.Ex.19, p.3). Specifically, on May 8, 1990, Donald Dillbeck requested that "since being at this facility I no longer wish to attend the cooking and baking school, I would prefer staying assigned to food service." (P.Ex.18, p.2297). Sixteen (16) days after Donald Dillbeck was transferred to Quincy Vocational Center, he was assigned to an outside community service project on February 22, 1990. (P.Ex.19, p.3). Outside community service projects conducted by the DOC with it's inmates at Quincy Vocational Center were conducted outside the prison with unarmed guards supervising the inmates while in communities surrounding the Quincy, Florida area. (P.Ex.11, p.25). Donald Dillbeck was subsequently assigned to additional outside community service projects on February 28, 1990, March 8, 1990, and June 18, 1990. (P.Ex.19, p.3). During all of the aforesaid community projects, Donald Dillbeck had a medium custody status with the DOC. (P.Ex.19, p.3).

On June 22, 1990, Donald Dillbeck was once again assigned to a work detail to serve food at Gretna Elementary School in Gretna, Florida. (P.Ex.19, pp.3-4). This particular outside community

service project was the North Florida Educational Development Corporation's annual banquet. (P.Ex.19, p.3). The North Florida Educational Development Corporation consists mainly of senior citizens. (P.Ex.19, p.3). The banquet on June 22, 1990 was held at the Gretna Elementary School in Gretna, Florida. (P.Ex.19, p.3).

The work detail, which included Donald Dillbeck, departed from Quincy Vocational Center at approximately 6:30 P.M on Friday, June 22, 1990. (P.Ex.19, p.4). The work detail was supervised by Sgt. Wester, Darryl Washington and Joseph Fleming of the DOC. (P.Ex.19, p.4). Upon their arrival at the Gretna Elementary School, the work detail assembled the serving line and served the guests attending the function. (P.Ex.19, p.4). After the guests were served, the inmates themselves ate dinner. (P.Ex.19, p.4). When Sgt. Wester assembled the inmates and instructed them to prepare to leave, he discovered that Donald Dillbeck was missing at approximately 8:15 P.M. (P.Ex.19, P.4). After doing a quick search of the area, Sgt. Wester reported to Quincy Vocational Center at approximately 8:25 P.M that Donald Dillbeck had escaped. (P.Ex.19, p.4). The other inmates on the work detail were returned to Quincy Vocational Center and the DOC implemented its escape and recapture procedures. (P.Ex.19, pp.4-5).

DONALD DILLBECK'S ESCAPE TO TALLAHASSEE, FLORIDA

Donald Dillbeck stated that while at Gretna Elementary School on the work detail, he stood around for about twenty (20) minutes while trying to work up the nerve to leave since the DOC officers

were not watching him. (P.Ex.17, p.1974). Donald Dillbeck asked an inmate if he would snitch on him because the inmate was looking at him at that time. (P.Ex.17, p.1974). The inmate said nothing and turned and walked away. (P.Ex.17, p.1974). When the inmate walked off, Donald Dillbeck ran from Gretna Elementary School at about 8:00 P.M. on June 22, 1990. (P.Ex.17, p.1974).

Donald Dillbeck stated that he walked or ran seven (7) or eight (8) miles the night of June 22, 1990. (P.Ex.17, p.1975). Donald Dillbeck did not get any sleep on the night of June 22, 1990. (P.Ex.17, p.1976).

On Saturday, June 23, 1990, Donald Dillbeck stated that he had made it to Quincy, Florida at about lunch time when he got a pair of clothes off a clothes line in Quincy, Florida. (P.Ex.17, p.1976). Donald Dillbeck then walked all day Saturday toward Tallahassee, Florida. (P.Ex.17, p.1976).

Donald Dillbeck stated that he was in Tallahassee, Florida when it got dark on Saturday night, June 23, 1990. (P.Ex.17, p.1977). At that time, he bought a Mountain Dew at a filling station in Tallahassee, Florida and attempted to call a friend on the telephone. (P.Ex.17, p.1977). Donald Dillbeck's plan was for the friend to pick him up in Tallahassee, Florida. (P.Ex.17, p.1977).

Donald Dillbeck slept in the woods in Tallahassee, Florida the night of June 23, 1990 for about three (3) or four (4) hours. (P.Ex.17, p.1977).

On Sunday morning, June 24, 1990, Donald Dillbeck bought two (2) donuts and some Mountain Dews. (P.Ex.17, p.1978). Donald Dillbeck also bought a knife in Tallahassee, Florida on Sunday morning. (P.Ex.17, p.1978; P.Ex.31). Donald Dillbeck stated that the reason he bought the knife was if he couldn't get his friend, he was going to get somebody to drive him out of Tallahassee. (P.Ex.17, p.1979). Sometime thereafter, Donald Dillbeck eventually ended up at the Tallahassee Mall. (P.Ex.17, p.1980).

On June 24, 1990, at approximately 2:30 P.M. in the afternoon, Mrs. Vann stopped by the Tallahassee Mall on the way to taking her children to the lake for a picnic. (P.Ex.35, Statement of Tony Vann). Mrs. Vann waited in her car that day since she only had a t-shirt over her swimsuit and she felt that she was not appropriately dressed for going into the Tallahassee Mall with her children in order for them to exchange some clothes at the Gayfers store. (P.Ex.35, Statement of Tony Vann). Jackie and Tony Vann stated that they believe they saw a man, they now believe to be Donald Dillbeck, leaning against one of the pillars at the Gayfers store at Tallahassee Mall looking like he was waiting for someone. (P.Ex.28; P.Ex.35, Statements of Tony and Jackie Vann). Upon leaving the Gayfers store at the Tallahassee Mall, the Vann children saw that their mother, Mrs. Faye Vann, had been brutally murdered in the parking lot of the Tallahassee Mall. (P.Ex.30, P.Ex.32 and P.Ex.35, Statements of Tony and Jackie Vann).

SPECIAL INVESTIGATION BY THE DEPARTMENT OF CORRECTIONS OF THE STATE OF FLORIDA INTO THE ESCAPE OF DONALD DAVID DILLBECK ON JUNE 22, 1990

On June 27, 1990, DOC Inspectors Bryan Pimm and Michael Cravener provided a special investigative report concerning the classification of Donald Dillbeck and the escape of Donald Dillbeck from DOC's custody in Gretna, Florida. (See P.Ex.19).

According to the special investigative report by the DOC inspectors on June 22, 1990, Donald Dillbeck escaped while on a work detail in Gretna, Florida. (P.Ex.19, p.4). According to the DOC officer supervising the inmate crew, Donald Dillbeck was last seen approximately five (5) minutes before he was reported missing. (P.Ex.19, Statement of Don Wester).

DISCIPLINARY MEASURES TAKEN BY DOC AFTER THE JUNE 27, 1990 SPECIAL INVESTIGATIVE REPORT CONCERNING THE ESCAPE OF DONALD DILLBECK

As a result of the special investigative report of June 27, 1990 concerning the escape of Donald Dillbeck from a work detail in Gretna, Florida, the DOC took action against its employees for negligence. (P.Ex.9, pp.27-31; P.Ex.33). All of the DOC employees involved were cited for negligently performing their duties as DOC employees. (P.Ex.9, pp.27-31). Specifically, those DOC employees were cited as violating the DOC's policies, procedures, rules and regulations. (P.Ex.9, p.39).

By DOC's own admission (P.Ex.19):

1. An unduly short period of time -- sixteen days -- elapsed between his transfer to Quincy Vocational Center and his subsequent assignment to kitchen duty at functions outside the correctional institution. (P.Ex.19) Once on outside assignment, at a social function held at a Gretna

elementary school, he was not watched by correctional guards with the strict level of guarding required by DOC. (P.Ex.24).

2. Correctional officers who supervised the outside work assignments at Gretna Elementary School testified that up to thirty minutes elapsed before Dillbeck's escape was noticed, and that the kitchen's outside exit was not locked. (P.Ex.19). This thoroughly inadequate supervision of an inmate of Dillbeck's type constitutes negligent supervision and, also failure to follow established DOC policies. (P.Ex.19).

Appellant's/Plaintiff's Third Amended Complaint Clearly Sets Forth the Negligence of DOC

The Plaintiff's Third Amended Complaint which the Plaintiff submitted to the trial court included Counts One through Seven which are the allegations against the DOC. (Third Amended Complaint, Record pages 53-84). The facts which support the two Counts of the Complaint (other than those previously mentioned) which apply to this appeal are as follows:

1. Count One of the Third Amended Complaint alleges that the DOC negligently failed to supervise Donald Dillbeck which allowed him to escape on June 22, 1990. (Third Amended Complaint, Record Pages 4-6).

The DOC employees responsible for the supervision of Donald Dillbeck negligently failed to follow DOC policies, rules, regulations and procedures. (P.Ex.24). Specifically, Sergeant Wester, Darryl Washington and Joseph Fleming failed to follow the Florida Administrative Code, Volume 13, Rule 33-4.001(3) which states:

"(3) Responsibility for Inmate Custody and Security. All employees of the Department of Corrections, except secretarial and clerical employees, whose duties and responsibilities involve direct contact with inmates at any time, are deemed to have the primary and essential duty and responsibility of maintaining physical custody and security of such inmates 100 percent of the time." (P.Ex.24).

and, Rule 33-4.002(12) of the Florida Administrative Code, which states:

"(12) No employee shall willfully or negligently permit an inmate to escape." (P.Ex.24).

2. Count Two of the Third Amended Complaint alleges that the DOC negligently failed to warn the public of Donald Dillbeck's escape. (Third Amended Complaint, Record Pages 6-8). Specifically, that the DOC negligently failed to warn the public in and around Tallahassee, Florida on June 23, 1990, of Donald Dillbeck's escape which occurred on June 22, 1990. (Third Amended Complaint, Record Pages 6-8). The DOC failed to warn the public of Donald Dillbeck's escape by failing to warn the public in and around Tallahassee, Florida through either newspaper, and/or radio announcements, and/or publishing of Donald Dillbeck's picture in the newspaper or on television on June 23, 1990. (Third Amended Complaint, Record Pages 6-8).

The Tallahassee Police Department was not informed of Donald Dillbeck's escape by the DOC until after the murder. (D.Ex.4, pp.9-11,24). It is clear from the testimony of Robert McMaster that the DOC failed to warn the public in the Tallahassee, Florida area, specifically, Faye Lamb Vann, of a dangerous condition (escape of a convicted cop killer) created by Donald

Dillbeck's escape which was not readily apparent to persons who could be injured and/or killed by this convicted murderer. (D.Ex.4, pp.9-11,24).

SUMMARY OF ARGUMENT

I. WHETHER THE STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS, MAY BE HELD LIABLE AS A RESULT OF THE CRIMINAL ACTS OF AN ESCAPED PRISONER?

GOVERNMENTAL IMMUNITY

An analysis of whether or not a governmental entity is liable to a member of the public for negligence ordinarily requires two different determinations. The first determination is whether the governmental entity is immune from tort liability for the alleged negligent acts under §768.28, Fla. Stat. (1991), Florida's sovereign immunity statute.

§768.28(1) Fla. Stat. states, in pertinent part, as follows:

> "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."

Additionally, §768.28(5) Fla. Stat. states, in pertinent part, the recovery limits against the state and its agencies and subdivisions as follows:

> "(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgments. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person

> which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000...."

COMMON LAW DUTY

The second determination, after eliminating any right to sovereign immunity, is whether the governmental entity owed the particular plaintiff a legal duty at the time of the alleged negligent act.

It is undisputed that the DOC owes no statutory duty of care to a person injured by the violent acts of an escapee inmate. Department of Health & Rehabilitation Services v. Whaley, 574 So.2d 100, 102-03 n.1 (Fla. 1991), George v. Hitek Community Control Corporation, 639 So.2d 661, 663 (Fla. 4th DCA 1994).

DOC is liable to the Plaintiff in this case for its operational level negligence to the same extent as a private individual in a similar situation. See generally Trianon Park v. City of Hialeah, 468 So.2d 912, 917 (Fla. 1985). In Trianon Park, the Florida Supreme Court stated, when referring to suits against governmental entities, that:

> "....governmental entities 'shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances.' This effectively means that the identical existing duties for private persons apply to governmental entities."

Id.

There is no requirement that a special duty exist between a governmental entity and a plaintiff before the governmental entity can be said to owe the plaintiff a duty of care. In Commercial

Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979), this Honorable Court rejected this very argument as "circuitous reasoning", and stated that:

> "....it [would] be circuitous reasoning to conclude that no cause of action exists for a negligent act or omission by an agent of the state or its political subdivisions where the duty breached is said to be owed to the public at large but not to any particular person. This is the "general duty" - "special duty" dichotomy emanating from Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967). By less kind commentators, it has been characterized as a theory which results in a duty to none where there is a duty to all....Does the Modlin doctrine survive notwithstanding the enactment of section 768.28? We think not."

Id. at 1015.

Once the Plaintiff demonstrates that a private person could be held liable under similar circumstances, the Plaintiff has established the basis of DOC's duty.

PRIVATE PERSON LIABILITY

Under traditional tort law principles, a private citizen defendant may owe a plaintiff, harmed by the conduct of a third person under the Defendant's control, a duty of care. Garrison Retirement Home Corporation v. Hancock, 484 So.2d 1257 (Fla. 4th DCA 1985).

In Garrison Retirement, supra, the plaintiff, who was injured by an escaped resident of a retirement home, sued the retirement home for the resulting injuries based on common law negligence. The plaintiff in Garrison Retirement, supra, claimed that the retirement home owed plaintiff a duty of care in supervising and controlling its residents. The trial court granted summary judgment for the plaintiff on the duty argument and the retirement

home filed a petition for writ of certiorari, the issue being whether the retirement home owed the injured plaintiff a duty of care.

Relying, in part, on §§315, 319, and 324A of the Restatement (Second) of Torts, (1964), the Third District Court of Appeal in Garrison Retirement, supra, held that the retirement home owed the injured plaintiff a duty of care. First, the court cited §315 of the Restatement for the proposition that there is a duty to control the conduct of a third person to prevent harm to others if a special relationship exists between the actor (the retirement home) and the third person (the escaped resident). Second, the court cited §319 of the Restatement for the proposition that one who takes charge of a third person, knowing that the third person is likely to cause bodily harm to others if not controlled, is under a duty to reasonably control the third person to prevent such harm to others. Finally, the court cited §324A of the Restatement for the proposition that one who voluntarily assumes to act for another, which he knows is necessary for the protection of a third person, owes the third person a duty of care if his failure to exercise such care increases the risk of harm.

Similarly, in Nova University, Inc. v. Wagner, 491 So.2d 1116 (Fla. 1986), this Honorable Court held that the university, operating a residential rehabilitation program which accepted delinquent, emotionally disturbed and/or ungovernable children as residents, had a duty to exercise reasonable care in its operation to avoid harm to the general public. There, two juvenile residents

who had exhibited a propensity toward physical violence, of which the defendants were aware or should have been aware, ran away from the center and the following day encountered two small children, one of whom they killed and permanently injured the other. The complaint alleged that the defendants were negligent in failing to supervise and control the two delinquents assigned to their custody. In approving the Fourth District's decision reversing the trial court's summary judgment in favor of the university, this Honorable Court relied upon the principle of law set forth in Section 319 of the Restatement. Section 319 of the Restatement sets forth the duty of those in charge of persons having dangerous propensities and states: **"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 reasonable care to control, the third person to prevent him from doing such harm."** Restatement §319. This principle is equally applicable to this case.

The applicability is demonstrated in the Illustrations to Section 319 as follows:

> "A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes harm to C. A is subject to liability to C."
>
> Restatement §319.

This Honorable Court in Nova University then concluded "that a facility in the business of taking charge of persons likely to harm others has an ordinary duty to exercise reasonable care in its operation to avoid foreseeable attacks by its charges upon third

persons." Nova University, 491 So.2d at 1118. This principle is equally applicable to the facts of the case Sub Judice.

Here, the Appellant/Plaintiff alleges that DOC was in control of and supervised Dillbeck during the period of his incarceration. Further, he alleges that DOC knew that Dillbeck was serving a life sentence for murder and that Dillbeck committed violent acts while in DOC custody. Thus, it is clear that the Appellant/Plaintiff properly alleges that DOC owed the Decedent, Mrs. Vann, a duty of care. This case is an even more compelling situation than the situation which existed in Garrison Retirement Home, supra, because there the persons controlled by the defendant were mentally ill due to sickness and old age and were as much a threat to themselves as to others.

However, in this case the person controlled by DOC (Dillbeck), as alleged in the complaint, was and is an imprisoned murderer who had been sentenced to serve a great number of years in prison and who had committed violent acts and had escape attempts while in prison, which were reported to the DOC. Dillbeck was not under the charge of DOC voluntarily, nor was he as much a threat to himself as he was to the rest of society, if he was negligently allowed to escape. As such, the duty owed to Mrs. Vann by DOC, as with any other private entity, was arguably stronger than the duty owed by the retirement home to the injured plaintiff in Garrison Retirement, supra.

PRIVATE PERSONS (ENTITIES) PROVIDE SAME SERVICE

At the time that Dillbeck escaped and murdered Mrs. Vann, Private, for profit corporations, were engaged in and provided the same service as DOC. As evidenced by the Affidavit of Dr. Charles Newman, an Expert in the field of criminal corrections and justice, private correctional facilities performed the same correctional functions as DOC in the State of Florida. Specifically, Corrections Corporation of America operated the Bay county Jail and Bay County Jail Annex in Panama City as well as the Hernando County Jail in Brooksville, Florida (P. Ex.16, Exhibit No. 2, pp. 11-12).

Because Trianon Park, supra, requires that we look to "private person" liability and because Garrison Retirement, supra, states that a private person may be liable even if no special relationship exist between the victim (Mrs. Vann) and the controller (DOC), the case law supports the Appellant's contentions.

Section 319 of the Restatement provides the connection with the Common Law which provides the duty of DOC and the private entitles providing correctional services in the State of Florida. Section 319 of the Restatement states:

> "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 reasonable care to control the third person to prevent him from doing such harm."

As the comment clearly states, the rule applies to two situations. The first situation is on in which the actor has charge of one or more of a class of persons to whom the tendency to act injuriously is normal. THE SECOND SITUATION IS ONE IN WHICH

THE ACTOR HAS CHARGE OR A THIRD PERSON WHO DOES NOT BELONG TO SUCH A CLASS BUT WHO HAS A PECULIAR TENDENCY SO TO ACT OF WHICH THE ACTOR FROM PERSONAL EXPERIENCE OR OTHERWISE KNOWS OR SHOULD KNOW.

A review of the Statement of Facts provides all the evidence needed to clearly demonstrate that DOC knew that Dillbeck had a peculiar tendency to act violently.

There is more than ample evidence to support the Trial Judges finding of Negligence on the part of the DOC personnel. Also, it must not be forgotten that the DOC special investigation reached the same conclusion.

Since the common law duty is applicable to the private, for profit corporation, providing similar services, the common law duty is applicable to DOC.

II. IS IT FORESEEABLE THAT THE DOC'S BREACH OF IT'S COMMON LAW DUTY OF CUSTODY AND CONTROL OF INMATE DILLBECK WOULD RESULT IN THE STABBING DEATH OF MRS. VANN BY THE ESCAPEE, INMATE DILLBECK?

It is clear from the facts of this case that it was foreseeable that DOC's negligent conduct which resulted in inmate Dillbeck's escape would create a zone of risk which posed a general threat of harm to others, specifically, Mrs. Vann. See McCain, 593 So.2d at 503 n.2 (citing Restatement (Second) of Torts § 285 (1965)).

Additional legal authority concerning foreseeability is stated in Wilson v. Department of Public Safety & Corrections, 576 So.2d 490 (La. 1991), a case which provides a more specific test than McCain for determining whether a victim of an escaped prisoner's criminal acts comes within the zone of risks that can be considered a reasonably foreseeable consequence resulting from a custodian's negligent act. The test there adopted provides further support to the trial court's judgment in this case. Therein the court stated:

> In resolving the scope of the duty issue, improper emphasis has occasionally been placed . . . on the proximity of time and distance between the escape and the escapee's offense that caused the injury to his victim. **The proper question is whether the offense occurred during, or as an integral part of, the process of escaping.**

Wilson, 576 So.2d at 493. (Emphasis added).

In so deciding, the court noted that the operative word in the analysis is "process", because "there is no bright-line point of delineation which will satisfactorily assist a court in making the appropriate duty-risk analysis." Wilson, supra, at p. 494. It concluded that the time and distance from the escape to the time and place of injury were but two factors among many which should be considered in determining whether the acts for which the plaintiff sought compensation were committed during, or as an integral part of, the process of escaping. Wilson, supra, at p. 494.

In applying the above test to the instant case, the Trial Judge properly found that the fatal injuries suffered by Mrs. Vann transpired during an integral part of the inmates' process of escape. The facts disclose that Dillbeck murdered Mrs. Vann while attempting to steal her car as a part of his flight from the custody of the DOC. After applying the test approved in McCain, the Trial Judge properly concluded DOC's negligence more likely than not created a foreseeable zone of risk that included the harm suffered by Mrs. Vann.

III. WERE THE ACTS OF DOC WHICH RESULTED IN INMATE DILLBECK'S ESCAPE; PLANNING LEVEL FUNCTIONS OR OPERATIONAL LEVEL FUNCTIONS?

The DOC's actions in it's failure to maintain custody and control of inmate Dillbeck are clearly operational in nature. The facts alleged and the evidence presented in the instant case show obvious operational-level activity which is not barred by governmental immunity. The failure to the guards to properly supervise the inmates placed in their custody can hardly be considered a discretionary function of the government which is inherent in the act of governing. See Trianon, 468 So.2d at 918. The conduct of the DOC, moreover, is similar to the nonexclusive examples this Honorable Court listed in Trianon as indicative of existing common law duties of care: the negligent operation of motor vehicles or the handling of firearms by public employees during the course of their employment for the purpose of enforcing compliance with the law. Trianon, supra, at p. 920.

The Florida courts have developed a starting point for the analysis of allegations of negligence against a governmental entity. Under Commercial Carrier Corporation v. Indian River Community, 371 So.2d 1010 (Fla. 1979), a four question test has been derived from Evangelical United Brethren Church v. State, 67 Wash.2d 246, 407 P.2d 440 (1965). The questions are:

> "1. Does the challenged act, omission, or decisions necessarily involve a basic governmental policy, program, or objective?

2. Is the questioned act, omission, or decision 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?

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

4. Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission or decision?"

Under Commercial Carrier, supra, if these preliminary questions can be clearly and unequivocally answered yes, then the challenged act is probably policy-making, and/or planning activity which is immune from tort liability. Any negative answer to any of these questions may indicate that the DOC employee's actions do not rise to the level of basic policy making which is a prerequisite to immunity under Commercial Carrier, supra. If the answer to any of these questions is no, the activity is probably operational level which is not immune.

Applying the Evangelical questions to the facts of this case, those questions can clearly be answered in the negative. The allegations of negligence against the DOC do not allege that DOC failed to have a policy in place for security, or that any policy decisions were made by DOC employees. The allegations of the Third Amended Complaint are that DOC employees failed to follow the policies already in place. (Third Amended Complaint, Record Pages 53-84).

It is anticipated that the DOC may rely on Reddish v. Smith, 468 So.2d 929 (Fla. 1985) for the proposition that the DOC cannot ever be liable for its negligent acts whether they are planning or operational functions unless such activity is an "activity normally engaged in by private persons." Reddish, supra, 468 at 932. Dr. Charles Newman in his deposition stated that a private corporation did engage in correctional activities in the State of Florida prior to June 22, 1990. (P.Ex.16, Exhibit Number 2, pp.11-12). Notwithstanding that fact, State Department of Health and Rehabilitative Services v. Yamuni; 529 So.2d 258 (Fla. 1988) states that the law "requires minute examination of the alleged negligent actions of the governmental unit to determine if they are operational or planning level as each case comes to court." Yamuni, 529 at 260. This was done by the Trial Court, which ruled that based upon the facts the acts complained of were operational level functions.

Furthermore, Yamuni, supra, fleshes out the Reddish, supra, private versus governmental function analysis. Yamuni, supra, a 1988 Florida Supreme Court case, holds that the planning versus operational function test is the test for sovereign immunity of a governmental unit. "The only governmental activities for which there is no waiver of immunity are basic policy making decisions at the planning level." Yamuni, 529 at 261.

The following quoted paragraphs from Yamuni, supra, overrules Reddish, as being the law of sovereign immunity.

"The HRS (DOC) also argues that its activities here were exclusively governmental and are not performed by private persons. Therefore, HRS (DOC) reasons that there has been no waiver of sovereign immunity because section 768.28(1) only waives immunity 'under circumstances in which the state or such agency or subdivision, if a private person, would be liable.' (Emphasis supplied). This reasoning was presented and rejected in Commercial Carrier because to accept it "would be to essentially emasculate the [waiver of immunity] and the salutary purpose it was intended to serve." 371 So.2d at 1017. The HRS (DOC) argues that we used language in Reddish v. Smith, 468 So.2d 929, 932 (Fla. 1985), which indicates that we now accept this reasoning. We agree that the language in Reddish is contrary to Commercial Carrier. We note, however, that this argument was not in fact presented by the parties in Reddish and that we gave no indication we were receding from the contrary Commercial Carrier holding. Moreover, Reddish was decided on the basis of the Commercial Carrier criteria and our contradictory statements were dicta. We recede from any suggestion in Reddish that there has been no waiver of immunity for activities performed only by the governmental and not private persons. **The only government activities for which there is no waiver of immunity are basic policy making decisions at the planning level.** Commercial Carrier." (Insertions added). Yamuni, supra, 529 at 260.

Another 1988 case that follows the Yamuni, supra, rationale for governmental immunity is Dunagan v. Seely, 533 So.2d 867 (Fla. 1st DCA 1988) (Dunagan, supra, is a case where an inmate sued a sheriff for negligence as a result of his injuries which resulted from an attack by another inmate.) In pertinent part, Dunagan, supra, states:

"Further, when a governmental entity creates a known dangerous condition which is not readily apparent to persons who could be injured thereby, a duty at the operational level arises to warn the public of, or protect the public from, the known danger. The failure to fulfill this operational-level duty is, therefore, a basis for an action against the governmental entity. City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982); Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982); Department of Transportation v. Webb, 438 So.2d 780 (Fla. 1983).

> Considering the above authorities and the evolution of the sovereign immunity exceptions through Commercial Carrier, Trianon, Reddish v. Smith, 468 So.2d 929 (Fla. 1985), and now Yamuni, we conclude that, while the making of the policies and procedures for classifying, supervising and maintaining inmates is a discretionary function to which sovereign immunity does attach, the allegation of injury due to the failure to follow those policies is actionable because that failure was an operational function and is not protected by the sovereign immunity doctrine.
>
> We also reject appellee's argument that sovereign immunity attaches because of the provision in section 768.28(5) that the state and its agencies and subdivisions shall be liable for tort claims 'in the same manner and to the same extent as a private individual under like circumstances.' Appellee contends that since private individuals do not engage in the supervision of inmates, sovereign immunity cannot be considered waived in that regard. **That argument has been rejected** in Commercial Carrier, Yamuni, and Durrance v. City of Jacksonville, 532 So.2d 696 (Fla. 1st DCA 1988). In Yamuni, the court specifically receded from any contrary suggestion in Reddish.
>
> We further agree with appellant that the question of foreseeability in this case is clearly one to be presented to the jury. The allegations of the complaint are that appellant was under the supervision of appellee, as was his attacker, his attacker had at least some known propensities for violence; appellee ad policies and procedures to be followed to protect the very class of persons into which appellant falls from the very class of persons into which his attacker fell. Therefore, since a jury question exists as to whether the attack on appellant was foreseeable, for that reason also, granting the motion for summary judgment was error." (Emphasis added).

Clearly, the cases of Commercial Carrier, supra, Yamuni, supra, and Dunagan, supra, have adopted the planning versus operational function test for determining sovereign immunity of a governmental unit such as the DOC. The private versus governmental functions analysis of Reddish, supra, is no longer the law for sovereign immunity in the State of Florida.

Yamuni, supra, outlines what are discretionary or planning functions versus operational functions of a governmental entity under Commercial Carrier, supra. Yamuni, supra, 529 at 260, states:

> "This argument is grounded on the definitional approach to 'discretion' which we, and the Johnson court, rejected because 'all governmental functions, no matter how seemingly ministerial, can be characterized as embracing the exercise of some discretion in the manner of their performance.' 371 So.2d at 1021. We have no doubt that the HRS (DOC) caseworkers exercised discretion in the dictionary or English sense of the word, but discretion in the Commercial Carrier sense refers to discretion at the policy making or planning level. We agree with the district court that the actions of caseworkers investigating and responding to reports of child abuse simply cannot be elevated to the level of policy-making or planning. To accept the HRS (DOC) argument would require that we recede from Commercial Carrier by negating any meaningful distinction between operational and planning level activity. We firmly rejected this argument in Commercial Carrier and decline to recede therefrom. We hold that the caseworker activities were operational level for which there is a waiver of immunity. We answer the certified question with a qualified no, [1] noting that we adopted a case-by-case approach in Commercial Carrier and it is at least theoretically conceivable, although pragmatically unlikely, that some action of a caseworker might rise to the level of basic policy making." (Insertions added for purposes of argument).

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[1] The question certified to the Florida Supreme Court was whether state had statutorily waived sovereign for liability arising out of negligent conduct of Department caseworkers. The Supreme Court, Justice Shaw, held that:

> "(1) statutory waiver of immunity is not a blanket waiver but applies to activities conducted on operation level; (2) caseworker activities in failing to investigate complaints of child abuse occurred on operational level and were subject to statutory waiver of immunity; (3) Department had statutory duty of care to prevent further harm to children following reports of child abuse; (4) evidence was sufficient to support finding of negligence; and (5) statute protecting Department from liability for caring out its protective functions on behalf of protected class did not protect it from liability for failing to carry out those protective measures." Yamuni, supra, 529 at 258.

The facts of this case support the Trial Judges findings that the DOC employees negligently performed operational functions by failing to follow the DOC policies, rules, regulations and procedures. The Trial Judge correctly found negligence on the part of the DOC's employees in performing operational level activity by ruling for Plaintiff and entering a judgment for Plaintiff and against the DOC in the amount of $150,000.00.

CONCLUSION

The First District Court of Appeal reversed the trial court's verdict in favor of Mr. Vann, as personal representative of the Estate of Faye Lamb Vann, Deceased in the amount of $150,000.00 based upon it's opinion that the DOC owed no legal duty to Mrs. Vann. That decision is contrary to Florida law.

Based upon the foregoing facts and legal authorities, DOC breached its common law legal duty of maintaining custody and control of inmate Dillbeck which was the foreseeable direct result of the death of Mrs. Vann. Additionally, the DOC is not immune from suit in this case since the DOC's actions were clearly operational.

This appeal and this Honorable Court's decision is a matter of great public importance. Specifically, it would be egregious to Mr. Vann and his children as well as to all citizens of the State of Florida to hold that the DOC is not liable for it's failure to perform it's duties at the operational level. Although DOC's internal investigation of itself found that it had committed negligence at the operational level as concerns inmate Dillbeck's escape from DOC's custody and control, rather than accepting the limited responsibility provided by the Waiver of Sovereign Immunity (i.e., $200,000.00 damage cap as pertains to this case), the DOC has taken the position that "THE KING CAN DO NO WRONG", no matter how egregious its conduct.

This Court's failure to recognize that DOC does have a duty to the public will place the posture of the law in the State of

Florida in the irrational and untenable state of allowing an inmate to recover for the acts of DOC but deny the same to the law-abiding public.

There is no logical basis for holding that DOC should not be held accountable for its irresponsible acts. This is particularly so in light of the Waiver of Sovereign Immunity and accompanying cap on damages.

The First District Court of Appeal's decision is due to be reversed with this Honorable Court directing that the trial court's judgment be reinstated in this case.

Respectfully submitted this the 28th day of April, 1995.

EDWARD M. PRICE, JR.
FLORIDA BAR NO. 207551

PURSUANT TO RULE 9.320 OF THE F.R.A.P., THE APPELLANT IS CONTEMPORANEOUSLY FILING HIS MOTION FOR ORAL ARGUMENT WITH THE APPELLANT'S BRIEF.

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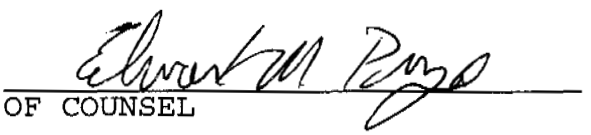
CERTIFICATE OF SERVICE

I hereby certify that I have this date mailed a copy of the above and foregoing to the Offices of the Clerk, Sid White, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399, one copy by U.S. Mail to R. Bruce McKibben, Jr., Esquire, Davidson F. Dunlap, Jr., Esquire, Pennington & Haben, P.A., Post Office Box 10095, Tallahassee, Florida 32302 and Loren E. Levy, Esquire, Academy of Florida Trial Lawyers, Post Office Box 10583, Tallahassee, Florida 32302 this the 28th day of April, 1995.



OF COUNSEL

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