SUPREME COURT OF FLORIDA

UNION PARK MEMORIAL CHAPEL, POWELL-WEBBER FUNERAL SERVICES, INC., f/k/a BURKETT-WEBBER FUNERAL SERVICES, INC.

Appellant,

Case No.: 85,558

v.

KATHLEEN BARRINGTON HUTT, f/k/a KATHLEEN G. BARRINGTON and BRIAN HUTT

Appellees.
_____/

APPELLANT'S INITIAL BRIEF ON THE MERITS

STOWELL, ANTON & KRAEMER

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PRELIMINARY STATEMENT

Throughout this Initial Brief, appellant, Union Park Memorial Chapel, Powell-Webber Funeral Services, Inc., f/k/a Burkett-Webber Funeral Services, Inc., shall be referred to as "Union Park". Appellees, Kathleen Barrington Hutt, f/k/a Kathleen G. Barrington, and Brian Hutt, shall be referred to as "the Hutts" or "Mr. and Mrs. Hutt".

Citations to the Record on Appeal shall be designated by the letter "R" followed by the appropriate page number. Citations to the transcript of the proceedings of April 12, 1994 shall be designated by the letter "T" followed by the appropriate page number. Citations to the Appendix shall be designated by the letter "A" followed by the appropriate page number.

STATEMENT OF THE CASE AND THE FACTS

On or about February 26, 1992, appellee, Kathleen Hutt, suffered injury in an automobile accident when a vehicle operated by Ms. Hazel Workman Nichols collided with Ms. Hutt's vehicle. At the time of the accident, Ms. Hutt was driving through an intersection in Orange County, Florida, as a participant in a funeral procession. (R: 98-99) The parties stipulated that Ms. Hutt was traveling through a red traffic light at the time of the collision and that her vehicle had its headlights on. (T: 6-7)

The amended complaint filed by Ms. Hutt and her husband named as defendants: Ms. Nichols, the driver of the vehicle which collided with Ms. Hutt's vehicle; Auto-Owners Insurance Company, the Hutt's own underinsured motorist carrier; and appellant, Union Park Memorial Chapel ("Union Park"), the funeral director that headed the funeral. (R: 97) Ms. Nichols and Auto-Owners Insurance settled with plaintiffs (R: 145-148), leaving Union Park as the sole remaining defendant.

The Hutts allege that Union Park was negligent in, among other things: failing to properly supervise the funeral procession; failing to provide an escort service and/or traffic director at the intersection where the accident occurred; failing to advise the funeral followers about potential traffic risks, escort practices, traffic direction practices and procession instructions; and failing to provide directions to the destination site. (R: 100-101).

Upon motion by Union Park, the trial court issued an order dismissing the amended complaint with prejudice for failure to state a cause of action. The trial court relied on McCorvey v. Smith, 411 So. 2d 273 (Fla. 1st DCA 1982)(finding no liability on the part of a funeral director pursuant to section 316.1974, Fla. Stat.), a case with facts almost identical to those in the present case. (R: 160-169)

The Hutts appealed the dismissal of the amended complaint. In an opinion filed March 17, 1995, reported at 20 Fla. L. Weekly D704, the Fifth District Court of Appeals reversed the trial court's order of dismissal. (A: 1-7) The Fifth District Court also certified a conflict, however, between its decision and the First District Court of Appeals' decision in McCorvey. (A: 7) Union Park timely filed a notice to invoke this Court's certiorari jurisdiction.

ISSUE ON APPEAL

Whether a funeral director owes a duty to individuals accompanying a funeral procession to prevent or minimize the risk of injury from automobile collisions which might occur as the procession lawfully crosses an intersection, if a vehicle which is not part of the procession fails to yield the right of way and collides with a vehicle traveling in the procession, as happened in the present case.

SUMMARY OF ARGUMENT

The First District Court of Appeals, in McCorvey v. Smith, 411 So. 2d 273 (Fla. 1st DCA 1982), correctly found that Florida law imposes no duty upon a funeral director to protect individual funeral procession participants from the type of injury which occurred in the present case. Section 316.1974, Florida Statutes, by its plain language, places responsibility for avoiding collisions between funeral procession participants and non-participants upon the respective drivers. Reallocation of such responsibility would violate the plain meaning of section 316.1974 and contravene clear legislative intent.

The Fifth District Court of Appeals in its decision below erroneously held that a funeral director's failure to take certain precautions to reduce the possibility of automobile accidents between funeral procession participants and non-participants might in some instances constitute a breach of duty. In so ruling, the Fifth District Court presumed the existence of an underlying duty upon a funeral director to provide for the safety of individuals accompanying the procession. No such duty exists, either by statute or common law. Absent a duty to provide for the safety of individuals traveling in a funeral procession, the court improperly held that a funeral director could be negligent for failing to take action to protect such individuals.

With respect to a funeral procession, a funeral director assumes responsibility only for transporting the deceased and the deceased's family to the committal site. A funeral director does

not undertake a duty to protect individual mourners who choose to follow in the procession from the risk of injury from automobile accidents or otherwise provide for their safety. Where no duty exists, a court cannot find negligence.

Furthermore, this Court should not sanction the Fifth District Court's presumption of a duty upon funeral directors to protect those who accompany a funeral procession from possible injury resulting from automobile accidents. Nor should the Court create such a duty. To do so would impose upon funeral directors demands which are both impractical and unreasonable.

Finally, refusing to impose upon funeral directors a duty to prevent or minimize the risk of injury from automobile accidents best serves the public interest by preserving a time honored tradition. Making funeral directors legally liable for the safety of each individual accompanying a funeral procession would invite the demise of the procession tradition as we know it.

ARGUMENT

I. McCORVEY CORRECTLY HOLDS THAT A FUNERAL DIRECTOR OWES NO DUTY TO INDIVIDUALS ACCOMPANYING A FUNERAL PROCESSION TO PROTECT THEM FROM AUTOMOBILE COLLISIONS WHICH MIGHT OCCUR AS THE PROCESSION LAWFULLY TRAVELS THROUGH AN INTERSECTION.

In McCorvey v. Smith, 411 So. 2d 273 (Fla. 1st DCA 1982), Florida's First District Court of Appeals held that a funeral director has no duty to protect individuals accompanying a funeral procession from injuries which may occur as the procession lawfully travels through an intersection. (A: 8-9) In that case, as here, an individual participating in a funeral procession received injuries when the vehicle in which the individual was traveling at the time was struck by another vehicle. In both cases, the collision occurred while a funeral procession traveled through an intersection and the vehicle which collided with the plaintiff's vehicle failed to yield the right of way to the procession, in violation of section 316.1974, Florida Statutes.

As recognized by the court in McCorvey, Id. at 274, responsibility for the safety of persons in a funeral procession as they travel through intersections rests with the drivers, pursuant to section 316.1974, Florida Statutes. (A: 9) Section 316.1974 provides:

> "(1) As used in this chapter, "funeral procession" means four or more motor vehicles accompanying a body of a deceased person in the daytime, when each of such vehicles has its headlights on.
>
> (2) Pedestrians and the operators of all vehicles, except emergency vehicles, shall yield the right of way to each vehicle which is part of a funeral procession. Whenever the lead vehicle in a funeral procession lawfully enters an intersection, the remainder of the vehicles in such procession may continue to follow the lead vehicle

through the intersection, not withstanding any traffic control device or right of way provisions prescribed by statute or local ordinance, provided the operator of each vehicle exercises due care to avoid colliding with any other vehicle or pedestrian upon the roadway.

(3) No person shall operate any vehicle as a part of a funeral procession without having the headlights of such vehicle lighted.

(4) No operator of a vehicle shall drive between vehicles in a funeral or other procession which are properly identified while the procession is in motion except when directed to do so by a police officer."

A. PLAIN STATUTORY LANGUAGE IS CONTROLLING.

By its plain language, section 316.1974, Florida Statutes, allocates risk of injury from an accident which occurs while a funeral procession crosses an intersection among drivers approaching the intersection and drivers participating in the procession. In Florida, legislative intent controls statutory construction, and the plain meaning of statutory language is the primary consideration in determining intent. Public Health of Dade County v. Lopez, 531 So. 2d 946 (Fla. 1988). Courts have no legislative function. State v. Swope, 30 So. 2d 748 (Fla. 1947). In matters controlled by statute, the judiciary seeks only to ascertain the will of the legislature. Id. Therefore, because the plain language of section of 316.1974 places responsibility to avoid automobile accidents upon drivers, this Court may not reallocate part of this responsibility to funeral directors.

The Florida Legislature knows full well the hazards presented by allowing a funeral procession to cross an intersection against a red light, especially in places where major traffic problems already exist. See, Letter from William A. Ramsey, Traffic

Engineer, to Ralph Poston, Chairman, Senate Transportation Committee (April 12, 1971)(recommending deletion of section 316.162, now section 316.1974). (A: 10-12) Notwithstanding such knowledge, the legislature has continued, since the codification of section 316.162 in 1967 (now section 316.1974), to leave responsibility for avoiding automobile accidents which might occur during funeral processions to drivers.

In addition, the legislature is presumably aware of prior court decisions. Bankston v. Brennan, 507 So. 2d 1385, 1387 (Fla. 1987). Thus, if the legislature disagreed with the decision of the First District Court of Appeals in McCorvey, it could easily have altered the language of section 316.1974 to affect the legislature's desired outcome. If, for example, the legislature believed the party arranging the procession should provide for an escort, it could have incorporated such a requirement into section 316.1974.[1]

The legislature's imposition of responsibility solely upon drivers approaching a funeral procession (to yield the right of way) and upon drivers participating in the procession (to exercise due care to avoid collisions) evidences the legislature's intent to

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[1] See, § 46.2-828, Va.Code Ann. (1994)("Funeral processions traveling under police or sheriff's escort shall have the right-of-way ..."); § 28-776, Ariz.Rev.Stat.Ann (1994)("Pedestrians and operators of all vehicles, except emergency vehicles, shall yield the right-of-way to each vehicle which is part of a funeral procession being led by a funeral escort vehicle."); and § 39-10-72, N.D.Cent.Code (1993)("Notwithstanding any traffic-control device or provision governing the right of way, whenever a law enforcement officer leading a funeral procession enters and intersection, the remainder of the vehicles in the procession may follow through the intersection.")

impose responsibility upon them exclusively. Any argument for reallocating such responsibility in Florida must be made to the legislature, not the courts.[2]

B. ANY OTHER INTERPRETATION OF SECTION 316.1974 WOULD LEAD TO UNREASONABLE RESULTS.

In addition, the Court should reject any interpretation of section 316.1974, Florida Statutes, which allows for allocating to funeral directors responsibility for protecting funeral procession participants against injury from automobile collisions while the procession travels through an intersection because such construction would lead to unreasonable and absurd results. City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950) (courts will not ascribe to the legislature an intent to create absurd or harsh consequences; thus, an interpretation avoiding absurdity is always preferred). Accord, McKibben v. Mallory, 293 So. 2d 48 (Fla. 1974). The result of imposing liability upon a funeral director for the type of automobile accident which occurred in this case would be unreasonable because a funeral director has no realistic or practical means to protect the cars following behind the director from the possibility that an oncoming car will fail to yield the right of way and collide with a vehicle in the cortege. Florida courts have long been loathe to impose liability

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[2] Both of the cases which the Fifth District Court of Appeals below found persuasive, Maida v. Velella, 511 N.E.2d 56 (N.Y. 1987) and Pickett v. Jacob Schoen & Son, Inc., 488 So. 2d 1257 (La. App. 4 Cir. 1986) are distinguishable from the present case because unlike Florida, neither New York nor Louisiana has a statute specifically addressing responsibility for avoiding automobile collisions during a funeral procession.

based upon a defendant's failure to control the conduct of a third party. Boynton v. Burglass, 590 So. 2d 446 (Fla. 3d DCA 1991).

As the Boynton court explained:

> Under the common law, a person had no duty to control the conduct of another or to warn those placed in danger by such conduct; however, an exception to that general rule can arise when there is a special relationship between the defendant and the person whose behavior needs to be controlled or the person who is a foreseeable victim of that conduct. ... Implicit in the creation of that exception, however, is the recognition that the person on whom the duty is to be imposed has the ability or the right to control the third party's behavior. ... Id. at 448 (Citations omitted.)

Applied to the case at bar, Boynton would impose no duty upon a funeral director to warn individuals traveling in a funeral procession of the potential risk from the type of accident which occurred here, i.e. an automobile accident that took place when a third party, not participating in the procession, failed to yield the right of way and collided with a vehicle traveling in the procession.

In addition, the type of duties which the Fifth District Court of Appeals would impose upon funeral directors would place upon them excessive and unrealistic demands. The Fifth District Court cited Pickett v. Jacob Schoen & Son, Inc., 488 So. 2d 1257 (La. App. 4 Cir. 1986), for the proposition that a funeral director might owe a duty of safety to mourners accompanying a funeral procession. As the two judges dissenting in Pickett explained, however, it is impossible to envision what that duty might entail. Requiring a funeral director to make sure each member of the procession receives information about signal light violation

hazards, or to afford the family of the decedent the option to have and pay for a police escort, or to furnish for every funeral a sufficient and adequate police escort would be both unreasonable and impractical. Pickett, Id. at 1259 (Redmann, C.J., and Gulotta, J., dissenting).

The present case involves facts similar to those at issue in Gilbert v. Gwin-McCollum Funeral Home, 106 So. 2d 646 (Ala. 1958). In that case, plaintiff was a passenger in a vehicle which was part of a funeral procession. As the procession crossed a heavily traveled highway, a trailer truck struck the plaintiff's vehicle and plaintiff suffered injuries as a result. Plaintiff alleged that the funeral director, who "organized or directed or supervised" the procession was negligent in failing to provide safe passage and failing to provide an escort or other means of protection to the guests in the funeral procession. Finding no duty on the part of a funeral director to provide the guests in a funeral procession with safe passage, the court refused to find the funeral director negligent. Id. at 652. In so ruling, the court recognized that the funeral director had no control over the operation of the vehicle in which the plaintiff was riding, nor any right to direct the driver how to operate the vehicle. Id.

The court in Jones v. J.W. Willis Co., 171 N.E.2d 710 (Ohio 1960), also found a funeral director not liable for injuries sustained by a mourner who received injuries while riding in an automobile driven by her husband in a funeral procession when their car was struck by another vehicle as the procession crossed an

intersection. In Jones, the funeral director had hired an escort service and the plaintiff sought to hold the director liable under a theory of respondeat superior. The court found no such liability, specifically finding that, aside from hiring a police escort at the request of the deceased's widow, the funeral director did not undertake to supervise the funeral procession to its minutest details. The funeral director did not, for example, furnish the automobile in which the plaintiff was riding, did not assign her to ride in any particular car, had no authority to determine whether the plaintiff should or should not join the procession, and aside from supplying some flags and windshield stickers, exercised no authority over the operation of the automobiles in the procession. Id. at 711.

Similarly, Union Park lacked the authority and the ability to exercise control over the drivers who chose to follow in the procession or other drivers whose path the procession might cross. Union Park undertook only to see that the deceased and the deceased's immediate family arrived at the committal site in a safe and timely manner. Accordingly, this Court should refuse to find Union Park owed a duty to individuals following in the procession to protect them from possible injury from automobile accidents or otherwise provide for their safety.

II. NO DUTY TO PROTECT INDIVIDUALS ACCOMPANYING A FUNERAL PROCESSION FROM AUTOMOBILE COLLISIONS EXISTS UNDER FLORIDA COMMON LAW, NOR SHOULD SUCH A DUTY EXIST.

This Court should uphold McCorvey on the additional ground that no common law duty of the type presumed by the Fifth District

Court of Appeals below exists. A survey of Florida case law reveals no case other than McCorvey addressing the issue of funeral director liability for the type of injury received by the plaintiff in the present case.

The Fifth District Court of Appeals erroneously presumed the existence of an underlying duty of safety owed by a funeral director to individuals accompanying a funeral procession. In its opinion below, the court held that McCorvey was not controlling because it relied on section 316.1974 and section 316.1974 does not address "a funeral director's duty to use care in planning and leading a funeral procession in such a manner that minimizes reasonably anticipated risks to those participating in the procession". (A: 5) The court's reference to such a duty presumes the existence of an underlying duty of safety which a funeral director owes to individuals accompanying a funeral procession; yet the court cited no authority under Florida law to support such a duty.

Instead, the Fifth District Court of Appeals suggested that merely because a funeral director can foresee potential risks and might in some instances be able to reduce those risks (however minimally), a funeral director owes a duty of safety to funeral procession participants. (A: 5-7) The ability to foresee and prevent risk of injury, however, is insufficient, without more, to create a legal duty. See, e.g., Boca Aviation, Inc. v. Famiglietti, 502 So. 2d 1287 (Fla. 4th DCA 1987)(small airport which was not required by regulation to have a traffic control

tower was not negligent for failing to construct one even though experts testified to the need for a tower, an ad hoc committee had recommended building a tower, and the airport could have constructed one); Pysz v. Henry's Drug Store, 457 So. 2d 561 (Fla. 4th DCA 1984)(pharmacist who filled customer's Quaalude prescription for nine years was not negligent for failing to warn the customer of the drug's addictive propensities despite allegations that the pharmacist knew or should have known of such propensities).

Furthermore, the Fifth District Court of Appeals erred by holding that the allegations in the amended complaint "present a situation in which the appellee funeral director had a duty to the appellant, which may have been breached" (emphasis added) (A: 5). Although breach of duty is a matter for the fact finder, the presence or absence of duty constitutes a legal question. McCain v. Florida Power Corporation, 593 So. 2d 500, 502 (Fla. 1992). The existence of a duty represents the minimal threshold legal requirement for opening the courthouse doors. Id. at 502. Therefore, unless a legal duty exists, no set of facts can constitute a negligence, i.e., a breach of duty.

McCorvey correctly acknowledged that under Florida law, a funeral director has no duty to protect individuals accompanying a funeral procession from risk of injury from automobile accidents. Accordingly, a funeral director's failure to warn, failure to

provide an escort, and failure to plan the safest route[3] cannot constitute negligence. If no duty of safety exists, failure to take safety precautions cannot constitute breach of an existing duty.

The Court should also reject the Fifth District Court's presumption of existing duty upon funeral directors for the safety of individuals accompanying a funeral procession because the drivers on the roadway represent the parties most capable of avoiding an automobile collision. A funeral director, on the other hand, has no control over individual drivers. Thus, section 316.1974 already allocates responsibility to those individuals in the best position to prevent injury. Moreover, the dangers faced by funeral procession participants should be apparent to them, without the need for specific warning, and Florida law already imposes upon them a duty to exercise due care. § 316.1974, Fla. Stat. As the court below acknowledged, "Everyone who drives in today's traffic knows how dangerous it is to cross a heavily traveled intersection against a red light". (A: 5).

Furthermore, a funeral director does not invite individuals to accompany a procession for any business or personal purpose of the director. They follow out of respect for the deceased, at the request of the deceased's family, or simply by tradition. Thus, a

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[3] Imposing upon a funeral director responsibility for choosing the "safest" procession route, as suggested by the Fifth District Court of Appeals below, would be patently unfair. Moreover, because the amended complaint contains no allegation that Union Park failed to choose the safest procession route, the Fifth District Court's consideration of this possible duty addressed an issue not presented in this case.

funeral director has no control over, and often has no realistic opportunity to communicate with, each individual who elects to participate.

III. PUBLIC POLICY SUPPORTS SHIELDING FUNERAL DIRECTORS FROM POTENTIAL LIABILITY TO INDIVIDUAL MOURNERS WHO CHOOSE TO ACCOMPANY A FUNERAL PROCESSION.

Public policy considerations support this Court's refusal to recognize an existing duty, or create a duty, upon funeral directors to protect individuals accompanying a funeral procession from possible injury from automobile accidents. The funeral procession constitutes an integral part of the funeral ceremony. As the body is removed from the funeral service, mourners pay homage to the deceased and assist the deceased's family in their grieving process by traveling with them, and the body, in ceremonial fashion, to the deceased's final resting place.

The funeral director facilitates all aspects of the funeral ceremony, including the procession, in a manner consistent with the wishes of the deceased and the deceased's family. To impose upon a funeral director a duty to protect third parties from injury as they accompany the procession would have a chilling effect on the willingness of a funeral director to assist the deceased's family in this procession tradition which plays such an important role in the funeral ceremony.

In Florida, imposition of a legal duty is inextricably intertwined with issues of public policy. See, e.g., Selby v. Bullock, 287 So. 2d 18 (Fla. 1973)(delegation of responsibilities and rights of among livestock owners and motorists is consistent

with the goals of promoting the safety of highway users and the livestock industry). Of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on societal consensus. Shands Teaching Hospital and Clinics, Inc. v. Smith, 497 So. 2d 644, 646 (Fla. 1986). The issue of civil liability for automobile accidents which occur during funeral processions is, therefore, best left to the legislature.

CONCLUSION

Based on the foregoing, this Court should resolve the issue on appeal in favor of Union Park and refuse to recognize or create a legal duty upon funeral directors to provide for the safety of those who accompany a funeral procession to protect them from injury resulting from automobile accidents. The legislature has spoken on this matter and has allocated responsibility exclusively to individual automobile operators.

In addition, where, as here, the accident occurred when a party not participating in the procession failed to yield the right of way and collided with a vehicle accompanying the procession as the procession lawfully traveled through an intersection, it would be unreasonable and impractical to impose upon a funeral director a duty to prevent or minimize the risk of such injury.

A funeral director undertakes only to see that the deceased and the deceased's family arrive at the committal site in a safe and timely manner and "leads" the procession only by virtue of tradition that dictates the mourners follow the deceased. A funeral director, does not, by honoring the procession tradition, undertake a duty to third parties following along behind to provide for their safety. Without a duty, there can be no negligence.

Accordingly, this Court should reverse the decision of the Fifth District Court of Appeals below and uphold McCorvey.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 31st day of May, 1995, to Melvin B. Wright, Post Office Box 4979, Orlando, Florida 32801.

Lisa East for
Douglas L. Stowell