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.

FILED
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APPELLANT'S REPLY BRIEF

STOWELL, ANTON & KRAEMER

Douglas L. Stowell
Florida Bar I.D. No.: 116277
Post Office Box 11059
Tallahassee, Florida 32302
(904) 222-1055

ATTORNEY FOR APPELLANT,
UNION PARK MEMORIAL CHAPEL,
POWELL-WEBBER FUNERAL SERVICES, INC.

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The Florida legislature, in formulating and codifying section 316.1974, Florida Statutes, addressed the risk of injury which occurs when a funeral procession travels through an intersection, and has allocated responsibility to avoid automobile accidents to individual automobile operators. Accordingly, the Court should defer to the legislature on this matter and refuse to impose a common law duty upon funeral directors to take action to avoid or minimize this same risk.

In addition, the Court should refuse to find Union Park owed a duty of care to Ms. Hutt based solely on Union Park's failure to take action to reduce foreseeable harm. Foreseeability alone does not give rise to a duty of care. Furthermore, Union Park's failure to take action cannot be construed as creating or increasing the zone of risk to which Ms. Hutt exposed herself by voluntarily participating in the funeral procession. The risk inherent in such participation stems from the right of way granted to funeral processions by the legislature in section 316.1974, Florida Statutes. This Court should, therefore, reverse the decision of the Fifth DCA below, which found a duty owed by Union Park to Ms. Hutt, and adopt McCorvey.

ARGUMENT

THE COURT SHOULD REVERSE THE DECISION BELOW AND UPHOLD McCORVEY.

In McCorvey v. Smith, 411 So. 2d 273, 274 (Fla. 1st DCA 1982), a case with facts strikingly similar to those in the present case, plaintiff alleged that a funeral director owed a duty of reasonable care to participants in a funeral procession to provide for their safety, and that the director breached such duty by failing to adequately protect participants as they traveled through an intersection. The First District Court of Appeals dismissed the complaint, ruling that "Florida law does not impose upon a funeral director the duty of care alleged by appellants." Id. at 274.

In its decision below, the Fifth District Court of Appeals ("the Fifth DCA") declined to follow McCorvey, finding that the allegations of the Hutts' amended complaint "is sufficient to charge Union Park with subjecting Ms. Hutt to an unreasonably hazardous traffic situation by leading the procession through the intersection where she received her injuries without safeguards or warnings." Hutt v. Nichols, 20 Fla. L. Weekly D704, 705 (Fla. 5th DCA March 17, 1995). Because a duty to provide safeguards or warnings would only arise if a funeral director has an underlying duty to provide for the safety of individual mourners as they travel in a funeral procession, the First and Fifth District Court reached conflicting conclusions. McCorvey correctly holds that a funeral director has no such duty.

A. THE COURT SHOULD DEFER TO THE LEGISLATURE ON MATTERS INVOLVING THE RISK OF AUTOMOBILE COLLISIONS DURING A FUNERAL PROCESSION.

In their answer brief below, the Hutts acknowledge that section 316.1974, Florida Statutes, does not impose a duty upon a funeral director to provide an escort or traffic directions or instructions to members of a funeral procession so as to reduce the likelihood of automobile accidents occurring at heavily traveled intersections. See, Appellee's Brief on the Merits, page 6. The Fifth DCA agrees. They suggest, however, that a funeral director may have a duty to minimize such risk under common law. Id. See also, Hutt v. Nichols, supra, 20 Fla. L. Weekly at D705.

The risk of harm in both the present case and McCorvey is the risk of injury from automobile accidents occurring while a funeral procession crosses an intersection. As acknowledged in McCorvey, the legislature has addressed this risk and allocated responsibility for reducing it to individual automobile operators. McCorvey, 411 So. 2d at 274. The Court should, therefore, defer to the legislative branch.

The present case is analogous to Bankston v. Brennan, 507 So. 2d 1385 (Fla. 1987), where the Court refused to create a common-law cause of action against a social host for injury or damage caused by an underage guest who became intoxicated. Section 768.125, Florida Statutes, addresses liability for injury or damage resulting from intoxication of minors. This law does not apply to social hosts. Id. at 1387. Accordingly, the Court stated:

> "We do not hold that we lack the power to [create such a cause of action], but we do hold that when the legislature has actively entered a particular field and has

> clearly indicated its ability to deal with such a policy question, the more prudent course is for this Court to defer to the legislative branch. ... While creating such a cause of action may be socially desirable as petitioners cogently argue, the legislature is best equipped to resolve the competing considerations implicated by such a cause of action." Id. at 1387.

Similarly, in Horne v. Vic Potamkin Chevrolet, Inc., 533 So. 2d 261 (Fla. 1988), the Court held that in light of a statute which relieves sellers of automobiles from liability for accidents which occur after transfer and delivery (section 319.22(2), Florida Statutes), the Court would not create a cause of action against the seller for making a sale to a purchaser whom the seller knows is incompetent and intends to operate the vehicle. A new policy such as this is best left for development by the legislature which is better equipped to resolve the competing considerations implicated by such a cause of action. Id.

The Florida legislature has considered the dangers which might result as a funeral procession travels through an intersection.[1] Pursuant to section 316.1974, Florida Statutes, the legislature has placed responsibility for avoiding such accidents upon drivers.[2] Thus, the Court should defer to the legislature and decline the

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[1] Because Louisiana has no statute directly addressing risk of automobile accidents which might occur during a funeral procession, Pickett v. Jacob Schoen & Son, Inc., 499 So. 2d 1257 (La. App. 4 Cir. 1986), cited by the Hutts and the Fifth DCA, is distinguishable from the present case.

[2] Significantly, the legislature has not amended section 316.1974 in reaction to McCorvey. See, Horne, supra, 533 So. 2d at 262 (despite the courts' past application of the section 319.22 to bar liability against former owners, the legislature has chosen not to amend the statute). See also, Bankston, 597 So. 2d at 1387 (the legislature is presumably aware of our prior decisions).

Hutts' invitation to create a cause of action against funeral directors for the same risk of harm already addressed by statute.

B. A FUNERAL DIRECTOR HAS NO DUTY TO PROTECT FUNERAL PROCESSION PARTICIPANTS FROM THE RISK OF AUTOMOBILE ACCIDENTS.

The Court should reject the position taken by the Fifth DCA in its decision below, and by the Hutts in their answer brief, because it relies upon the erroneous conclusion that Union Park, merely because it could foresee that an accident was more likely to happen if it failed to take certain precautions, owed Ms. Hutt a duty to take such precautions. Under Florida law, foreseeability alone does not give rise to a legal duty.

The fact that one realizes, or should realize, that an affirmative act on his part is necessary for another's protection does not itself impose upon him a duty to take action. Puhalski v. Brevard County, 428 So. 2d 375 (Fla. 5th DCA 1983)(Cowart, J., specially concurring), citing, Restatement (Second) of Torts, § 314. In Nelson v. Traer, 188 So. 2d 65, 67 (Fla. 3d DCA 1966)(on rehearing), the court held that a deputy sheriff had no duty to provide for the safety of a woman whom he left alone at night on the side of a heavily traveled highway after arresting her husband. The act of the deputy in leaving her alone, even if unkind or bad judgment under the circumstances, did not give rise to action for negligence in the absence of a legal duty to protect her. Id. at

67.[3] As this case demonstrates, foreseeability of harm, without more, is not actionable.

In McCain v. Florida Power Corporation, 593 So. 2d 500, 502 (Fla. 1992), this Court recognized that the district courts sometimes confuse the question of foreseeability as it relates to duty with the question of foreseeability as it relates to proximate causation. The duty element of negligence focuses on whether a defendant's conduct created a foreseeable zone of risk that posed a general threat of harm to others. Id. at 502. The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. Id. The duty element constitutes a minimal threshold legal requirement for opening the courthouse doors, whereas the proximate cause question is part of the much more specific factual requirement that a plaintiff must prove to win the case once the doors are open. Id.

In its decision below, the Fifth DCA found that the allegations in the amended complaint present a situation in which Union Park owed a duty of care to Ms. Hutt. The court failed, however, to adequately identify the basis or source of this alleged duty.

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[3] Springer v. Morris, 74 So. 2d 781 (Fla. 1954), cited by the Hutts in their answer brief for the proposition that knowledge of peril, or the opportunity to acquire such knowledge, is the prime foundation of liability in cases of negligence, involved an automobile accident. Because Florida law has long recognized a motor vehicle as a "dangerous instrumentality", the operation of which is commensurate with a duty to maintain a sharp and attentive lookout in order to keep prepared to the meet the exigencies of an emergency within reason and with reasonable care and caution, Nelson v. Ziegler, 89 So. 2d 780, 783 (Fla. 1956), the Hutt's reliance on Springer is misplaced.

To the extent the Fifth DCA suggests that a duty arose because Union Park's conduct created a foreseeable zone of risk, the Court must reject this finding. Although case law holds that one who creates a foreseeable zone of risk bears a duty to prevent or minimize the risk of harm he or she created, Kaisner v. Kolb, 543 So. 2d 732, 735 (Fla. 1989), no conduct or alleged conduct on the part of Union Park created or increased the danger faced by Ms. Hutt.

Union Park neither invited nor otherwise actively encouraged Ms. Hutt to participate in the procession. Union Park took no action which hindered Ms. Hutt's ability to avoid the oncoming vehicle which struck the car she was operating, or the ability of the driver of the oncoming vehicle to avoid striking Ms. Hutt's car.

Compare the facts of the present case with those in Maida v. Velella, 511 N.E. 2d 56 (N.Y. 1987), cited by the Hutts in their answer brief. In that case, the funeral director allegedly increased the danger of traveling in the procession by actually stopping the procession as it crossed through an intersection. As a result of this stoppage, plaintiff's vehicle was trapped in the middle of the intersection and the driver was left with no means to avoid oncoming traffic.

In an attempt to find some culpable conduct on the part of Union Park, the Fifth DCA suggests that by not taking action to make an already dangerous intersection less dangerous, Union Park made it more dangerous. See, Hutt, supra 20 Fla. L. Weekly at D705

(by leading the procession through a dangerous intersection without safeguards or warnings, Union Park subjected Ms. Hutt to an unreasonably hazardous traffic situation). According to the Fifth DCA's argument, Union Park made the intersection more dangerous (by failing to make it less dangerous) and thereby "created or broadened the foreseeable zone of risk." Thus, Union Park became legally obligated to take action to reduce the existing danger.

The Court should reject this convoluted argument. The Fifth DCA's reasoning if taken to its logical (or illogical) conclusion, would mean, in effect, that any time an individual can foresee harm and fails to take action to prevent it, he or she will be deemed to have increased the harm, and accordingly, will automatically become guilty of breaching a duty to take action to reduce the harm.

The lack of any conduct by Union Park which created or increased the dangerous nature of the intersection (other than failing to reduce the danger) distinguishes the present case from Thunderbird Drive-In Theatre v. Reed, 571 So. 2d 1341, 1343 (Fla. 4th DCA 1990); Johnson v. Howard Mark Productions, Inc., 608 So. 2d 937 (Fla. 2d DCA 1992); and Kaisner v. Kolb, supra, all cited by the Hutts in their answer brief.[4]

In Thunderbird Drive-In Theatre v. Reed, 571 So. 2d 1341 (Fla. 4th DCA 1990), the defendant scheduled seven different movies to commence at one time and encouraged its patrons to arrive within a single thirty minute interval by offering an "early bird" discount

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[4] Vining v. Avis Rent-a-Car Systems, Inc., 354 So. 2d 54 (Fla. 1977), also cited by the Hutts is distinguishable because it dealt with conduct which violated Florida statutory law.

to all those who arrived between 7:30 and 8:00. Accordingly, the court held that a jury could find that the defendant was negligent by failing to take action to lessen or take precautions against the dangerous condition created by the resulting traffic congestion. Id. at 1343. In so ruling, the court acknowledged that where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect other from the harm the risk poses. Id. at 1343-44 (citations omitted).

In Kaisner, the court held that sheriff's deputies owed a duty of care to a motorist whom they pulled over to minimize the risk of harm in which they placed him. By directing the motorist to pull off to the side of the highway and detaining him there, the deputies deprived the motorist of his normal opportunity for protection against onrushing traffic. Kaisner, supra, 543 So. 2d at 734. Thus, the deputies' conduct created a foreseeable zone of risk.

Johnson involved an injury which occurred when a automobile struck a teenager who was crossing the street at night to patronize defendant's teenage nightclub business. Defendant's business attracted more patrons than could park in defendant's lot, causing spill-over parking across the street from the club. Defendant could, therefore, be deemed to have created a foreseeable zone of risk. Johnson, supra, 608 So. 2d at 938.

The "zone of risk" faced by Ms. Hutt and by participants in any funeral procession is the dangerous situation created by section 316.1974, Florida Statutes, which authorizes vehicles in a funeral procession to proceed through intersections without regard to traffic control devices. The amended complaint contains no allegations that any conduct by Union Park increased this existing danger at the intersection where Ms. Hutt received her injuries.

Allegations that Union Park failed to take action to reduce the level of danger there cannot be construed as having created or increased the risk of harm. In Puhalski v. Brevard County, 428 So. 2d 375 (Fla. 5th DCA), where an injured bicyclist charged Brevard County with negligence in failing to properly maintain a bicycle path, the court affirmed summary judgment in favor of the County. As Judge Cowart explained, the danger of a bicyclist riding on the edge of the pavement on a busy highway being struck by a motorist is obviously foreseeable. Id. at 375-76. The County's failure to properly maintain the path did not create this danger. Moreover, although the County's lack of maintenance led to defects in the path, the defects did not cause plaintiff's injuries. Id. at 376. The County's failure to act cannot constitute a breach of duty because the County had no legal duty to maintain the path. Id. Similarly, Union Park's failure to take action to minimize the danger of crossing intersections did not create the danger inherent in the act of crossing an intersection against a red light, nor did Union Park have any legal duty take such action.

CONCLUSION

Based on the foregoing, Union Park respectfully requests this Court to reverse the decision of the Fifth District Court of Appeal below and adopt McCorvey.

Respectfully submitted,

STOWELL, ANTON & KRAEMER

By: Douglas L. Stowell

Douglas L. Stowell
Florida Bar No. 116277
Post Office Box 11059
Tallahassee, Florida 32302
(904) 222-1055

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 22nd day of June, 1995, to Melvin B. Wright, Post Office Box 4979, Orlando, Florida 32801.

Douglas L. Stowell