SUPREME COURT OF FLORIDA

LINDA MCGHEE,

Petitioner,

vs. CASE NO. 85,636

DEPARTMENT OF CORRECTIONS, DISTRICT COURT OF APPEAL
FIRST DISTRICT, NO. 93-3757

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

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DOC advances the following arguments in support of its position that liability may not be imposed against it as a result of the criminal acts of an escaped prisoner: (1) the answer to the certified question is controlled in its favor by Reddish v. Smith, 468 So. 2d 929 (Fla. 1985), as clarified by Department of Health & Rehabilitative Services v. Whaley, 574 So. 2d 100 (Fla. 1991); (2) the Restatement (Second) of Torts §§ 315(a) and 319 principles pertaining to duties which arise when one assumes custody of individuals with dangerous propensities do not apply to DOC because DOC is not "in the business" of supervising prisoners for remuneration; (3) if DOC owes a duty to third persons, that duty is limited geographically to the immediate search perimeter surrounding the prison and chronologically to the period of time prison officials are actively pursuing the escaped prisoners; and (4) because sovereign immunity has not been waived for the malicious, wanton and willful acts of state employees, the state is concomitantly immune for the malicious, wanton and willful acts committed by third persons. Petitioner will address each argument below.

I. Reddish does not relieve DOC of liability.

DOC strenuously asserts that Reddish v. Smith insulates it from tort liability in this case. In Reddish, a prisoner was assigned to Lawtey Correctional Institute, a minimum-security facility, even though the prisoner had been convicted of first-

degree murder, armed robbery and escape. The prisoner escaped from Lawtey and abducted and shot respondent during the course of a robbery in Jacksonville. Respondent claimed that DOC "failed to conform to the proper standard of care to be taken in classifying and assigning the custody of prisoners." Reddish, 468 So. 2d at 930. Respondent's complaint was dismissed based upon sovereign immunity grounds and based upon lack of foreseeability due to the lapse of time between the escape and injury (three months). The district court reversed and certified the following question of great public importance: "May prisoner classifications ever give rise to tort liability, and, if so, under what circumstances?" Smith v. Department of Corrections, 432 So. 2d 1338, 1343 (Fla. 1st DCA 1983).

As applicable to the present case, the Reddish court first decided that DOC enjoyed sovereign immunity for the classification and assignment of prisoners within the prison system. The court reasoned that the trial court correctly dismissed the action because "[t]he complaint in this case was based on the classification and assignment of [the prisoner] and not on the possible negligence of the department's employees having a direct and operational-level duty to supervise him and keep him confined at the time of his escape." Reddish, 468 So. 2d at 931-32. At bar, the operative issue was legal duty, not

sovereign immunity as in Reddish.[1] Further, the complaint filed in this case was not based upon classification and assignment of the escaped prisoners, but, instead, was based entirely upon the negligence of the department's employees having a direct and operational-level duty to supervise the prisoners and keep them confined at the time of their escape (R 623-27). The holding of Reddish, therefore, does not control.

In dicta, the Reddish court also explained that no liability could be imposed against DOC even if the alleged negligent conduct (classification and assignment of the prisoner) was an operational-level activity. Reddish, 468 So. 2d at 932. This court supported that conclusion by first emphasizing that the statutory waiver of immunity applies to governmental agencies "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." Reddish, 468 So. 2d at 932, quoting § 768.28(1), Fla. Stat. (1977)(emphasis the court's). This court further explained that the emphasized portion of the statute allows recovery against a governmental agency "only to the extent that such is available against a private person for the same conduct as that committed by a state employee and charged as being tortious." Reddish, 468 So. 2d at 932. Answering the certified question in the negative and

[1] DOC admitted below that it was guilty of "operational level negligence," preserving the legal duty question for appellate review (T 12).

finding the statutory waiver of sovereign immunity inapplicable, this court concluded that "the decision to transfer a prisoner from one corrections facility to another is an inherently governmental function not arising out of an activity normally engaged in by private persons." Reddish, 468 So. 2d at 932.

This court revisited Reddish in Department of Health and Rehabilitative Services v. Yamuni, 529 So. 2d 258 (Fla. 1988), where the question was whether the state had waived sovereign immunity for liability arising out of the negligent conduct of an HRS caseworker which resulted in injuries to a child. This court first decided that the caseworker's actions in allowing an infant to remain in the custody of its mother were not planning-level or policy-making activities to which immunity attached. Yamuni, 529 So. 2d at 260. This court also addressed HRS's Reddish-based argument that because its activities were exclusively governmental operations not performed by private persons, liability could not be imposed. In response, this court acknowledged that the language from Reddish relied upon by HRS was dicta and receded "from any suggestion in Reddish that there has been no waiver of immunity for activities performed only by the government and not private persons." Yamuni, 529 So. 2d at 261.

Reddish was again acknowledged in Whaley, 574 So. 2d at 102 n.1., where this court made the following statement embraced by DOC: "Moreover, Reddish is further distinguished because the

department of corrections has no specific duty to protect individual members of the public from escaped inmates while HRS has specific statutorily imposed duties to protect children." With the utmost respect, because Reddish was decided on sovereign immunity grounds and on the ground that private persons do not engage in prisoner assignment and classification operations, the quoted statement from the Whaley footnote was dicta and should not serve as controlling precedent in this case.

Not only is DOC's reliance upon Reddish and Whaley misplaced, its Trianon Park analysis is highly suspect. DOC hides behind the shield afforded by Trianon Park's Category II, "Enforcement of Laws and Protection of the Public Safety." Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912, 919 (Fla. 1985). Under Category II,[2] discretionary activities conducted by judges, prosecutors, law enforcement officers, building inspectors and health and safety officers generally are insulated from liability. Trianon Park, 468 So. 2d at 919. This court cautioned, however, that law enforcement activities such as the negligent operation of motor

[2] Petitioner's Initial Brief (pages 16-17 n.5) inadvertently stated that DOC acknowledged at oral argument in the district court that its conduct was a Category III activity. DOC contended instead its conduct fell within Category II.

vehicles and handling firearms give rise to an actionable duty of care. Trianon Park, 468 So. 2d at 920.

The allegations of misconduct in the present case are more analogous to the motor vehicle-firearms exception to Category II than to the discretionary power of law enforcement officials to enforce the law for which no liability under Category II attaches. Indeed, several of the allegations in the present case relate to firearms and the inspection of the motor vehicle used to transport the prisoners from the correctional facility to the doctor's office where the prisoners escaped (R 628-29, ¶ 8). Rather than exercise its discretionary law enforcement powers, DOC in this case negligently violated their own established rules and procedures and thereby allowed the inmates to escape and subsequently kill petitioner's decedent.[3] Trianon Park, petitioner respectfully submits, was never intended to insulate DOC from tort liability for this type of conduct. See City of Pinellas Park v. Brown, 604 So. 2d 1222 (Fla. 1992)(duty owed to all persons who might encounter police caravan negligently

[3] DOC admitted that the transport officer carrying the weapon was too close to the inmates to safely guard them in violation of Department and Holmes Correctional Institute policies and procedures and that the officer's failure to maintain a safe distance from the inmates allowed them to attack the officer with a pair of scissors taken from the Holmes Correctional Institute barber shop and forcibly remove the officer's firearm from his person (R 806-07, ¶¶ 38-42). Petitioner's expert witness testified that DOC violated its standards, procedures, practices and policies which led to the escape of the inmates and the death of petitioner's decedent (T 108). Because DOC had admitted negligence, the trial court did not allow further elaboration (T 23-24).

conducting high speed chase of motorist); Woodall v. City of Miami Beach, 599 So. 2d 231 (Fla. 3d DCA 1992)(police officer liable for using excessive force to effect arrest).

II. The Restatement (Second) of Torts §§ 315(a) and 319 apply.

DOC argues that the Restatement (Second) of Torts §§ 315(a) and 319 do not apply because DOC is required by law to take custody of dangerous individuals and, therefore, is not "in the business" of supervising prisoners. Answer Brief of Respondent at 12. DOC argues further that sections 315 (a) and 319 apply only to private institutions, thereby distinguishing Nova University, Inc. v. Wagner, 491 So. 2d 1116 (Fla. 1986). Answer Brief of Respondent at 12-13. DOC's argument completely misses the mark.

"Section 768.28, Florida Statutes [(1989)], waives governmental immunity from tort liability 'under circumstances in which the state or [an] agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state.' § 768.28(1), Fla. Stat. [(1989)]." Department of Health and Rehabilitative Services v. B.J.M., 656 So. 2d 906, 911 (Fla. 1995). Section 768.28(5), Florida Statutes (1989), also provides that "[t]he 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." Thus, duty in the context of governmental tort liability may be founded upon "a common law or statutory duty of

care . . . that would have been applicable to an individual under similar circumstances." Kaisner v. Kolb, 543 So. 2d 732, 734 (Fla. 1989). In short, "the identical existing duties for private persons apply to governmental entities." Trianon Park, 468 So. 2d at 917.

Nothing in the waiver of immunity statute or case law supports DOC's contention that common law duties cannot be imposed against it because it is not "in the business" of supervising prisoners. Government is liable in tort to the same extent as a private individual under similar circumstances. This test does not mean that the governmental agency must engage in remunerative activity to demonstrate the requisite similarity to the private sector. Indeed, few governmental functions are performed for remuneration, and liability has been consistently and repeatedly imposed against governmental agencies for a wide variety of uncompensated activities. See, e.g., Butler v. Sarasota County, 501 So. 2d 579 (Fla. 1986)(analyzing duty owed by county, as operator of swimming facility, from same perspective as "private owner" of swimming facility); Department of Transportation v. Webb, 438 So. 2d 780 (Fla. 1983)(Department of Transportation liable for negligent maintenance of railroad grade crossing); Crawford v. Department of Military Affairs, 412 So. 2d 449 (Fla. 5th DCA 1982), rev. denied, 419 So. 2d 1196

(Fla. 1982)(negligent operation of motor vehicle by national guardsman).[4]

Consistent with the Restatement (Second) of Torts § 319, this court has held that a private party in the business of taking custody of dangerous individuals has a duty to exercise ordinary care to avoid foreseeable harm its charges might inflict upon members of the public. Nova University, 491 So. 2d at 118. This same duty applies to DOC. Holding DOC liable also is consistent with the statutory framework governing private correctional facilities. Chapter 957 created the "Correctional Privatization Commission" which is authorized to execute contracts "for the designing, financing, acquiring, leasing, constructing, and operating of private correctional facilities" in the state of Florida. § 957.03, Fla. Stat. (1993). The legislature expressly provided that each private correctional facility contracting with the commission "is liable in tort with respect to the care and custody of inmates under its supervision . . . ." § 957.05, Fla. Stat. (1993). Section 768.28(1) imposes tort liability against a government-operated correctional facility to the same extent.

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[4] Some jurisdictions adhere to the "pecuniary benefit test" to determine governmental tort liability whereby immunity is waived only for proprietary functions performed by governmental agencies which usually are performed by private individuals for profit. See 57 Am. Jur. 2d, Municipal, County, School, and State Tort Liability § 97 (1988). Florida has rejected that approach. See Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979).

DOC also erroneously relies upon language from Restatement (Second) of Torts § 324A which it contends distinguishes between the duty owed by entities which voluntarily, for profit or otherwise, assume custody of others and entities like DOC who assume custody of others involuntarily under a legal obligation. Answer Brief of Respondent at 12-13. Section 324A clearly does not apply to the prison setting, but, instead, covers liability to third persons arising from contractual undertakings. For example, if a store owner hires an electrician to repair a light fixture hanging over an aisle, the electrician negligently fails to secure the fixture, and the fixture falls and injures a customer, section 324A imposes liability against the electrician. Restatement (Second) of Torts § 324A, comment c, illustration 1 (1964). Section 319, as its title indicates, addresses the "Duty of Those in Charge of Person Having Dangerous Propensities" and controls DOC's liability in this case.

III. DOC's duty of care extended to petitioner's decedent.

DOC argues that if this court answers the certified question in the affirmative and holds that a duty is owed, that duty should be limited in this case geographically to the immediate search perimeter surrounding the prison and chronologically to the period of time prison officials were actively pursuing the escaped prisoners. Answer Brief of Respondent at 15-21.[5]

[5] In the district court, DOC conceded a duty was owed to that extent. Department of Corrections v. McGhee, 653 So. 2d 1091, 1098 (Fla. 1st DCA 1995)(Ervin, J., concurring and dissenting).

Drawing arbitrary geographical and chronological boundaries does little to protect the public from dangerous inmates who might escape custody as a result of DOC negligence. If this court accepts DOC's invitation to draw the time line at the point prison officials "call off the dogs," DOC will be tempted to terminate its search prematurely to avoid possible liability for harm the escaped inmates might inflict upon members of the public. Geographical parameters also make little sense. For example, in this case DOC argues that liability should not extend across several state lines to Ocean Springs, Mississippi. Ocean Springs, however, is about the same distance from the escape location in Bonifay as Jacksonville where DOC conducted surveillance on inmate Woolard's girlfriend (T 547). The fact-specific time and distance parameters established in each case are more appropriately the subject of the jury's proximate cause analysis and should not be subject to rigid judicial control. See Wilson v. State, Department of Public Safety and Corrections, 576 So. 2d 490, 494 (La. 1991)("To focus exclusively on the time expiring after the inmate's exit from the prison grounds to the point where he victimizes a plaintiff leads to arbitrary cut-off points which serve neither the interests of plaintiffs nor those of the State. The same may be said of the distance involved.").

The test adopted by the Louisiana Supreme Court represents the more reasonable approach. Under that test, the controlling factor is "whether the offense occurred during, or as an integral

part of, the process of escaping." Wilson, 576 So. 2d at 493. In applying that test, the Louisiana court discouraged application of arbitrary time and distance limitations and observed "there is no bright-line point of delineation which will satisfactorily assist a court in making the appropriate duty-risk analysis." Wilson, 576 So. 2d at 494. Accordingly, the facts of each case should determine whether the criminal acts of the escaped inmates were committed during, or as an integral part of, the escape process. Wilson, 576 So. 2d at 494.

The Louisiana cases cited by DOC, which were decided before Wilson, are not authoritative because they overemphasize time and distance considerations. In Nelson v. Parish of Washington, 805 F.2d 1236 (5th Cir. 1986), the court recognized that the appropriate inquiry was whether the offense occurred as an integral part of the process of escaping, regardless of the time and location, but decided the case nonetheless based "upon the proximity in time and space of [the escaped prisoner's] offense to the point of his escape." Nelson, 805 F.2d at 1240-41 n.6. The other two Louisiana cases cited by DOC, Reid v. State, Dept. of Corrections, 376 So. 2d 977 (La. App. Ct. 1979), and Graham v. State, Health and Social and Rehabilitation Services Admin., 354 So. 2d 602 (La. App. Ct. 1978), also overemphasize time and distance contrary to Wilson.

The Oregon case cited by DOC, Buchler v. State, Oregon Corrections Division, 316 Or. 499, 853 P.2d 798 (1993), offers

DOC no support. First, directly opposing DOC's position at bar, the Oregon Supreme Court expressly adopted Restatement (Second) of Torts § 319 as the standard for measuring the duty owed by a correctional facility to members of the general public for the escape of an inmate. Buchler, 853 P.2d at 802. Having adopted section 319, the dispositive question confronting the Oregon court was whether the state, tracking section 319, "knew or should have known that the prisoner was 'likely to cause bodily harm to others if not controlled.'" Buchler, 853 P.2d at 802. Because the prisoner in that case who escaped and shot two people had no history of violent criminal behavior, the criminal attack was not foreseeable and the court refused no find a legal duty owed to the victims. Here, in sharp contrast to Buchler, the inmates' known histories of violent crime, previous escape attempts and aberrant, anti-social behavior made their post-escape crime spree entirely predictable.

IV. The waiver of sovereign immunity extends to malicious, wanton and willful acts committed by third persons.

DOC argues that because the state's waiver of immunity under section 768.28(9)(a) does not extent to malicious, wanton and willful acts of its employees, public policy dictates that the state should enjoy immunity for the malicious, wanton and willful conduct of third parties. This argument completely lacks merit.

First, the statute cited by DOC specifically relates to willful and wanton acts committed by state employees, not by third persons for whose conduct the state may be held liable.

Second, the state is liable under section 768.28(1) to the same extent as private individuals. Private individuals may be held responsible under Florida law for intentional acts committed by third persons over whom no control has been exerted. See, e.g., K-Mart Enterprises of Florida, Inc. v. Keller, 439 So. 2d 283 (Fla. 3d DCA 1983), rev. denied, 450 So. 2d 487 (Fla. 1984). Finally, contrary to DOC's argument, Florida courts repeatedly have imposed liability against governmental agencies for the intentional or criminal acts committed by third persons. See, e.g., Department of Health & Rehabilitative Services v. Whaley (HRS held liable for damages sustained by juvenile as a result of sexual assault by fellow detainees in juvenile detention intake facility); Department of Health and Rehabilitative Services v. Yamuni (HRS held liable for injuries and damages sustained by infant negligently allowed to remain in mother's custody); Doe v. Escambia County School Board, 599 So. 2d 226 (Fla. 1st DCA 1992)(school board liable for damages sustained by high school student raped by five fellow students).

CONCLUSION

The certified question should be answered in the affirmative and the decision below should be quashed with directions to the district court on remand to address the remaining issues

presented for review by appeal and cross-appeal.

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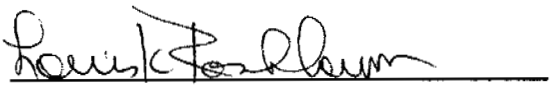
By: 
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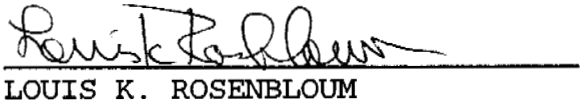
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Laura Rush, Esquire, Assistant Attorney General, Office of the Attorney General, The Capitol - Suite Pl - 01, Tallahassee, Florida 32399-1050; Jack W. Shaw, Jr., Esquire, Suite 1400, 225 Water Street, Jacksonville, Florida 32202-5147; and to Loren E. Levy, Esquire, Post Office Box 10583, Tallahassee, Florida 32302 by mail this 7th day of September, 1995.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