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IN THE SUPREME COURT OF FLORIDA

LEVADA LEE, ETC.,

Petitioner,

v.

CASE NO. 87,071

DISTRICT COURT OF APPEAL,
1ST DISTRICT NO. 93-1350
93-1411

DEPARTMENT OF HEALTH AND REHABILITATIVE: SERVICES,

Respondent.
_____/

REPLY BRIEF OF PETITIONER

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ISSUE I

CONFLICTING EVIDENCE WAS PRESENTED AT TRIAL REGARDING NEGLIGENT SUPERVISION BY HRS AND THUS TEE CASE WAS PROPERLY SUBMITTED TO TEE JURY

In its Answer Brief, HRS has acknowledged that it owed D. L., as a residential developmentally disabled adult client at Sunland-Marianna, a common-law duty of reasonable care to protect her from foreseeable harm by third persons (Answer Brief at p. 13). As set forth in Petitioner's Initial Brief, there was substantial, competent evidence presented at trial that HRS breached its acknowledged duty of care to protect D. L. from foreseeable harm by third persons, resulting in injury to D. L.. Thus, the issue of HRS' negligence in this case was properly submitted to the jury. *See* GNB, Inc. v. United Danco Batteries, Inc., 627 So.2d 492 (Fla. 2d DCA 1993) (The resolution of conflicts in evidence and inferences therefrom was a task for the jury).

HRS argues that the Petitioner failed to make out a prima facie case of negligence, relying on what it argues were errors in evidentiary rulings by the trial court below. Due to the page limitation for this Reply Brief, Petitioner directs this Court to the arguments presented to the district court in her Answer Brief for extensive argument regarding the correctness of the trial court's evidentiary rulings which were challenged by HRS on direct appeal. Petitioner will, however, briefly address the two primary evidentiary issues raised by HRS.

First, HRS argues that the abuse report and the HRS abuse investigator's testimony regarding his conclusions of inadequate supervision should not have been admitted at trial (Answer Brief at

14). Mr. Peacock's testimony, as well as his abuse report constituted admissions of a party opponent, and were properly admitted at trial under the admissions exception to the hearsay rule set forth in Section 90.803(18)(d), Fla. Stat. (1985), which includes "[a] statement by [a party's] agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship."

Mr. Peacock testified that at all times relevant hereto he was employed by HRS as an abuse investigator with the Division of Aging and Adult Services (R-86). He testified that he prepared his abuse report as part of his official duties as an HRS abuse investigator charged with the responsibility of investigating abuse reports and filing reports thereon (R-88). Thus, Mr. Peacock's testimony and his abuse report concerned a matter within the scope of his employment made during the existence of the employment relationship, and this evidence was properly admitted at trial. ***See*** Metropolitan Dade County v. Yearby, 580 So.2d 186 (Fla. 3d DCA 1991).

Additionally, Mr. Peacock's abuse report was admissible under the "public records and reports" exception to the hearsay rule, as it constituted a report of a public agency concerning "matters observed pursuant to a duty imposed by law as to matters where there was a duty to report." Section 90.803(8), Fla. Stat. It was undisputed that Mr. Peacock conducted his investigation and prepared his abuse report pursuant to the mandates of Section 415.104(1), Fla. Stat., which provides that HRS shall, upon a receipt of a report alleging abuse, neglect, or exploitation of a disabled adult, commence, or cause to be commenced within 24 hours,

a protective services investigation of the facts alleged therein (R-88). His report was therefore also properly admitted under the public records and reports exception to the hearsay rule. See Florida Association of Counties, Inc. v. Dept. of Administration, Division of Retirement, 580 So.2d 641 (Fla. 1st DCA 1991); Sikes v. Seaboard Coast Line RR Co., 429 So.2d 1216 (Fla. 1st DCA 1983).

HRS incorrectly states that the investigator's conclusion that D. L. was inadequately supervised was not based upon any facts uncovered during the course of his investigation. Mr. Peacock testified that prior to writing his report, he reviewed all HRS records concerning D. L.; interviewed staff who had contact with D. L.; and conducted interviews with D. L. and various Sunland clients (R 87; R 96; R 111). His review of D. L.'s sonogram revealed that impregnation occurred within four days of March 21, 1987 (R 97). His interviews with HRS staff revealed that on March 18, 1987, a date within the time frame for impregnation, patients were left at a dance conducted in the gym from 6:30 to 8:45 without proper supervision (R 97-98; R 117). D. L. told Mr. Peacock that two clients, including Leslie Shaw, had "played nasty" with her at the dance (R 93; R 96). Although, Mr. Peacock was advised of at least two clients having sex with D. L., no instances of sexual activity involving D. L. were ever reported, as required by Fla. Admin. Code R. 10D-38.023(1)(d) (R 98).

HRS' argument that Mr. Peacock's testimony and report should not have been admitted into evidence due to his failure to consider the normalization principle or the client's Bill of Rights contained in Section 393.13, Fla. Stat., is without merit. Mr.

Peacock testified that he was trained in the proper methods of conducting abuse investigations by HRS, and that he utilized his training and experience in preparing the abuse report (R 89). HRS itself has acknowledged in its Answer Brief that the normalization principle does not obviate its duty to continuously supervise its residential clients (Answer Brief at 31). Thus, if Mr. Peacock's investigation revealed that clients were improperly supervised, the normalization principle would have no impact upon his conclusions.

The cases cited by HRS for the proposition that Mr. Peacock's conclusion that neglect was "indicated" improperly told the jury how to decide the issue of negligence, are distinguishable, because those cases deal with legal conclusions testified to by expert witnesses. In this case, Mr. Peacock, was merely testifying to the results of his investigation conducted in the course of his employment with HRS and in accordance with Florida Statutes. As noted, his testimony and his abuse report fell within well recognized exceptions to the hearsay rules,

HRS also argues that the Petitioner's expert, Jean Becker Powell, was unqualified to render an opinion regarding D. L.'s mental state because she had no training or experience in evaluating developmentally disabled adults, especially with respect to ascertaining symptoms of Post-Traumatic Stress Disorder in such individuals. HRS' objections to the qualifications of Ms. Powell were properly overruled by the trial court. Ms. Powell testified that she has held employment as a clinical counselor in a mental health facility and as a Victim Assistant's Coordinator for the State Attorney's Office, specializing in child sexual abuse and sexual assault (R-188). In the course of her work with the State

Attorney's Office, she received extensive ongoing training with regard to victim related issues, including Post Traumatic Stress Disorder (PTSD) and she counseled and worked with sexual abuse victims including disabled victims (R-192). She has conducted workshops, statewide and nationally, and has put on over thirty seminars on sexual abuse, victimology and PTSD; and, she has taught the study of PTSD at Florida State University (R-191-192). Ms. Powell has done research and read materials dealing with the topic of diagnosing PTSD in mentally retarded victims, and has worked with a number of mentally retarded victims of sexual abuse (R-194; R-208). Based on Ms. Powell's study of authoritative sources and her experience in the area of diagnosing PTSD in mentally retarded victims, the trial court properly allowed Ms. Powell to testify as an expert witness in the area of PTSD. See Lake Hospital and Clinic, Inc. v. Silversmith, 551 So.2d 538, 545 (Fla. 4th DCA 1989); Seaboard Air Line R.R. Co. v. Lake Region Packing Ass'n, 211 So.2d 25, 30-31 (Fla. 4th DCA 1968).

Contrary to HRS' contention that Ms. Powell's testimony was based solely on D. hearsay statements, Ms. Powell testified that her expert opinions were based upon a review of extensive records received from HRS, conversations with D. L., and conversations with D. L.'s family (R 196-197). Although HRS contends that expert opinion based on hearsay statements is inadmissible, Section 90.704, Fla. Stat., provides that an expert may rely on facts that have not been admitted, or are even admissible, when those underlying facts are of "a type reasonably relied upon by experts in the subject to support the opinions expressed. Sikes v. Seaboard Coast Line R.Co., 429 So.2d 1216,

1222 (Fla. 1st DCA 1983). Particularly, hearsay may be relied upon by an expert in forming her opinions if that kind of hearsay is relied upon during the practice of the experts themselves when not in court. Robinson v. State, 574 So.2d 108, 111 (Fla. 1991). At trial, Ms. Powell testified that she must always rely on what sexual abuse victims tell her in forming her opinions as there are normally no witnesses to acts of sexual abuse (R 213-214). Since HRS has admitted that its employees were without knowledge as to any sexual incidents involving D. L., it is obvious that Ms. Powell would have to rely in part upon statements made to her by D. L. in forming her expert opinions regarding sexual abuse and PTSD.

HRS argues that Petitioner did not introduce evidence to show that D. L. intermingled, unsupervised, at any particular time with particular clients who were known by HRS to be sexually aggressive toward D. L. or any other client. Contrary to this assertion, testimony was introduced that D. L. told the abuse investigator that Leslie Shaw had played nasty with her at the gym during a dance. D. L.'s social worker, Russell Register, testified that Leslie Shaw was known to be sexually active and aggressive (R 174). The evidence at trial was uncontroverted that supervision by Sunland staff was the only means available to protect D. L. from foreseeable sexual abuse by clients known to be sexually aggressive (R 146; R 171-172; R 361). Based upon the evidence that D. L. reported that Leslie Shaw had played nasty with her at the dance, a dance which occurred within the critical time period for her impregnation, and the fact that no one ever

observed D. L. having sex, the issue of whether D. L. was negligently supervised was properly submitted to the jury.

Next, HRS argues that any claim by Petitioner that HRS violated its rules and regulations was barred because neither Chapter **393** nor any provisions of Chapter 10D-38 contains an expression of legislative intent to permit a private cause of action based upon violation of the rules pertaining to supervision and staffing. This argument is without merit. As noted by Amicus Advocacy Center, Section **393.13(5),** Fla. Stat., specifically provides: "[a]ny person who violates or abuses the rights or privileges of persons who are developmentally disabled as provided in this act shall be liable for damages as determined by law." The legislature clearly did not intend to relieve HRS of its negligence for injuries sustained by an HRS client who is sexually abused as a direct result of HRS' negligent failure to supervise. One of the primary rights of developmentally disabled persons under Chapter **393** is the right to "dignity, privacy, and humane care, including the right to be free from sexual abuse in residential facilities." Section **393.13(3),** Fla. Stat. **(1995).**

CONSENT

HRS argues that the only evidence presented by the Petitioner regarding D. lack of consent was her mental, as well as physical, disability. The record does not support this assertion. The Plaintiff's expert testified that it was her expert opinion, based upon review of hundreds of pages of HRS records, interviews with D. L. and interviews with her family, that D. L. had been forced to have sex against her will on at least two occasions

while residing at Sunland (R 199). HRS presented no conflicting expert testimony.

As noted in the Petitioner's Initial Brief, it was undisputed that D. L. had no understanding of the relationship between intercourse **and** pregnancy (R 149-150). Virtually every witness testified that D. L. had never expressed any interest in sex in the 25 years she had been in Sunland, and acted at all times like a three year old child (R 174; R 327). Mr. Parramore, the Sunland Director, testified that D. L.was an individual who was unable to protect herself or her own interests (R 134). Thus, in addition to the evidence regarding D. L.'s severe mental retardation, there was undisputed evidence that she had no understanding of issues regarding sexual intercourse and its consequences. HRS presented no evidence whatsoever that D. L. had even a rudimentary understanding of issues regarding sexual relations, The only testimony presented by HRS regarding the issue of consent, was that Sunland staff did not notice any changes in D. behavior prior to the discovery that she was almost five months pregnant.

The Petitioner presented substantial competent evidence that D. L. was an unwilling victim of sexual abuse while a client at Sunland. Further, it was uncontroverted that D. L. did not have the ability to consent to sexual relations in any sense of the term "consent" in that she did not have any understanding of sex and sex related issues. In sum, the jury had substantial evidence, in addition to D.'s L. mental and physical disabilities, from which it could properly conclude that D. L. did not, and could not, consent to sexual intercourse. See

Gautreaux v. tate, 588 So.2d 1, 3 (Fla. 1st DCA 1991) (The question of consent is a matter for the jury's determination.)

ISSUE II

CONTINUOUS SUPERVISION IS NOT INCONSISTENT WITH NOR OBVIATED BY THE NORMALIZATION PRINCIPLE

HRS acknowledges that its duty to provide continuous supervision for Sunland residents is not obviated by the normalization principle set forth in Section 393.13, Fla. Stat. (Answer Brief at 31). Thus, if this Court determines that the issue of HRS' negligent supervision was properly submitted to the jury, additional discussion regarding the normalization principle in this Reply is unwarranted.

The Petitioner's Initial Brief, as well as the briefs submitted by Amici, present thorough arguments supporting their positions that the normalization principle does not alter the traditional analysis of sovereign immunity. At no time has Petitioner challenged discretionary policy decisions regarding application of the normalization principle to D. L.. Rather, this case was tried on the theories that HRS was negligent in failing to protect D. L. from foreseeable sexual abuse; in failing to implement the level of supervision determined to be appropriate in her habilitation plan; or, in failing to maintain the level of supervision required by the governing administrative rules and regulations. HRS' common law duty to protect D. L. from foreseeable harm, and well as its implementation of existing policies and planning-level decisions regarding supervision, must be classified as operational-level functions *to* which sovereign immunity does not apply. Otherwise, developmentally disabled

clients will have no recourse under any foreseeable circumstances when they are injured as a result of HRS' common law negligence or violation of its own policies, rules or procedures.

The primary case relied upon by HRS to support its position that the Petitioner's claim for negligent supervision is not actionable is Foy v. Greenblott, 190 Cal. Rptr. 84 (1st App. Div. 1983). The Petitioner distinguished Foy in great detail in her Initial Brief, and would only reiterate that Foy involved a claim based upon an institution's failure to prevent the plaintiff from engaging in consensual sexual activity. As the instant case involves allegations and proof of HRS' failure to protect D. L. from foreseeable sexual abuse, Foy is inapplicable.

HRS has acknowledged that it had a common-law duty to protect D. L. from foreseeable harm by third persons, and that the requirement for constant supervision is not obviated by the normalization principle. Given these admissions by HRS, its attempt to distinguish this case from the multitude of supervision cases, holding supervision to be an operational-level function not barred by sovereign immunity, is not persuasive.

ISSUE III

SOVEREIGN IMMUNITY DOES NOT BAR THE PETITIONER'S CLAIM OF NEGLIGENT SUPERVISION

HRS bases its arguments that the instant case is barred by sovereign immunity on its repeated assertions that the Petitioner failed to present a prima facie case of negligence against HRS. Petitioner agrees that if this Court finds that there was no evidence presented at trial upon which a reasonable jury could

conclude that HRS negligently supervised D. L. resulting in sexual assault, then a directed verdict should have been granted in favor of HRS. However, such a lack of proof would not warrant a court determination that Petitioner's case, based on negligent supervision, is barred by sovereign immunity.

The Petitioner has never challenged HRS' discretionary policy-making decisions with regard to the amount of supervision to provide D. L.. Rather, the action complained of in this case was HRS' failure to perform its common law duty of care to protect D. L. from foreseeable harm, as well as its failure to comply with the standards already established by HRS for the supervision of D. L.

HRS has attempted to distinguish the numerous cases holding that supervision is an operational-level function to which sovereign immunity does not attach, based solely on the fact that the defendants in those cases were not charged with the task of balancing competing duties to protect and to afford adult rights of freedom of movement, association and privacy, including the right to engage in sexual relations. This attempt to distinguish the prevailing law is not persuasive. As noted in Department of Health & Rehabilitative Services v. Whaley, 574 So.2d 100, 104 (Fla. 1991), a person taken into custody is owed a common law duty of care and that duty is an operational level function. HRS admits in its Answer Brief that it owed this common law duty of care to D. L. In sum, therefore, the only issue in this case is whether the Petitioner presented competent, substantial evidence to support the jury determination that HRS negligently breached its duty of care to D. L. resulting in injury.

HRS argues that this case should be governed by the holdings in Emig v. Department of Health and Rehabilitative Services, 456 So.2d 1204 (Fla. 1st Dca 1984), Reddish v. Smith, 468 So.2d 929 (Fla. 1985) and Davis v. Department of Corrections, 460 So.2d 452 (Fla. 1st DCA 1984). In Whaley, supra, this Court itself distinguished Reddish and Davis from cases involving HRS' common-law duty to protect children in its custody from harm. As in Emig the complaint in Reddish was based on the classification and assignment of a prisoner and not on the possible negligence of the agency's employees having a direct and operational-level duty to supervise the plaintiff and keep him confined at the time of his escape. Whaley at 102-103, fn 1. Similarly, the complaint in Davis hinged "upon allegations of negligence at the planning level, such as in the classification of prisoners or in the policies adopted for their supervision." Id. In the instant case, as in Whaley, the complaint alleged, and the evidence revealed, that HRS employees violated their duty to supervise D.L. in accordance with their common-law duty of reasonable care and HRS' own rules and regulations regarding continuous supervision.

Additionally, Reddish is distinguishable from the present case 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 developmentally disabled adults who are unable to protect themselves. See Whaley, at 103, fn 1. As stated by this Court in Whaley "HRS' statutory duties toward children are, ultimately, the main difference between this case and prisoner cases such as Reddish and Davis, and we decide this case solely on HRS' duty, not

the duty of any other governmental agency." Id. Likewise, this case should be distinguished from the prisoner cases due to HRS' common-law and statutory duties to protect developmentally disabled adults within its custody who are unable to protect themselves.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the First District Court of Appeal's ruling that her action far negligent supervision is barred under the doctrine of sovereign immunity, and that the case be remanded with instructions that an order be entered affirming the final judgment entered by the trial court below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to Laura Rush, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida 32399-1050, Edwin R. Hudson, Esquire, Henry, Buchanan, Hudson, Suber & Williams, P.A., Post Office Drawer 1049, Tallahassee, Florida 32302-1049, Ellen M. Saideman, Esquire, Advocacy Center for Persons with Disabililities, Inc., 2901 Stirling Road, Fort Lauderdale, Florida 33312, and to Loren E. Levy, Esquire, The Levy Law Firm, Post Office Box 10583, Tallahassee, Florida 32302 this 1 day of May, 1996.

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