NR-2599

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,000

ALAN H. SCHREIBER, Public Defender of the 17th Judicial Circuit of Florida, and Richard L. Jorandby, Public Defender of the 15th Judicial Circuit of Florida,

Petitioners,

-vs-

ROBERT R. ROWE,

Respondent.
_____/

SUPPLEMENTAL REPLY BRIEF OF PETITIONER, ALAN H. SCHREIBER, ON SOVEREIGN IMMUNITY

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INTRODUCTION

The Petitioners, Alan H. Schreiber, Public Defender of the 17th Judicial Circuit of Florida, and Richard L. Jorandby, Public Defender of the 15th Judicial Circuit of Florida, were defendants in the trial court. Respondent, Robert R. Rowe, was the plaintiff in the trial court. In his brief, the parties will be referred to by name.

REPLY ARGUMENT ON SOVEREIGN IMMUNITY

As outlined in the Supplemental Brief of Petitioner, Alan H. Schreiber, on Sovereign Immunity, Section 768.28, Florida Statutes, waives the governmental immunity of the Office of the Public Defender from tort liability only "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." Sec. 768.28(1), Florida Statutes. Section 768.28(5) provides that the such state agencies shall be free from tort claims in the same manner and to the same extent as a private individual under like circumstances. Succinctly put, there can be no governmental liability unless a common law or statutory duty of care existed that would have been applicable to an individual under similar circumstances. *Henderson v. Bowden*, 737 So. 2d 532 (Fla. 1999).

Citing *First American Title Insurance v. Dixon*, 603 So.2d 562 (Fla. 4th DCA 1992), Respondent notes that the duty of care issue concerns whether a statutory or a common law duty of care is owed to the public as a whole or to a definable class of individuals. In *Dixon*, the Fourth District held that the doctrine of sovereign immunity did not bar a claim against the clerk of court for negligently indexing a claim in the public records. The court stated: "[t]o

hold a governmental agency or subdivision liable for its negligence, it must be demonstrated that the governmental entity owed the specific claimant either a 'statutory' or 'common law' duty of care that was breached, and the challenged conduct of the government must involve an 'operational' rather than a 'planning' level of decision-making." *Id*. (emphasis added).

This is where Respondent's analysis breaks down. The *Dixon* court explained that "in contrast to the building code in *Trianon*, it appears that the statutory recording scheme was intended to benefit a definable class of individuals, and not just the general public." *Id*. The court noted that each document entitled to be recorded is handled by the clerk, and that the clerk's proper handling of each document makes the marketable record title law work. Because public policy considerations favor accountability by the clerk for negligence, the court held that sovereign immunity did not bar a civil suit.

However, unlike the theory asserted against the clerk in *Dixon*, the theories asserted against Schreiber are not based upon a breach of a statutory or common law duty of care owed to the specific claimant (Rowe). Specifically, the first four theories asserted against Schreiber include a claim that he was negligent in managing the resources of the office of the public defender; a claim that he was negligent in the selection of Brawley to

represent Rowe; a claim that Schreiber was negligent in the supervision of Brawley; and a claim that he failed to ensure that Brawley did not have an excessive case load. Those theories are based upon a duty to the public as a whole.[1]

For example, although as a public defender Schreiber may have had a duty to the public as a whole to properly manage the resources of the office, such a duty did not run individually to any particular indigent client. Similarly, the duty to properly select and supervise assistant public defenders for each case and to ensure that they do not have an excessive case load are duties owed to the general public and not specifically to Rowe. On the other hand, the fifth claim asserted by Rowe, for legal malpractice, would be a duty owed to him specifically. Therefore, the public defender could not be liable for the first four claims asserted by Rowe. Even if the first four claims asserted were considered to be based upon a duty of care owed specifically to Rowe, they are still based on discretionary, policy-making, or planning activities of the office of the public defender, for which there are sovereign immunity.

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[1]This is why the claims against Schreiber belong in the second *Trianon* category and why there is no governmental tort liability in regard to such discretionary governmental functions.

Rowe agrees that had he "challenged Schreiber's spending decisions or the widespread policy and planning activities of the Office of the Public Defender, then he would agree that based on prior rulings of the Court, such governmental decisions would likely be immune." (Respondent's Supplemental Brief of Sovereign Immunity, p. 11). In fact, the assertions made by Rowe do call into play Schreiber's spending decisions or the widespread policy and planning activities of the public defender. To be sure, the public defender does not have an unlimited budget. To the contrary, it is well known that public defenders have limited resources and are typically under-funded.

Consequently, Schreiber's management of the resources of the office certainly calls into play spending decisions and policy and planning activities. Moreover, decisions involving which assistant public defender should be assigned to a case, how attorneys should be supervised, and managing the excessive case load of the office are all functions of managing the resources of the office. For example, given the limited resources of the office, decisions must be made regarding allocating dollars between hiring a greater number of inexperienced lawyers or a lesser number of more experienced lawyers to handle the same caseload. When a greater number of attorneys of lesser

experience are hired, each attorney has a smaller caseload of indigent clients. When a smaller number of more experienced lawyers are hired, the caseloads are greater, but less supervision is needed. Each decision, from hiring - to assignment of cases - to supervision, has widespread ramifications upon overall resource management. As Rowe concedes, the public defender must remain immune from liability from the making of such spending decisions and the widespread policy and planning activities of the office.

CONCLUSION

Based on the foregoing, Petitioner Alan H. Schreiber requests that this court enter its order affirming the trial court's dismissal of the claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail this 1st day of November, 2000, to Diane H. Tutt, Esq., 8211 West Broward Blvd., Suite 420, Plantation Florida 33324 (954) 475-9933, counsel for Respondent Robert R. Rowe; Kenneth J. Kavanaugh, Esq., 400 SE 8th Street, Fort Lauderdale Florida 33316-5000, counsel for Respondent Robert R. Rowe; James C. Barry, Esq., Adams, Coogler, Watson & Merkel, P.A., Post Office Box 2069, 1555 Palm Beach Lakes Blvd., Suite 1600, West Palm Beach, Florida 33402-2069, counsel for Petitioner, Richard L. Jorandby; Thomas E. Warner, Solicitor General and Louis F. Hubener, Assistant Attorney General, Office of the Solicitor General, The Capital, Tallahassee, Florida 32399-1050.

I HEREBY CERTIFY that this brief is produced in 14 point Arial font type, which is proportionately spaced.

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