

**IN THE SUPREME COURT
OF THE STATE OF FLORIDA**

CASE NO. SC07-1074
L.T. Case No. 05-15088

UNITED STATES OF AMERICA, et al.,

Defendants-Appellants,

v.

MAUREEN STEVENS, etc.,

Plaintiff-Appellee

On Certified Question from the United States Court of Appeals
for the Eleventh Circuit

Brief of Appellee,
MAUREEN STEVENS

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STATEMENT OF THE FACTS

Respondent accepts the facts stated in the opinion of the Eleventh Circuit Court of Appeals certifying the question to this Court. In addition, Respondent would provide the following:

Plaintiff's Complaint alleges that Defendants' conduct in creating and maintaining the certain strain of Anthrax bacterium which killed Robert Stevens foreseeably created a zone of risk. The Complaint alleges (¶¶7-9):

7. That on or before October 5, 2001, the Defendant, THE UNITED STATES OF AMERICA, owned, managed, grew, experimented with, and/or was in control of a certain strain of Anthrax bacterium at its Fort Detrick, Maryland facility and other facilities.

8. That the Defendant, THE UNITED STATES OF AMERICA, knew that the activities it carried on with the Anthrax bacillus were ultra-hazardous activities in that the mere handling of microscopic quantities of this bacillus involved a potentially high degree of risk of harm and that that potential harm was likely to be great, namely, the cause of human death.

9. That despite the above knowledge, the Defendant, THE UNITED STATES OF AMERICA, failed to adequately secure samples of this highly toxic lethal bacillus and, as early as 1992, samples of this formidable, dangerous, and highly lethal organism were known to be missing from the lab at Fort Detrick, Maryland occupied by the United States Army Medical Research Institute for Infectious Diseases (USAMRIID), along with samples of the hanta virus and the ebola virus, pursuant to a memo which is attached hereto and made a part hereof as Exhibit "F".

Based on those allegations, Stevens claimed that the United States owed a duty of care, in fact, the highest degree of care, in the manufacturing, handling,

transporting, utilizing, processing, analyzing, distributing, warehousing, storing, testing or experimenting with Anthrax (Complaint ¶17).

The District Court denied the Motion to Dismiss and Motion for Judgment on the Pleadings filed by the United States and Battelle. In the order, Judge Hurley relied on McCain v. Fla. Power Corp., 593 So.2d 500 (Fla.1992) and In Re September 11 Litigation, 280 F.Supp. 2d 279 (S.D. N.Y. 2003), among other authorities, to conclude that it was reasonable to expect the United States to maintain security measures for those who are foreseeably at risk in the event that a deadly pathogen is released. The entire order is included in the Appendix.

SUMMARY OF ARGUMENT

The question certified by the Eleventh Circuit Court of Appeals should be answered in the affirmative. The issue presented in this case does not involve the duty to protect Robert Stevens from a criminal attack. Instead, the issue in this case is whether the United States and Battelle had a duty to maintain control over the dangerous bacteria being manufactured, stored and transported by them. Under this Court's analysis in McCain, the duty imposed upon the United States and Battelle was commensurate with the zone of risk created by them. By manufacturing and storing Anthrax, the Petitioners created a risk that the Anthrax would be released into the public. After they were made aware that some pathogens were missing, the Petitioners were put on notice that whatever security measures they had in place were insufficient. They therefore had a corresponding duty to take the reasonable steps necessary to prevent the release of the pathogens being stored at the facility.

The analysis employed by the Petitioners is flawed because it begins with the assumption that third parties had Anthrax and then considers whether the Petitioners had a duty to prevent criminal conduct utilizing the bacteria to kill Robert Stevens. The breach of duty alleged in the Complaint was not, however, that the Petitioners failed to protect Robert Stevens from a criminal attack. The Complaint alleged that the Petitioners failed to maintain control over the Anthrax

they were storing. The Petitioners have ignored the fact that it was their Anthrax which killed Robert Stevens.

CERTIFIED QUESTION

UNDER FLORIDA LAW, DOES A LABORATORY THAT MANUFACTURES, GROWS, TESTS OR HANDLES ULTRA-HAZARDOUS MATERIALS OWE A DUTY OF REASONABLE CARE TO MEMBERS OF THE GENERAL PUBLIC TO AVOID AN UNAUTHORIZED INTERCEPTION AND DISSEMINATION OF THE MATERIALS, AND, IF NOT, IS A DUTY CREATED WHERE A REASONABLE RESPONSE IS NOT MADE WHERE THERE IS A HISTORY OF SUCH DANGEROUS MATERIALS GOING MISSING OR BEING STOLEN?

Standard of Review

The certified question arises out of a denial of a Motion to Dismiss by the Federal District Court for the Southern District of Florida. The existence of a duty is a question of law. McCain v. Fla. Power Corp., 593 So.2d 500 (Fla.1992). A ruling on a motion to dismiss based on a question of law is subject to de novo review. Execu-Tech Business Systems, Inc. v. New Oji Paper Co. Ltd., 752 So.2d 582, 584 (Fla. 2000).

Argument

In this case, Stevens alleged liability pursuant to the Federal Tort Claims Act. The Defendants, United States and Battelle, filed a Motion to Dismiss arguing that they had no duty to protect Robert Stevens from a criminal attack which infected him with Anthrax and killed him. The Motion to Dismiss argued

that a duty is only owed to those with whom the Defendants had a “special relationship.”

Under Florida law, there is no requirement that Stevens allege the existence of a special relationship between Robert Stevens and the Petitioners because the Petitioners are alleged to have been negligent in the manufacture, transportation and storage of Anthrax. The McCain analysis recognizes the existence of a duty commensurate with the zone of risk created by the Defendants’ activities and, under that rule, Petitioners had a duty to take reasonable precautions to prevent the loss of the Anthrax within their control. The “special relationship” analysis is not applicable because the negligence alleged by the Plaintiff is not that the Defendants failed to protect Robert Stevens from the criminal Anthrax attack through the mail but, rather, that the Defendants negligently failed to secure the Anthrax under their control when they knew or should have known that the security was inadequate and that the consequences would be deadly. The proper analysis is the zone of risk analysis set forth in McCain.

I. Overview of Florida Tort Law Regarding Duty

The question certified by the Eleventh Circuit should be answered affirmatively based on the fundamental principle defining duty in negligence cases, which was formulated by this Court almost one hundred years ago. In J.G. Christopher Co. v. Russell, 63 Fla. 191, 58 So. 45 (1912) this Court stated:

The reasonable care which persons are bound to take in order to avoid injury to others is proportionate to the probability of injury that may arise to others. And, where a person does what is more than ordinarily dangerous, he is bound to use more than ordinary care.

The J.G. Christopher pronouncement predated Justice Cardozo's opinion in Palsgraf v. Long Island Railway Co., 162 N.E. 99, 100 (N.Y. 1928) in which he applied the same principle in an unusual factual scenario to determine whether the Long Island Railway Company owed a duty to Mrs. Palsgraf.¹ The conclusion that no duty was owed in that case was set forth in the opinion neatly, "The risk reasonably to be perceived defines the duty to be obeyed..." That same analysis should be applied here, since under the Federal Tort Claims Act the government is subject to the same rules of tort law as a private citizen.

The Complaint alleges that the government created the particular strain of Anthrax bacteria that killed Stevens, and it has been genetically traced to its biological warfare research facility at Fort Detrick, Maryland. Battelle was later provided access to the same strain of Anthrax after it had been developed by the government. This Anthrax has only one function and that is to incapacitate or kill individuals exposed to it. The ultra-hazardous propensity of Anthrax is not just

¹ In Palsgraf, the plaintiff was a woman who was standing near some scales on a railroad platform. In the process of helping a passenger to board the train, a railroad worker knocked a package out of the passenger's arms. The package fell between the platform and the railroad car and exploded. The concussion from the explosion forced the scales to fall, injuring Mrs. Palsgraf.

due to its inherent nature, but also to the fact that proper containment and handling of it requires highly technical training and skills. It is indisputable that the federal government and Battelle have been aware of the significant dangers associated with Anthrax. Thus, under settled tort principles, the scope of their duty to exercise reasonable care is defined by those risks, which necessarily extend to members of the public who are injured or killed as the result of the Petitioner's failure to monitor and secure the deadly bacteria they manufacture, store and transport.

This Court's analysis of the issue of duty in McCain v. Florida Power Corp., 593 So.2d 500 (Fla. 1992) is central to the answer to the certified question from the Eleventh Circuit. McCain involved the question of whether an electric utility had a duty to prevent injuries to a worker who was operating a mechanical trencher. It appears from the wording of the opinion that McCain was not a business invitee of Florida Power but was, rather, digging a trench on property owned by someone else. While trenching in an area marked "safe" by Florida Power, the trencher hit an underground electric cable and injured McCain. The Second District held that Florida Power had no duty to McCain and ordered that a directed verdict be entered in favor of Florida Power.

This Court considered the issue of whether Florida Power had a duty to protect McCain, and the impact of foreseeability on the case. The decision in

McCain restated the law of negligence, and explained that the question of foreseeability impacts both the existence of a duty and proximate cause in different ways. This Court explained that the duty element of negligence focuses on whether the Defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm, while the proximate causation element is concerned with whether, and to what extent, the Defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. This Court held that Florida Power could have foreseen a broader zone of risk caused by its power generating activities, even if it could not foresee the specific manner of McCain's injuries.

With regard to the existence of a duty, the McCain court stated that a duty can arise from (footnote 2):

other sources such as statutes or a person's status (e.g., the duty a parent owes a child). The Restatement (Second) of Torts, for example, recognizes four sources of duty: (1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of the case. Restatement (Second) of Torts §285 (1965). (emphasis added)

The McCain court noted that it was dealing with the last category in which "the duty arises because of a foreseeable zone of risk arising from the acts of the defendant." Id. That is the same category involved in the case *sub judice*.

Particularly applicable to the facts of this case is the discussion on page 19 of this brief concerning those who possess wild animals and on page 20 regarding the liability of a person for engaging in abnormally dangerous activities.

The scope of duty as defined by the risk created was explained by this Court as follows:

The statute books and case law, in other words, are not required to catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care. Rather, each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. This requirement of reasonable, general foresight is the core of the duty element. For these same reasons, duty exists as a matter of law and is not a factual question for the jury to decide: Duty is the standard of conduct given to the jury for gauging the defendant's factual conduct. As a corollary, the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant. *Ibid.*, at 503. [Emphasis Supplied]

Importantly, this Court noted that “as the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken.” *Ibid.*, citing J.G. Christopher Co. v. Russell, 63 Fla. 191, 58 So. 45 (1912) (emphasis added). This Court explained that the element of foreseeability impacts the issue of existence of a duty and the scope of the duty in different ways.

Especially significant to the determination of a duty in this case is this Court’s explanation that the existence of a duty depends on the degree of the risk.

If the activities of a defendant only create a risk for people who are on that defendant's property (i.e., invitees), then the defendant only owes a duty to invitees and, in more limited circumstances, trespassers. As the risk posed by the defendant's conduct grows, the duty is extended to include those within the expanded zone of risk.

The issue of duty and foreseeability was examined again in Henderson v. Bowden, 737 So.2d 532 (Fla. 1999). In Henderson, two brothers, Bowden, were killed when the driver of the vehicle in which they were riding, Lyons, lost control of the vehicle. The personal representatives of the Bowden estate filed suit against Henderson as the Sheriff of Hillsborough County based on allegations that after the original driver of the Bowden vehicle was arrested for DUI, the sheriff's deputies who made the arrest directed Lyons to drive the other occupants home even though Lyons told the deputies that he, too, was intoxicated and had taken LSD. The trial court entered summary judgment for the sheriff, but the Second District reversed, holding that the sheriff's deputies had a duty of reasonable care during the roadside detention which was not barred by sovereign immunity.

This Court began the analysis of the sovereign immunity issue by first deciding whether the deputies had a duty to Bowden. Relying heavily on McCain

and Kaisner v. Kolb, 543 So.2d 732 (Fla.1989)², this Court held that the sheriff's deputies placed the passengers of Lyons' vehicle in danger by directing Lyons, who was intoxicated, to drive the vehicle and that doing so, more likely than not, created a foreseeable zone of risk. The creation of the risk gave rise to a legal duty.

Sheriff Henderson argued that Kaisner did not apply because the passengers were not in custody and, therefore, were owed no duty. This Court rejected the sheriff's argument and pointed out that its holding had nothing to do with the relationship of the passengers to the deputies as people who were in custody. This Court's decision was based on the simple fact that the deputies' actions placed the passengers in danger.

In Whitt v. Silverman, 788 So.2d 210, 217 (Fla. 2001), this Court considered the application of the rule in McCain to the liability of a landowner for injuries caused by an obstruction on the land to people on an adjacent sidewalk. The landowners in Whitt were the owners of an Amoco service station on Collins Avenue on Miami Beach. While leaving the service station premises in her car, a service station customer struck two pedestrians, killing one and injuring the other.

² In Kaisner v. Kolb, this Court held that law enforcement officers who created a zone of risk by stopping the driver of a vehicle, having him stand between the officer's car and the driver's car, and depriving him of the normal protection of his vehicle had a duty to prevent the driver from that risk. As a result, the law enforcement officers could be held liable when another vehicle crashed into the officer's car, pushing it forward and crushing the driver who was standing there.

The plaintiffs alleged that the accident was caused by foliage on the Amoco property which obstructed the view of the driver. The Third District affirmed the trial court's dismissal of the negligence claim, holding that this Court's decision in McCain did not apply to a landowner's liability for injuries occurring off his premises by a condition on the premises which obstructed the view of people using the adjacent roadway. This Court quashed the decision of the Third District.

This Court's analysis in Whitt centered on the conflict between the "agrarian rule," which generally gave immunity to a landowner for injuries occurring outside his premises, and the rule in McCain which imposes a duty to protect against foreseeable injuries. The decision in McCain was characterized by this Court as a restatement of the law of negligence, and it was held to apply in all cases of negligence. This Court concluded that an inquiry as to the liability of a landowner of a commercial business in an urban area should be guided by the foreseeability analysis in McCain. Using the McCain analysis, the Whitt Court concluded the landowners' conduct created a foreseeable zone of risk which posed a general threat of harm toward the patrons of the business as well as those pedestrians and motorists using the abutting streets and sidewalks that would reasonably be affected by the traffic flow of the business. As a result, the owners of the Amoco service station had a duty to protect those people.

The general rule which has developed through the decisions in McCain, Henderson, Kaisner and Whitt is that the existence of a duty and creation of risk go hand-in-hand. If an actor creates a zone of risk, then that person has a corresponding duty to protect people within that zone of risk. The only relationship which must exist between the actor and the person to whom the duty is owed is that the person is within the zone of risk created by the actor.

II. Overview of The Restatement of Torts (Second)

While several provisions of the Restatement of Torts (Second) are applicable to the analysis of this case, the Defendants erroneously rely on certain sections which are not intended to apply under circumstances such as the case *sub judice*.

Restatement of Torts (Second) § 302 Risk Of Direct Or Indirect Harm:

A negligent act or omission may be one which involves an unreasonable risk of harm to another through either

(a) the continuous operation of a force started or continued by the act or omission, or

(b) the foreseeable action of the other, a third person, an animal, or a force of nature.

Section 302, comment a) states, in part:

In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to

protect them against an unreasonable risk of harm to them arising out of the act.

This portion of comment a) appears to be a statement of the same rule set forth in McCain.

Comment a) continues:

The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty. As to the distinction between act and omission, or "misfeasance" and "non-feasance," see § 314 and Comments. If the actor is under no duty to the other to act, his failure to do so may be negligent conduct within the rule stated in this Section, but it does not subject him to liability, because of the absence of duty.

While the comments to §302 make it clear that §302 only defines a negligent act, and does not define the general duty, the comment also makes it clear that a duty exists any time an "affirmative act" creates a zone of risk. The second part of comment a) explains that the duty owed for omitting to act are limited only to situations involving the special relationships described in §§314, 315, 316, 317, 318 and 319. However, here Plaintiff has not alleged that these Petitioners failed to act to prevent criminal conduct but, rather, that their unreasonable failure to secure the Anthrax created a foreseeable zone of risk which ultimately resulted in Steven's death.

Restatement of Torts (Second) § 302A

Risk Of Negligence Or Recklessness Of Others:

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person.

Restatement of Torts (Second) § 302B

Risk Of Intentional Or Criminal Conduct³

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

Comment a) to Section 302B states that comment a) to 302 is equally applicable to situations involving criminal conduct as it is to situations of negligent conduct.

Comment e) states as follows (emphasis added):

There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. The following are examples of such situations. The list is not an exclusive one, and there may be other

³ Section 302B has been relied upon by Florida courts, Garcia v. Duffy, 492 So.2d 435, 439 (Fla. 2d DCA 1986).

situations in which the actor is required to take precautions.

Restatement of Torts (Second) § 314:

Petitioners rely heavily on Restatement of Torts (Second) § 314 which provides:

The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

However, that section does not apply here, where the dangerous instrumentality utilized to harm Stevens was created by, and within the exclusive control of, the Petitioners. This is made clear by comment “d” to § 314 which provides:

Comment d) The rule stated in this Section applies only where the peril in which the actor knows that the other is placed is not due to any active force which is under the actor's control. If a force is within the actor's control, his failure to control it is treated as though he were actively directing it and not as a breach of duty to take affirmative steps to prevent its continuance (see § 302, Comments a and c). (emphasis added)

In the discussion in Whitt concerning the origins of the “agrarian rule,” this Court explained the meaning of Restatement of Torts (Second) § 314 (Whitt v. Silverman, 788 So.2d at 214 (Fla. 2001) (footnote 4) (emphasis added):

Historically, another consideration cited in support of the rule has been the distinction between “action” and “inaction,” or “misfeasance” and “nonfeasance.” See Sprecher v. Adamson Companies, 30 Cal.3d 358, 178

Cal.Rptr. 783, 636 P.2d 1121, 1125 (1981) (citing Restatement (Second) of Torts § 314 , and a traditional limitation of the liability of landowners only to persons who come upon the property). Misfeasance exists when a defendant contributes to the creation of the risk whereas nonfeasance arises when a defendant merely fails to intervene on a plaintiff's behalf. See id. at 1126. In the latter situation, no duty was imposed on a landowner except where a special relationship existed between the plaintiff and defendant. See id. Such a relationship has been recognized between landowners and persons injured while on the landowner's property. Traditionally, persons on a landowner's premises are grouped into one of three categories: (1) trespassers; (2) licensees; and (3) invitees, and the duty imposed on landowners for injuries to these people is determined by the injured person's classification. Of course, no such classification exists for persons injured while off the land of a landowner.

In the discussion in Whitt (footnote 4), this Court recognized the same distinction set forth in comment d) to Section 314. When the actor contributes to the existence of the risk, the negligent act can no longer be classified as “nonfeasance;” the act is classified as misfeasance and the rule set forth in Section 314 no longer applies. In this case, the United States and Battelle contributed to the existence of the risk. Therefore, the rule relied on by United States and Battelle does not apply.⁴

⁴ This is a distinguishing feature between this case and the decision in K.M. ex rel. D.M. v. Publix Super Markets, Inc., 895 So.2d 1114 (Fla. 4th DCA 2005)

Restatement of Torts (Second) §507
Liability Of Possessor Of Wild Animal⁵

(1) A possessor of a wild animal is subject to liability to another for harm done by the animal to the other, his person, land or chattels, although the possessor has exercised the utmost care to confine the animal, or otherwise prevent it from doing harm.

(2) This liability is limited to harm that results from a dangerous propensity that is characteristic of wild animals of the particular class, or of which the possessor knows or has reason to know.

Section 507 imposes a duty on those who choose to possess dangerous animals. There is no significant distinction between animals on one hand, and dangerous pathogens on the other. In each case the actor who creates a dangerous situation by choosing to possess a dangerous animal or deadly organism has a duty to protect people who are harmed because the dangerous person or animal escapes.

In Scorza v. Martinez, 683 So.2d 1115, 1117 (Fla. 4th DCA 1996), the plaintiff filed suit against a breeder whose monkey escaped as a result of Hurricane Andrew. Although the Fourth District held that the owner was not strictly liable for the escape of a monkey because the monkey was in the possession of a third party, and therefore outside the ambit of section 507, it nevertheless held that the owner could be held liable for negligence.

⁵ Section 507 was relied upon by the Fourth District in Scorza v. Martinez, 683 So.2d 1115, 1117 (Fla. 4th DCA 1996).

The Restatement rule related to possessors of wild animals is similar to the rule stated in May v. Burdett, 9 QB 101 (1846) and the rule adopted by this Court in Loftin v. McCrainie, 47 So.2d 298 (Fla. 1950) in which this Court held that the possessors of wild steers could be held liable when the steers escaped and injured the plaintiff on the public street.

Similar to instances involving a wild animal are cases involving a dangerous product which escapes from a defendant's property or transportation vehicle and causes injury. Under those circumstances, the law holds the owner of dangerous product is liable because any "person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so he is prima facie answerable for all the damage which is the natural consequences of its escape." Rylands v. Fletcher, L.R. 3 H.L. 330 (1868) (release of water from a dam flooded a nearby coal mine). The Rylands rule was apparently utilized by this Court in Pensacola Gas Co. v. Pebley, 25 Fla. 381, 390, 5 So. 593, 595 (Fla.1889), and officially adopted by the Second District in Cities Service Co. v. State, 312 So.2d 799, 800 (Fla. 2d DCA 1975).

In Cities Service Co., Cities Service maintained a phosphate settling pond behind a dam in Polk County. The dam broke and released billions of gallons of phosphate slime into the Whidden Creek and then into the Peace River, causing

damage to the environment and to property. The State of Florida brought suit against Cities Service for an injunction and for damages. The trial court granted a directed verdict on the issue of liability for compensatory damages.

The Second District recognized the rule announced in Rylands:

We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so he is prima facie answerable for all the damage which is the natural consequences of its escape.

The court discussed at length the provisions of the Restatement of Torts (First) §519 and §520 regarding abnormally dangerous activities⁶ which it felt was applicable. Section 519 now reads:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

⁶ The determination of whether an activity is abnormally dangerous involves consideration of the following factors (Restatement of Torts (Second) §520):

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

In accordance with the rules for storage of non-natural, dangerous chemicals, the court held Cities Service strictly liable for the damage caused by the release of the phosphoric slime.

With regard to abnormally dangerous activities, the Restatement of Torts (Second) § 521 provides an exclusion from strict liability of a public official performing his public duties, but also, in comment a) to that section, explains how an official can nevertheless be liable for negligence for failing to exercise care commensurate with the risk:

The rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.

Comment a) A public official a part of whose duties is to make or store high explosives in large quantities is not subject to the strict liability imposed by the rule stated in §519. Therefore, he is not liable unless he is negligent in the manufacture or custody of the explosives or has selected a place for storing them which makes their storage unnecessarily dangerous in the event of an explosion. On the other hand, he is subject to liability if he negligently fails to exercise in these particulars that care that the highly dangerous character of the things of which he has the custody requires him to exercise. (emphasis added)

Under this extension of the rule of strict liability for maintenance of a dangerous product on one's property, the Defendants in this case would be liable.

Similarly, in Louisville National Railroad Co. v. Hickman, 445 So. 2d 1023 (Fla. 1st DCA 1983), the First District upheld a compensatory and punitive damage award against a railroad in a circumstance in which the plaintiff was injured by hazardous chemicals spilled when one of its trains derailed. In that case, the plaintiff was simply a bystander by a river near the train tracks when he suffered injuries as a result of the chemical spill. The evidence demonstrated that the train was operating at an excessive speed, that it was of a greater tonnage than recommended, and that it was improperly handled. There was no requirement that the plaintiff have a special relationship to the defendant.

Finally, the decision in Hines v. Reichhold Chemicals, Inc., 383 So. 2d 948 (Fla. 1st DCA 1980) is also instructive. In that decision, the court held that the plaintiff stated a cause of action for negligent or intentional discharge of toxic gas which injured him while he was employed at the radio station adjacent to Reichhold's plant. The Complaint in that case alleged that Reichhold allowed the toxic gas to escape with knowledge that it was toxic. As in other cases referred to herein, there was no special relationship between the plaintiff and the defendant.

Analysis of Petitioners' Argument

The Petitioners have reached the conclusion that they owed no duty to Robert Stevens because they have looked only at the fact that Robert Stevens received the Anthrax in the mail through criminal conduct. The Petitioners then utilize the Restatement sections related to the duty to protect another from criminal conduct to reach an erroneous conclusion that they owed no duty. From this perspective, the Defendants completely ignore the issue of how the criminals obtained the Anthrax used to kill Robert Stevens and the role they played in it. They have started their analysis from the middle of the story and asked the question, "Now that the criminals have Anthrax, did the Defendants have a duty to protect Robert Stevens from the Anthrax?" Sections 314 and 315 have nothing to do with the duty analysis in this case, however, because the negligence alleged is not one of nonfeasance. The negligence alleged in this case is one of misfeasance. The question presented to this Court is not concerned with whether there was a duty to prevent third parties from using the Anthrax, but whether there was a duty to prevent third parties from being able to obtain access to Petitioner's Anthrax in the first place. This Court has already answered that question in McCain.

By their own terms, sections 314 and 315 of the Restatement of Torts deal only with the existence of a duty to come to the aid of another. Comment c) to section 314 provides, in part:

The origin of the rule lay in the early common law distinction between action and inaction, or “misfeasance” and “non-feasance.” In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence liability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.

This historical note explains that the rule of nonfeasance developed separate and apart from the rules related to the duty of a person who took an affirmative act, or misfeasance. Sections 314 and the following related rules in section 315-321 all relate to the duty of one person to protect another. Understandably, that duty is limited to situations in which either the actor has a legal obligation to act or the victim has a legal right to expect the actor to protect him or her.

However, comment d) makes it clear that when the actor is, himself, responsible for the peril in which the victim finds himself, the rules set for in section 314, et. seq. do not apply:

d. The rule stated in this Section applies only where the peril in which the actor knows that the other is placed is not due to any active force which is under the actor's control. If a force is within the actor's control, his failure to control it is treated as though he were actively directing it and not as a breach of duty to take affirmative

steps to prevent its continuance (see § 302, Comments a and c).

Referring back to comment a) imports the general rule:

In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.

While comment c) refers to the following situation:

The actor may be negligent in setting in motion a force the continuous operation of which, without the intervention of other forces or causes, results in harm to the other. He may likewise be negligent in failing to control a force already in operation from other causes, or to prevent harm to another resulting from it. Such continuous operation of a force set in motion by the actor, or of a force which he fails to control, is commonly called “direct causation” by the courts, and very often the question is considered as if it were one of the mechanism of the causal sequence. In many instances, at least, the same problem may be more effectively dealt with as a matter of the negligence of the actor in the light of the risk created.

Restatement of Torts does not attempt to define the duty of an affirmative actor in all situations. While Section 285 of the Restatement provides that a duty (standard of conduct) can be created by (1) legislative enactments or administration regulations; (2) judicial interpretations; and (3) other judicial precedent, it also recognizes a fourth source which it does not attempt to define; a duty arising from the general facts of the case. The fourth category was the one the Court discussed in McCain and the one involved in the case *sub judice*.

The fact that the Restatement does not attempt to catalog every duty arising from every affirmative act in every situation is not surprising. In McCain, this Court recognized that doing so was unnecessary (McCain, 593 So.2d at 503):

The statute books and case law, in other words, are not required to catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care. Rather, each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result.

In the situation described in this lawsuit, the United States and Battelle stored deadly Anthrax, among other deadly pathogens, and failed to take the steps necessary to prevent the release of those pathogens. Under the McCain analysis, the United States and Battelle had a duty which was commensurate with the risk they created by storing Anthrax. When they created a risk by manufacturing, storing and transporting Anthrax, the law imposed a commensurate duty to take the reasonable steps necessary to prevent the Anthrax from being taken out of the facilities. The legal threshold of the existence of a duty is satisfied because the act of manufacturing, storing and transporting Anthrax created a foreseeable zone of risk that the Anthrax could be released with deadly results to third parties. The question now for the trier of fact, which under the Federal Tort Claims Act is the

trial judge⁷, is whether the breach of that duty was the proximate cause of Robert Stevens' death.

The argument made by the United States and Battelle is really one of proximate cause rather than duty. To the extent the Petitioners can prove it was not foreseeable that the Anthrax spores would be used for a criminal purpose, they may succeed in proving the criminal conduct was an intervening cause. The issue at this point, however, only deals with foreseeability in the broad sense as it relates to duty. Under the circumstances of this case, the Petitioners had a duty to keep control of their Anthrax⁸. The District Court properly found the Petitioners had a duty.

⁷ 28 U.S.C. §2402.

⁸ The Government filed Burch v. Sun State Ford, 864 So.2d 466 (Fla. 5th DCA 2004), rev. dismissed, 889 So.2d 778 (Fla. 2004) as a supplemental authority in the Eleventh Circuit. In Burch, the court stated that the dangerous instrumentality doctrine (864 So.2d at 471), “[I]s not limited to negligent operation of a vehicle and that reckless driving or other intentional misconduct by an operator does not terminate liability under the doctrine.” Contrary to the claim of Petitioners, Burch does not support the argument that the liability of an owner of a dangerous instrumentality ends when the vehicle is used in a weapon-like manner with the intent to inflict physical injury. In fact, Burch did not cite or imply that any other Florida appellate decision had reached that conclusion. The Burch decision stated that vicarious liability is generally not imposed on the owner “when an implement or machine is used for a purpose different than that for which it is designed...” and not reasonably foreseeable. (889 So.2d at 472).

Here, the allegations of the Complaint demonstrate that the Anthrax at issue was ultimately used for the purpose it was designed, and that such use was foreseeable. For these reasons, Burch does not support the Government's position.

III. Answers to the Certified Questions

The certified question contains two parts. The first part, as has been explained above, should be answered in the affirmative that a duty exists because the Petitioners created a risk.

In the second part of the certified question, the Eleventh Circuit inquires whether even if no such duty existed initially, a duty is created when the possessor of the Anthrax had knowledge that its security measures were inadequate and that some of the pathogens under its control were missing. Although Respondent does not agree that a possessor of dangerous biohazards should be given “one free bite” before having a duty, it is clear that under those circumstances a duty would also exist.

In one analogous case, the First District Court of Appeal held that a car rental company could have a duty to a total stranger who was involved in a collision with a car owned by the company, even though the car was stolen from the rental lot. Hewitt v. Avis Rent-A-Car System, Inc., 912 So.2d 682, 686 (Fla. 1st DCA 2005). In Hewitt, Avis had a longstanding problem of cars being taken from the lot by employees and then “rented” in “side deals” to third parties. There were also longstanding problems of cars being stolen. Despite the knowledge by management for Avis that its cars were being stolen, it failed to implement security

procedures to prevent the thefts. Tara Hewitt was injured when she was involved in a collision with one of the vehicles stolen from the Avis lot.

Avis argued that it owed Hewitt no duty to secure the car keys or otherwise prevent the theft of its cars and further, even if it had a duty to secure the keys, the causation link to Hewitt's injury was broken by the theft of the car. The trial court entered summary judgment, finding that Avis had no duty to Hewitt. The First District reversed, holding that Avis might have a common law duty to secure the keys and explaining (*Id.*, at 686):

Because of the combination of special circumstances that exist in the case at bar, i.e., the high number of thefts at Avis's downtown facility during the short span of time preceding the accident; the general access its employees had to the vehicles' keys; the absence of any safeguards by management against theft; management's failure to take prompt action despite its awareness that its employees were involved in criminal activity; its failure to promptly report vehicle thefts to law enforcement; and the knowledge that Avis had, or should have had, of the harm that often occurs from the careless operation by thieves of stolen vehicles, we conclude the question whether the defendant's conduct created a foreseeable zone of risk, giving rise to a duty to lessen the risk by taking precautions to protect others from such risk, is one reserved for the fact finder.

As in the other decisions discussed herein, there was no “special relationship” between the defendant and the injured person. Tara Hewitt had no relationship to Avis, except that she was injured by its stolen car. The court did

not impose any additional requirements, such as the requirement that the duty had to exist specifically as to Tara Hewitt.

In this case, the Complaint alleges that Petitioners had knowledge that some of the organisms they were manufacturing, transporting and storing were missing. Based on that knowledge, Petitioners would have a duty to increase security.

IV. The Eleventh Circuit's Hypothetical Questions

In the opinion certifying the question to this Court, the Eleventh Circuit Court of Appeals posed the following hypothetical questions (Stevens v. Battelle Memorial Institute, 488 F.3d 896, 903-904 (11th Cir. 2007):

- 1) Would a gun store owner who consistently left the door unlocked at night, knowing that guns had been stolen in the past, be found free from liability if an unknown third party was killed by a criminal using one of the stolen guns?

- 2) Would a construction company that failed to increase security after dynamite was stolen on several occasions be found not liable if an unknown third party used the materials to blow up a building simply because there was no special relationship between the construction company and the thief or the construction company and the occupants of the demolished structure?

In Gallara v. Koskovich, 836 A. 2d 840, 364 N.J.Super. 418 (2003), a case involving facts which were similar to those in the first hypothetical question, the court held that the gun dealer had a duty to prevent guns from being stolen. In

Gallara, the court was considering a motion to dismiss the complaint against a commercial gun dealer whose guns were stolen and used to murder two men. The defendant argued that it owed no duty to prevent the commission of a crime. The court disagreed, and held that as a matter of law the defendant had a duty to prevent the theft of guns in its store.

Although the court found that certain statutes and administration regulations required the defendant to maintain a security system, it did not rely exclusively on those statutes and regulations for the existence of a duty. In addition, the court noted that one New Jersey appellate court held a private owner liable for failing to properly secure his shotgun while on vacation because a firearm is an inherently dangerous instrumentality and imposes a duty of extraordinary care, Palmisano v. Ehrig, 171 N.J.Super. 310, 408 A.2d 1083 (App. Div. 1979), cert. den. 82 N.J. 287, 412 A. 2d 793 (1980), and that the existence of a duty was consistent with “reasonableness, public policy, fairness and common sense.” Gallara, 836 A.2d at 851-852.

Respondent has been unable to find any decision similar to the Eleventh Circuit’s second hypothetical question. However in that situation the outcome would be similar to the first hypothetical question. In accordance with the decision in Hewitt, supra, there would be a duty to protect against the known risk of loss. Both are governed by the general rule that an actor who creates a foreseeable zone

of risk by its activities owes a duty to protect against damages which may be foreseeably caused by those activities.

CONCLUSION

This Court should answer the certified question in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing was furnished to all counsel on the attached service list, by mail, on September 26, 2007.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), I hereby certify that the foregoing Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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