IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NO. 63,440

AZOR J. EVERTON, JR.,

Petitioner,

MARION WILLARD, Individually and d/b/a WILLARD'S PAINTING COMPANY, PINELLAS COUNTY SHERIFF'S DEPARTMENT and PINELLAS COUNTY,

Respondents,

and

ANTON TRINKO, etc., et al.,

Petitioners,

vs.

MARION R. WILLARD, Individually and d/b/a WILLARD PAINTING, STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, DEPUTY C. W. PARKER, PINELLAS COUNTY SHERIFF'S DEPARTMENT and PINELLAS COUNTY,

Respondents.

_____/

ON PETITION FOR CERTIORARI FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA
APPEAL NOS: 81-2081, 81-2085

ANSWER BRIEF ON THE MERITS ON BEHALF OF RESPONDENTS, DEPUTY C. W. PARKER AND PINELLAS COUNTY SHERIFF'S DEPARTMENT

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STATEMENT OF THE CASE

Complaints were separately filed by Everton[1] and Trinko against the Pinellas County Sheriff's Department and its Deputy Sheriff, C.W. Parker. (R-1 and 169).[2] These two claims were consolidated for all purposes by court order into Pinellas County Circuit Court Case No. 79-8244-11. (R-463, 464). The operative pleadings were Everton's Second Amended Complaint dated February 3, 1981 and Trinko's original Complaint dated May 29, 1981. (R-169 through 175 and 1 through 15).

Both complaints alleged that at all times, Parker acted within the scope of his employment as a deputy (R-171, 8) and that as such owed a duty to the motoring public to remove drivers under the influence from the highway and to enforce the applicable Florida law. (R-171, 10 para.44).

Both complaints asserted breach of said alleged duty in four respects:

1) failure to enforce state law as it pertains to drivers under the influence;[3]

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[1]AzorEverton [Everton] brought suit upon his own personal injuries and Anton Trinko [Trinko] filed suit as personal representative of Renee Trinko, Anton's daughter, who was killed in the accident. In the trial court, Marion Willard and State Automobile Insurance Company were also Defendants but are not relevant to either the appeal below or this petition. Everton and Trinko were Appellants at the Second District and are Petitioners herein.

[2]References to the Record on Appeal are indicated as (R-).

[3]Particularly secs.316.193, 362.261 and 362.262, Fla.Stat. (1979) prohibiting driving under the influence of alcoholic beverages to extent that normal faculties are impaired.

2) failure to perform a field sobriety test,

3) failure to employ "informal action" by requiring the motorist to take alternative transportation home; and

4) by permitting Willard to continue to operate his vehicle when the deputy knew or should have known that the driver was intoxicated to the extent that his driving ability was impaired. (R-171, 172 and 10, 11).

Count IV, paragraph 47 of Trinko's amended complaint and Count III, paragraph 16 of Everton's second amended complaint allege that Deputy Parker

> "...was negligent in his procedure, judgment and decision, etc.". (R-11, 172).

On June 23, 1981, the Sheriff moved to consolidate and dismiss the actions on the basis that no tortious conduct was described by the two complaints. (R-17, 18, 16). A stipulation to consolidate was executed July 24, 1981. (R-22, 23).

Hearing on the Sheriff's motion to dismiss was held on September 13, 1981 and by Order rendered September 18, 1981, the motion was granted with prejudice. (R-465, 466). Notices of appeal in both cases were filed October 15, 1981 (R-498 and 502).

Oral argument was conducted on July 27, 1982 and on January 3, 1983, the Second District Court of Appeal affirmed the trial court's dismissal with prejudice by opinion, which now appears at 426 So.2d 996(Fla.2nd DCA 1983)[4].

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[4]The court gratuitously pointed out that Deputy Parker should have been dismissed as an invidual party defendant pursuant to sec.768.28(9)(a), Fla.Stat.(1979). Therefore, since review of this holding was not sought by Petitioners, the only Respondent is the Sheriff.

The Second District held that Deputy Parker's discretionary judgment not to invoke the criminal process was a governmental act not amenable to suit in tort, despite its opinion that Parker's decision occurred at the "operational" level of government rather than at the "policy making or planning" level.[5]

Rehearing and a motion to certify the question were denied by order of the Second District dated February 23, 1983. Notices of Invocation of this Court's certiorari jurisdiction were filed March 22, 1983. This Honorable Court accepted jurisdiction by Order dated September 9, 1983 and Petitioners' merits brief was served September 29, 1983. By extension, Respondent's merits brief was timely served November 7, 1983.

STATEMENT OF THE FACTS

The Sheriff adopts by reference the opinion of the Second District for its Statement of the Facts. This Court will recall that from a procedural standpoint, this case reaches this Court upon the trial court's granting of Defendant/Respondent's motion to dismiss with prejudice for failure to state a cause of action.

Therefore, the Sheriff takes the position that the only record available to this Court is the operative complaints, the motion to dismiss and the order of September 18, 1981. Carter v. National Auto. Ins. Co., 134 So.2d 864 (Fla.1st DCA 1961). All

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[5] See Commercial Carrier Corp. v. Indian River Co., 371 So.2d 1010(Fla.1979). (Hereafter Comm. Carrier).

other portions of the record must be disregarded.

Every citation in Petitioners' merits brief emanates from depositional testimony. This is improper as a matter of law. The "facts contained in both briefs should properly be termed "allegations" which are presumed true for the purposes of determining the sufficiency of complaints.

Therefore, Petitioners' reliance upon and inclusion of all depositions in the record (R-500, 501, 502, 503) permits the Sheriff to reveal contrasting facts to this Court.

Input of deputy sheriffs into law enforcement during nightime hours is concentrated primarily into deterence of residential and business burglaries and crimes against the person by high visibility patrol. (R-340, 366) Deputies are not structured for traffic enforcement. (R-340, 366). At the time of the incident herein, Deputy Parker was a seven-year veteran of the force and as of June 22, 1979, had made probably 25 DWI cases. (R-366). All charges went uncontested or obtained convictions. (R-367).

When Parker stopped Willard, Willard got out of his car, volunteered he had been drinking (R-341) but exhibited no signs whatsoever that he wasn't in control of his faculties. (R-342) Deputy Parker observed no difficulty getting out of the car, no problem walking back towards him, no difficulty removing his wallet, removing his license or handing it to the officer. (R-342). There was no staggering, no weaving, no stumbling, (R-354) and his manner of speech was normal. (R-356).

Willard told the Deputy that the U-turn was made to pick up a hitchhiker. (R-342). The U-turn was illegal only because it was made in a business district. (R-344). Willard was driving a Lincoln Continental which was too large to complete the U-turn within the roadway and its right front wheel clipped the concrete median that divides the northbound right turn lane from eastbound traffic. (R-344). It was not made in an erratic manner. (R-347). He didn't spin his tires. (R-347). He didn't go sideways. (R-347). He wasn't traveling excessively fast or slow. (R-347). He was well within the normal limit of traffic in that area. (R-347). Whether to give a field sobriety test was a question answered by Parker as follows:

"Q: Is it strictly a judgment decision?

A: Right exactly.

Q: Whether you will put a person through a field sobriety test?

A: Exactly.

Q: In your judgment, Mr. Willard did not need the field sobriety test?

A: No." (R-355).

Willard concurred in Deputy Parker's judgment that he was not impaired (R-47, 80) and feels strongly that the Petitioners' vehicle ran the red light, not he. (R-51, 71). The traffic light at the accident intersection is controlled by a trip device buried in the street upon which Petitioners' vehicle was traveling. (R-404).

It was Deputy Parker's testimony that:

"I think my training is quite sufficient to determine whether a person is under the influence or is not under the influence.

> There is obviously a question in this case as to Mr. Willard's condition and it is my opinion as a police officer and an experienced police officer that at the time I stopped him, he was in normal control, that he had no problem with the physical control of himself or his vehicle." (R-367).

Sould a jury be permitted to second-guess this judgment?

POINT ON APPEAL

WHETHER A LAW ENFORCEMENT OFFICER, WHO EXERCISES HIS QUASI-JUDICIAL DISCRETIONARY JUDGMENT NOT TO INVOKE THE STATE'S POLICE POWER, IS LIABLE IN TORT TO A THIRD PERSON NOT INVOLVED IN THE CONTACT BETWEEN OFFICER AND THE ALLEGED OFFENDER.

ARGUMENT

A LAW ENFORCEMENT OFFICER'S DECISIONS (1) NOT TO REQUIRE A FIELD SOBRIETY TEST AND (2) TO NOT ARREST A MOTORIST IS A GOVERNMENTAL DISCRETIONARY ACT THE WISDOM OF WHICH IS NOT SUBJECT TO SUIT IN TORT BY THIRD PARTIES.

> "(T) he province of the court is not to inquire how the executive, or executive officers, performs duties in which they have a discretion". Mr. Chief Justice Marshall, Marbury v. Madison, 1 CRANCH 137, at 170, 2 L.Ed.60(1803).

The Second DCA was presented the first Florida case which required application of Commercial Carrier's planning/operational dichotomy to the quasi-judicial exercise of discretionary judgment by a governmental officer executing the police power of the sovereign: a discretionary decision by a law enforcement officer not to invoke the judicial process based upon his judgment, under the exigent circumstances, that a motorist was not under the influence to the extent that his driving faculties were impaired. In reaching his result, Judge Campbell, for the court, demonstrated a rare sensitivity and awareness of the unique position in society occupied by law enforcement officers in maintaining an ordered society. It is equally obvious that the Second District struggled in vain to reconcile the need to protect the field officer's unfettered discretion with this Court's decision in Commercial Carrier. Judge Campbell's opinion squarely aligned the Second District with Mr. Chief Justice Marshall as set forth above. The rationale for this immunity derives from the theory of separation of powers, not the archiac logic that 'the King can do no wrong'. In Carr v. The Northern Liberties, 35 Pa.324, at 329(1860), the Pennsylvania Supreme Court

explained why a local government was immune from recovery for damage caused by an inqdequate town drainage plan:

> "How careful we must be that the courts and juries do not encroach upon the functions committed to other public officers. It belongs to the province of town councils to direct the drainage of our towns according to the best of their means and discretion, and we cannot control them in either. No law allows us to substitute the judgment of a jury... for that of the representatives of the town itself, to whom the business is especially committed by law."

In a 1980 decision defining liability of a municipality under 42 U.S.C.sec.1983 for alleged violations of constitutional deprivations, in a 5-4 vote, the Supreme Court in two opinions, summarized the then current state of municipal liability in the 50 states. Owen v. City of Independence, Mo., 445 U.S. 622(1980). The dissent places Florida in a group of sixteen states and the District of Columbia which follow the traditional rule against recovery for damages imposed by discretionay decisions that are confided to particular officers or organs of government, citing, among others, Commercial Carrier.

The Court explained that the leading commentators on governmental tort immunity have noted both the appropriateness and general acceptance of municipal immunity for discretionary acts. See Restatement (Second) of torts, sec.895C(2) and Comment(g)(1979), K. Davis, Administrative Law of the Seventies, sec.2513(1976); W. Prosser, Law of Torts, 986-987(4th Ed.1971).

Sec.768.28, Fla.Stat.(1979) waived governmental immunity by assenting to suits in the same manner and to the same extent as that of a private person. This phrase of art is

found in at least 15 immunity waiver statutes throughout the county.[6]

Sec.768.28, Fla.Stat.(1979) is applicable to sheriffs and their deputies. See Beard v. Hambrick, 396 So.2d 708(Fla.1981). However, as noted by this Court in Commercial Carrier, even in the absence of an exception for discretionary acts, it does not necessarily follow that all acts of omissions by government officials or employees may form the basis of recovery against the governmental authority involved.

Acknowledging the U. S. Supreme Court's warning in Dalehite v. United States, 346 U. S. 15(1953) that "Of course it is not a tort for government to govern", this Court stated it is necessary to dtermine where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins. Comm. Carrier at p.1018.

Comm. Carrier continued by explaining that the "discretionary exception", bottomed on the concept of separation of powers, found expression in Wong v. City of Miami, 237 So.2d 132(Fla.1970) where several businesses sustained property damage by rioters when police were withdrawan by order of the mayor. In affirming a summary judgment for the City, this Court held that while sovereign immunity was a

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[6]See e.g., 28 U.S.C. § 2674(1970), Colo.Rev.Stat. § 24-10-106 (1973); Fla.Stat.Ann. § 768.28(5) (West Cum.Supp.1980); Haw.Rev.Stat. § 662-2 (1976 Repl.Vol.); Iowa Code Ann. § 24A.2(5)(a)(West 1978); Mont.Rev.Codes Ann. § 83-701(1976 Repl.Vol); Neb.Rev.Stat. § 81-8, 210(4)(1971 Repl.Vol); Nev.Rev.Stat. § 41.031(1973); N.Y.Ct.Cl. Act § 8; N.C.Gen.Stat. § 143-291(1978 Repl.Vol., 1979 supp.); Ohio Rev.Code Ann. § 2743.02(A) (Page 1953, 1979 Supp.); Tenn.Code Ann. § 23-3302(4) (1956, 1978 Supp.); Tex.Civ.Code Ann. tit.6252-19, § 3 (Vernon 1970, 1979 Supp.); Wash.Rev.Code Ann. § 4.92.090 (1962, 1980 Supp.)

salient issue

> "We ought not lose sight of the fact that inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers.
>
> * * *
>
> The sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence." 237 So.2d at 134.

Commercial Carrier admitted that this was a clear recognition by this Court of a principle of law apart from the ancient doctrine of sovereign immunity as a simple aspect of sovereignty. Thus, while the waiver of immunity abrogated principles of law based upon the adage "the King can do no wrong", it left intact the common law immunities founded upon separation of powers, since the abrogation of sovereign immunity did not create duties where none existed before. It merely permitted suits against governmental entities that were previously immune from suit. Consequently, unless litigation or judicially created exceptions create a duty where none existed before, liability will not attach.

It is upon this point, that the Sheriff takes the position that this Court departed in Commercial Carrier from the line of reasoning it incorporated from Evangelical United Brethern Church v. State, 407 P.2d 440(Wash.1965). Subsequent Washington decisions applying said reasoning find that existence of immunity and existence of a duty are two separate concepts.

This Court used the Wong v. City of Miami alternative

rational set forth above to justify its engrafting of the "implied exception to immunity for discretionary acts" set forth in Evangelical United Brethern when in fact the concepts of immunity (the King can do no wrong) and sovereignty (separation of powers and exercise of the police power) are two different things.

The concept of sovereign immunity provides generally that despite the existence of an apparent duty, a municipal corporation, in the exercise of governmental functions, is immune from tort liability. This immunity does not occur because of a denial of the tort but because the resulting liability in tort is disallowed. W. Prosser, Torts, sec.131(4th Ed.1971). However, the sovereignty position, or the concept that the separation of powers cannot permit judicial interference in exercise of police power executive discretion, requires the existence of a duty which is breached and generally allows liability subject to some exceptions. J & B Development Co. v. King Co., 100 Wn.2d 299, ___P.2d___(Sept. 15, 1983).

This same criticism of Commercial Carrier has recently been offered by Judge Anstead in his dissent in The Manors of Inverrary XII Condominium Assoc., Inc. v. Atreco-Florida, Inc., City of Lauderhill, Florida, ___So.2d___(Fla.4th DCA, Case No. 81, 138, September 28, 1983), 8 Fla.L.Weekly 2377(Oct.7, 1983).

There, a condominium association filed suit against several parties including the City for failing to properly examine the plans and inspect the premises before issuing a building permit and certificate of occupancy. This conduct allegedly resulted in defects within the completed building. Reversing the City's order

of dismissal, the majority held that a building inspector's examination of plans and on-site inspections to determine compliance with code requirements are operational activities and thus subject to suit citing as controlling Trianon Park Condominium Assoc. v. City of Hialeah, 423 So.2d 911(Fla.3rd DCA 1982).

Judge Anstead points out that in Commercial Carrier, this Court overruled its prior decision in Modlin v. City of Miami Beach, 201 So.2d 70(Fla.1967), recalling that the Supreme Court characterized the Modlin decision as one predicated on sovereign immunity. Yet he pointed out that this Court, in Modlin, clearly stated the following:

> "Returning now to the merits of the case at hand, it follows that if the respondent City is to escape liability, it will have to be other than by the path of municipal tort immunity." Modlin, at p.74.

As Judge Anstead so appropriately states, the Modlin decision was predicated on the absence of a specific duty owed to the Plaintiff by the public official involved, a building inspector, the violation of which would give rise to tort liability.

Contrast the holdings of Third DCA, in Cheney v. Dade County, 353 So.2d 623(Fla.3rd DCA 1977) and of this Court in Commercial Carrier:

> The 3rd DCA:
>
> "Modlin merely holds that a municipal corporation is not liable in tort for the negligence of one of its employees in the absence of a duty of care owed by the municipality to the plaintiff which is something more than the duty a public officer owes the public generally. That is no more that re-stating

traditional negligence law in a governmental tort liability context." at p.629.

This Court:

> "Regardless, it is clear that the Modlin doctrine is a function of municipal sovereign immunity and not a traditional negligence concept which has meaning apart from the governmental setting." Comm. Carrier at 1015.

Judge Anstead concludes by stating that after Commercial Carrier, courts have appeared to lose sight of the requirement of the existence of a duty and have directed most of their attention to the difficult task of determining whether the action involved was "discretionary or operational" in accord with the standards of Evangelical United Brethern, supra. The Second DCA recognized this difficulty in Collom v. City of St. Petersburg, 400 So.2d 507 (Fla.2nd DCA 1981) when Judge Ott stated at p.508:

> "As already noted, the so-called exception for 'discretionary' acts is a misnomer. "Discretion to act' completely precludes any possibility that a duty to act will be breached. Historically, no one - whether an individual or a government - has ever been liable where true discretion has been exercised in deciding whether to act or which of two more reasonable courses of action to follow."

In Chambers-Castenes v. King Co., 100 Wn.275, ___P.2d___ (Case No. 47968-2, Sept. 14, 1983), the Washington Supreme Court recently expanded on its holding in Evangelical United Brethern, supra, and basically employed the reasoning alluded to by Judge Anstead's in The Manors of Inverrary, supra,

There, the plaintiffs pulled their automobile to a stop

behind a truck in King County. The occupants of the truck exited their vehicle and commenced beating plaintiff husband and wife. Onlookers and later plaintiff wife called King County police requesting assistance. Despite receiving 11 calls, the department did not respond until one hour and twenty minutes later. The assailants escaped.

Plaintiffs brought suit in tort against the police department and Sheriff contending basically that the law enforcement officers were liable for damages suffered by their failure to respond in a timely manner. Defendants' motion to dismiss was granted by the trial court, however, the Supreme Court of Washington reversed.

That court held that the threshhold question is whether the agencies are immune from suit. Recognizing that its legislature abolished sovereign immunity, Washington courts have adopted a narrowly circumscribed exception in instances involving high-level discretionary acts exercised at a truly executive level, citing Evangelical United Brethern Church v. State, 407 P.2d 440(Wash. 1965).

In Chambers v. King Co., the Washington Supreme Court held that the exercise of discretion at an operational level is not immune from suit. Mason v. Bitton, 534 P.2d 1360(Wash. 1975), at 1364.[7] Of course, this holding directly conflicts with the decision of the Second District Court of Appeal herein.

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[7] In Mason, plaintiffs were injured in a vehicle collision when a police cruiser collided with their auto in the course of a hot pursuit chase. The Washington Supreme Court held that the initial decision to chase and the decision as to whether to continue pursuit are properly characterized as operational. See also Walters v. Hampton, 543 P.2d 648(Wash.1975).

The four-pronged EUB inquiry was reviewed and the court suggested further that even if all four questions were answered affirmatively, the discretionary act must be the product of a "considered policy decision". See King v. Seattle, 525 P.2d 228 (Wash. 1974) and Bellevance v. State, 390 So.2d 442(Fla.1st DCA 1980).

The Washington court thus held that discretion exercised by police officers in the field is not protected as high level executive basic policy making decisions.[8] Based upon this Court's holding in Commercial Carrier, the judicial inquiry would cease. As presaged by Judge Anstead, that resolution is erroneous.

Chambers then recognizes that a cause of action for negligence will not lie unless the defendant owes a duty of care to plaintiff. The Sheriff there, as here[9] has a statutory duty to keep the peace and arrest all persons who breach the peace. This has been consistently held to be a duty owed to the public at large and is unenforceable as to individual members of the public. The opinion noted that said policy is consistent with the majority of jurisdictions. See Annot. Liability Of Municipal Or Other Governmental Unit For Failure To Provide Police Protection, 46 A.L.R.3rd 1084

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[8]This holding also directly conflicts with the decision in Ellmer v. City of St. Petersburg, 378 So.2d 825(Fla.2d DCA 1979) where the 2nd DCA rejected any notion that all "planning functions" must occur at headquarters and that any decision made on the scene must necessarily be operation.

> "Sometimes only persons in the field can make effective plans."

However, the court also observed that there is no duty to arrest. See footnote #11, infra.

[9]Sec.30.15, Fla.Stat.(1979) places a duty upon the sheriff to (5) be conservators of the peace and (6) apprehend any person disturbing the peace...

(1972). Indeed, this remains federal law as well. See South v. Maryland, 18 Howard 396, 59 U.S. 396(1856).

Two exceptions have been identified and the Washington court found that an actionable duty to provide police services arises if (1) there is some form of privity between the police department and the victim which sets the victim apart from the general public [Citing City of Tampa v. Davis, 226 So.2d 450(Fla.2nd DCA 1969)] and (2) where explicit assurances of protection to the victim create detrimental reliance. [Citing Sapp v. Tallahassee, 348 So.2d 363(Fla.1st DCA 1977).[10]

Also, an actionable duty to provide public services may arise under the rescue doctrine.

Therefore, it is apparent that all Florida pre-Commercial Carrier cases applying the Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla.1957) as refined in City of Tampa v. Davis, supra, and Modlin v. City of Miami Beach, supra, including Evett v. City of Inverness, 224 So.2d 356(Fla.2nd DCA 1969) are still viable because Modlin itself decreed its reasoning of no liability was not based on municipal soevereign immunity. Rather it was based upon the traditional tort concept of absence of duty.

This Court in Commercial Carrier labeled the general duty - special duty dichotomy "circuitous reasoning" which results in a duty to no one if a duty is owed to the public at large.

[10]However, see Henderson v. City of St. Petersburg, 247 So.2d 23(Fla.2nd DCA 1971). See also Restatement (Second) of Torts, sec. 323 (1979). Here, while Deputy Parker did not decrease the risk of injury to plaintiff by not taking Willard into custody, he certainly did not increase the hazard of the accident occurring which may well have happened without the confrontation between Willard and Parker. Certainly, Evett v. Inverness found no privity or reliance on this situation such that even under the Restatement, no liability attaches here.
This "good samaritan" theory was argued in depth by the brief prepared by City of Hiahleah in Trianon Park Cond. Assoc. v. City of Hiahleah, Case No. 63,115.

Chambers v. King Co., supra, responds directly to that criticism by stating that it is not well-founded since abrogation of the doctrine of sovereign immunity did not create duties where none existed before. It merely permitted suits against governmental entities that were previously immune from suit. Consequently, unless legislation of judicially created exceptions create a duty where none existed before, liability does not attach.

The Washington court found that plaintiffs there had the necessary privity or special relationship as well as detrimental reliance by virtue of the many calls for assistance made and assurances that help was on the way.[11] This court having decided to incorporate Washington law into the immunity law of this State, is it not bound by further development or explanation of that law?

At the Second District, Respondent did not argue the reasoning set forth in the Everton opinion, however, Respondent takes the position that the result is correct.

The Sheriff herein urges this Court to agree with its position of no liability under the facts of this case for several reasons.

First, it cannot be denied that Commercial Carrier/EUB/ Johnson v. State has been relatively amenable to application in

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[11] In closing, the court recognized the existence of no authority which supports a cause of action for "failure to arrest". The only authority was to the contrary. See Falco v. New York, 310 N.Y. Supp. 2d 524(Sup.Ct.1970), aff'd 329 N.Y.Supp.2d 97(1972).

Florida is in accord. See Elliott v. City of Hollywood, 399 So.2d 507(Fla.4th DCA 1981) which held that a city's failure to enforce its shrub-height municipal ordinance was a planning function. The bush in question was 12 feet high. The ordinance limited shrubs to 3 feet. Plaintiff claimed that an auto accident was caused by impaired vision due to the height of the shrub.

circumstances involving governmental improvements; i.e. the planning and maintenance of bridges, sewer systems, highways, traffic control devices, parking lots and schools as well as in the administrative realm such as building inspections and parole or release from custody situations. However, the distinction of "planning versus operational" finds tough sledding when applied to the quasi-judicial exercise of the state's police power; more particularly here, law enforcement activities.

Law-enforcement officers occupy unique positions in society and their tort exposure should so reflect.

Utilizing development of Washington law, expansion of Commercial Carrier is required as set forth in Chambers v. King Co. Once it is determined that a governmental act is operational, the inquiry must proceed to determine whether a duty is owed by the defendant to the plaintiff. Where the alleged duty breached is one owed to the public generally, liability exists only where there is alleged (1) privity, (2) reliance on assurance of police protection or (3) application of the rescue doctrine. Since none of those circumstances are present here, no cause of action exists.

Another method of evaluation is that since immunity already obtains outside of sec.768.28, Fla.Stat.(1979) for the other primary actors in the criminal process, why should the police officer in the field, the person who first exercises discretion in law enforcement; i.e. exercise of the police power, be treated differently?

In both Weston v. State of Florida, 373 So.2d 701(Fla. 1st DCA 1979) and Berry v. State of Florida, 400 So.2d 80(Fla.4th

DCA 1981), state attorneys were granted immunity where they were each accused essentially of malpractice. In Weston, the prosecutor obtained an indictment from the grand jury under a statute which, plaintiff alleged, the state attorney knew or should have known that plaintiff was not within the class of persons chargeable. The indictment was subsequently dismissed. Weston's complaint for malicious prosecution and false arrest was dismissed.

In Berry, the state attorney failed to prosecute a prisoner as a multiple offender which would have precluded parole. The prisoner was paroled and murdered plaintiff's decedent.

In both cases, the acts of the attorney were simply "failure to correctly apply statutes of which they were aware", conduct differing in no significent fashion from the discretionary decision of Deputy Parker herein not to take Willard off the highways.

Yet, each DCA held that the conduct of a state attorney in the exercise of his prosecutorial duties qualifies as a discretionary governmental function, the performance of which is not affected by the statute waiving sovereign immunity. Such acts require the exercise of basic policy evaluation, judgment and expertise in determining whether or not a charge should be made for violation of the state's criminal laws.[12]

Berry v. State also found judges exempt from liability, in that case for failure to sentence the prisoner as a recidivist

[12]These holdings, too, would seem to directly conflict with Chambers v. King County, supra, judges and state attorneys essentially being "field officers' not high-level executives making basic policy decisions.

or failure to consider the inmate a mentally disordered sex offender, thus precluding parole.

The 4th DCA found roots of non-liability in common-law judicial immunity which was not abrogated by the enactment of 768.28. This same common-law immunity was found to exist for prosecutors in Imbler v. Pachtman, 424 U. S. 409(1976) although discretion was also discussed.

Why should the real bedrock participants in the law-enforcement process be blessed with equal protection? The Second District has long been an advocate of such special protection for the officer in the street. See Everton v. Pinellas County Sheriff's Dept., 426 So.2d 996(Fla.2d DCA 1983) at p.1033 where it is observed that it would seem less than fair to not impose immunity as a result of the actions of the officer in the street under the pressures of the moment when immunity in the same case would be afforded the judge and prosecutor for their deliberate negligent actions in the cool light of day. See also Neumann v. Davis Water and Waste, Inc., 433 So.2d 559(Fla.2nd DCA 1983) at p.563 where the court observes that exercise of the police power of the state is a purely governmental function which has historically enjoyed immunity from tort liability, citing Wong v. City of Miami, supra, and Hernandez v. City of Miami, 305 So.2d 277(Fla.3rd DCA 1974).

A third method or alternative available to affirm the decision of the Second District herein is to simply hold that its only error was in finding that Deputy Parker's acts were in the operational field of law enforcement. 426 So.2d at 999. The court

agreed that the deputy's actions involved basic governmental policy and implementation thereof. It also held that essential to a reasonable system of law enforcement is the discretion of the officer under the circumstances of a particular case to decide whether or not to detain or arrest someone. The Second District's labeling of this conduct as "operational" flies in the face of its own earlier statement in Ellmer v. City of St. Petersburg, 378 So.2d at 826, that sometimes only persons in the field can make effective plans.

Discretion at the arrest stage of the criminal process is recognized by Professer Wayne R. LaFave, in his study, "Arrest: The Decision To Take A Suspect Into Custody (Little, Brown & Co. 1965). At p. 9, he states that

> "It is helpful to look at the total criminal justice system as a series of interrelated discretionary choices.... It is particularly important to be concerned about the exercise of discretion, most often by police, at the arrest stage. Many persons whose conduct apparently violates the criminal law are not arrested."

This is explained by instances where statutes are (1) obsolete, (2) vague, (3) where resources make full enforcement impossible or (4) where sentencing is meaningless. Police discretion is dealt with in depth by Professor LaFave in Chapter 3 beginning at p.63. At p.71, footnote 3 indicates that one study of traffic violations revealed that the general enforcement policy of a department is partly the result of traditional practices, partly the general orders of the chief (sheriff) modifying or amplifying these

unwritten laws and partly the character that the intelligent and honest official puts into his work. In summary, discretion.

Professor LaFave briefly deals with the situation herein in Chapter 5 of his book, placing the non-invocation of the criminal process in situations involving intoxicated motorists under "trivial offenses" where because of limited financial resources, warnings or alternative to invocation are used such as using cabs or hiding the keys. At p.109. One must remember that this book was published nearly 20 years ago.

Given no doubt that officers on the street possess wide-ranging enforcement discretion, the Second District found that Deputy Parker's acts passed all of the Evangelical tests:

> "(1) Does the challenged act necessarily involve a basic governmental program? Yes, that program being a reasonable system of law enforcement. (2) Is the act or decision essential to the accomplishment of that program as opposed to one which would change the course of the program? Yes, because we believe that to remove discretion from the operational level of law enforcement would make a radical change in the ability to maintain a reasonable, workable system of law enforcement. (3) Does the act or decision require the exercise of basic policy evaluation, judgment and expertise? Yes, because notably nowhere else is evaluation, judgment or expertise so immediately necessary as it may affect citizens' basic rights as with

> the law enforcement officer in the field. (4) Is there involved the lawful authority and duty to make the decision? Yes, again because if discretion were removed, law enforcement would necessarily undergo radical and unknown changes." at p. 1003.

Since all four prongs were answered in the affirmative, Johnson v. State was not needed to resolve the inquiry. However, in many of the cases applying the EUB test, the courts find relatively little difficulty in answering question 1 and 4 but find trouble with #2 and #3. This results from, in the Sheriff's opinion, an overly narrow construction of the question. Certainly, if the act of just one officer is examined, his or her act does appears rather meaningless just as one vote in a presidential election seems insignificant and powerless.

However, a bloc of votes elect presidents just as deputies, policemen and troopers enforce the law. Every individual decision they make is the law. Consider this - would a circuit judge's ruling or a state attorney's decision not to prosecute pass muster under the narrow test advocated by Petitioners? Hardly .[13]

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[13]Should we discriminate against the officer in the street, the front line of law enforcement, because he or she wears no coat or tie or boasts no law degree?

Therefore, the court should have found, as did the 1st and 4th DCA's in the case of state attorneys and judges, that discretionary decisions of law enforcement officers are judgmental, policy making decisions.

Before concluding with a final alternative, our sister jurisdictions should be consulted in the absence of any other Florida precedent concerning whether a decision whether or not to arrest creates tort liability.

We must agree with Petitioners that the courts of Arizona and Ohio give no aid. Outside of the reference in Chambers v. King Co. to an absence of any duty to arrest, the only other factually similar case located is Shore v. Town of Stonington, 444 A.2d 1379 (Conn.1982). The plaintiff decedent was killed by a drunk driver who had been stopped and warned by a law enforcement officer but not arrested. The officer had followed the offending motorist and observed him at about 10:40 PM speeding and weaving several times across the center line.

Approximately 50 minutes later the motorist struck a vehicle operated by decedent. Plaintiff filed suit alleging negligence in failure to enforce the drunk driving statutes. A summary judgment for the city was affirmed on the basis that no duty was owed by the city to plaintiff's decedent since the duty owed was to the public in general. Breach of that duty is a public injury and can only be redressed if at all in some form of public prosecution.

The Connecticut Supreme Court relied upon Evett v.

City of Inverness, 224 So.2d 365(Fla.2nd DCA 1969) in support of its holding that the required privity or special duty cannot be established by the mere fact that someone with whom the official had prior contact subsequently injured the plaintiff.

The court concluded by stating the following:

> "Should the officer try to avoid liability by removing from the road all persons who pose any potential hazard, he may find himself in many instances for false arrest. We do not think that the public interest is served by allowing a jury of laymen with the benefit of 20/20 hindsight to second guess the exercise of a policeman's discretionary professional duty. Such discretion is no discretion at all." at p.1384. See also Pierson v. Ray, 386 U. S. 547 (1967)

See also Wright v. City of Ozark, ___F.2d___(11th Cir. Case No. 82-7213, Sept. 26, 1983) slip sheets p.5059, (involving allegations that city suppressed information that area in which plaintiff walked resulting in her rape was high crime); Robertson v. City of Topeka, 644 P.2d 458(Ka.1982) (involving a police officer warning a suspected arsonist to leave premises rather than removing suspect - no liability to property owner where suspect later torched premises); Hage v. State, 304 N.W.2d 283(Minn.1981) (involving alleged failure to enforce fire safety regulations at a hotel - state not liable to occupant of hotel burned down by arsonist.)

The cases relied upon by Petitioner are not controlling since none deal with the duty to enforce laws or provide police protection. In discussing Payton v. United States, 679 F.2d 475 (5th Cir.1982), Petitioners may have misstated the holding. The decision as to whether or not to parole a mental patient was

determined to be a protected discretionary act.[14] However, the failure to maintain proper records and the failure to forward patient records constituted negligent implementation and was actionable. The decision of whether to parole or release an inmate has been found by one DCA to be a policy-making judgmental decision in Florida. See Berry v. State, 400 So.2d 80(Fla.4th DCA 1981) at p.84-86.[15]

In Downs v. United States, 522 F.2d 990(6th Cir.1975), the FBI agents violated its own handbook procedures for handling hijackers such that no discretion was allowed. See also Luizzo v. United States, 508 F.Supp. 923(E.D. Mich.1981).

In closing with one final solution to the question of liability of law enforcement officers in exercise of discretionary functions, the Sheriff commends to this Court the resolution offered in Bradshaw v. Prince Georges County, 396 A.2d 255(Md. 1979). There, waiver of immunity implies an exception for discretionary functions performed by government officers, without regard to the status of the individual making the decision, planning or operational.[16]

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[14]Construing the Federal Tort Claims Act, 28 U.S.C.sec.1346(b), 2671-80 (1970) which of course contains an explicit exception for "discretionary" functions, sec.2680(a).

[15]Contra, Bellevance v. State, 390 So.2d 422(Fla.1st DCA 1980). Interestingly, this was the issue in Johnson v. State, 447 P.2d 352 (Cal.1968) which Commercial Carrier relied upon.

[16]This resolution would essentially affirm Everton basing the decision upon immunity, not absence of duty as stressed in Chambers v. King Co., supra.

CONCLUSION

The term discretion denotes freedom to act according to one's judgment in the absence of a hard and fast rule. When applied to law enforcement officers, discretion is the power conferred upon them by law to act officially under certain circumstances according to the dictates of their own judgment and conscience and uncontrolled by the judgment or conscience of others.

Where a law enforcement officer's duty is absolute, certain and imperative, involving merely the execution of a set task, such as service of a subpoena or making of an arrest pursuant to a warrant, there is liability for performing the duty or failing to perform it, negligently or unskillfully.

On the other hand, where his powers may be exerted or withheld according to his own judgment as to what is necessary and proper, he should not be liable to any private person for a neglect to exercise those powers.

The Sheriff agrees with the Second District when it states so succinctly that the "the proper planning and implementation of a viable system of law enforcement for any governmental unit must necessarily include the discretion of the officer on the scene to arrest or not arrest as his judgment at the time dictates."

When that discretion is exercised, neither the officer nor the employing entity should be held liable in tort for the consequences of the exercise of that discretion. The Sheriff

respectfully requests this Court to affirm dismissal of these complaints.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondents' Answer Brief has been furnished by United States Mail to Robert K. Hayden, Esquire, 800 - Court Street, Clearwater, Florida 33516; Gary Dunlap, Esquire, 315 - Court Street, Clearwater, Florida 33516; Daniel C. Kasaris, Esquire, P. O. Box 4192, St. Petersburg, Florida 33731; Rick Mattson, Esquire, P. O. Box 14373, St. Petersburg, Florida 33733 and Michael J. Alderman, Esquire, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, Neil Kirkman Building, Tallahassee, Florida 32301 this 7th day of November, 1983.

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