IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

KATHY JEAN DUVALL, a minor by her father and next friend, WILLIAM R. DUVALL; RICHARD FONTAINE, as Administrator of the Estate of DONALD JOSEPH FONTAINE, a minor, deceased; CAMITA BEDDOW, as Administratrix of the Estate of JUDY LYNN SCROGGINS; and JOHN THOMAS TKAC and ANGELA TKAC,

Petitioners,

vs. CASE NO. 63,441

CITY OF CAPE CORAL,

Respondent.

RESPONDENT'S JURISDICTIONAL BRIEF FOR CITY OF CAPE CORAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent objects to the numerous "factual" representations in the Petitioner's jurisdictional brief. A jurisdictional brief is intended to be "limited solely to the issue of the Supreme Court's jurisdiction." Rule 9.120(d) Fla.R.Civ.P. Obviously, Petitioners' brief contains numerous statements which are not contained in the record proper for jurisdictional purposes. The placement of many of these facts within single spaced footnotes which begin "if permitted to brief this case" does not justify this practice and simply allows the Petitioners to file a brief which would have been fifteen pages in length if it were not single spaced. Although the Respondent is sorely tempted to respond to some of these "factual" allegations, the undersigned attorney will resist the temptation and simply ask this Court to rely upon the facts contained in the Second District's opinion.

ISSUE CONCERNING JURISDICTION

The City of Cape Coral would respectfully restate the issue concerning jurisdiction as follows:

> IN HOLDING THAT A POLICE OFFICER'S DECISION NOT TO ARREST OR DETAIN IS AN IMMUNE QUASI-JUDICIAL DECISION, THE SECOND DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OTHER DECISION IN THE STATE OF FLORIDA.

ARGUMENT

The Second District's decision in this case is not a lengthy opinion. It describes the basic facts of the case. It explains that the police officer who stopped Mr. McNally a few hours before the automobile accident elected to have Mr. McNally taken home in a cab. The decision holds that the lower court erred in failing to instruct the jury on the applicable statute which permits a police officer to send an intoxicated person home in a cab. Section 856.011(3), Florida Statutes (1981).

After holding that the lower court erroneously failed to give an applicable jury instruction, the court further held that the Petitioners could not recover against Cape Coral for the same reasons the Second District had recently explained in Everton v. Willard, ___So.2d ___ (Fla. 2d DCA 1983). The Petitioner's efforts to obtain conflict certiorari in this case appear to be exclusively based upon the reasoning in the Everton opinion.

The Everton opinion is a lengthy, well-reasoned opinion. In summary, it holds that a police officer's

decision not to arrest or detain an individual is an immune quasi-judicial decision because it satisfies the four-prong preliminary test described in the Evangelical case and required by this Court's decision in Commercial Carrier. This immunity is justified by matters of public policy. Neither Section 768.28 nor the Commercial Carrier case conditioned governmental immunity upon the status or rank of the governmental officer or employee involved in the decision making. So long as the discretionary decision satisfies the preliminary four-prong test, it is an immune "judgmental decision", even though the governmental employee's job would typically be regarded as an operational-level job rather than a planning-level job.

The above-stated holding of the Everton case is consistent with this Court's decisions in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979) and in City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982). Moreover, it announces a rule of law concerning a governmental activity which has not been previously examined under the limited waiver of sovereign immunity contained in Section 768.28, Florida Statutes. As demonstrated below, this opinion certainly does not expressly and directly conflict with another Florida decision and, accordingly, this Court lacks conflict jurisdiction.

Under Article V, Section 3(b)(3), Florida Constitution (1980) this Court may only assume jurisdiction

over decisions which expressly and directly conflict with decisions from another Florida court. Under the recent amendments to the Florida Constitution, the conflict must be "express" and contained within the written rule announced by the Court. Jenkins v. State. 385 So.2d 1356 (Fla. 1980). It is well established that even a conflict of opinions or reasons is not sufficient to create conflict jurisdiction. Instead, the conflict must exist between the actual decisions. Gibson v. Maloney, 231 So.2d 823 (Fla. 1970).

There are, of course, only two principle situations authorizing the use of conflict jurisdiction: (1) when the decision applies a rule of law to produce a different result in a case involving substantially the same controlling facts as those in a prior case decided by another appellate court; or (2) when the decision announces a rule of law that conflicts with a rule previously announced by another appellate court. Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

In this case, the Petitioners do not seriously argue that the Second District's decision applies a rule of law to produce a different result in this case as compared to some earlier case with the same controlling facts. This case and the Everton case appear to be the only cases which discuss liability under Section 768.28, Florida Statutes for a police officer's decision not to arrest or detain an

individual who subsequently causes injuries to another. Thus, under "fact" conflict as compared to "rule" conflict there clearly is no basis for conflict certiorari jurisdiction.

The fact that this case and the Everton case are the only cases announcing a rule of law under Section 768.28, Florida Statutes concerning a police officer's decision not to arrest is important not only for "fact" conflict but also for "rule" conflict. This case basically announces a rule of law concerning the application of Section 768.28 to law enforcement officers. There is no express and direct conflict between these cases and other cases which involve governmental liability for school teachers, road builders, and other functions of other types of state subdivisions. It is important to point out that the rule announced in these cases concerns a quasi-judicial function of government and concerns police options authorized by Section 856.011(3), Florida Statutes (1981). Express conflict does not exist between rules which involve different governmental subdivisions performing different governmental functions under different statutory authorizations.

This Court created a "case-by-case" method to evaluate sovereign immunity in the Commercial Carrier case. 371 So.2d at 1022 (Fla. 1979) As demonstrated below, the Second District faithfully followed that method. Thus, the Second District's decision not only notes no conflict with the Commercial Carrier decision but takes every effort to

follow the general procedures prescribed by that case.

In the Commercial Carrier case, this Court stated:

> "The temptation is strong to fall back on semantic labels for ease of application and seeming certainty. However, we eschew this temptation, as it surely will result in a return to the overly structured and often misleading analysis which persists in the law of municipal sovereign immunity."
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> 371 So.2d at 1020

In this case, the Petitioner's argument basically attempts to equate "operational level" and "planning level" with job status. Under this analysis, the acts of high-level, white-collar employees create no liability, whereas the acts of lower-level employees subject the state to suit. This clearly is a return to "semantic labels" rather than case-by-case analysis.

In the Commercial Carrier case, this Court, in discussing the California decision in Johnson v. State, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968) recognized that a definition of discretionary actions which preserved immunity for high-level decisions was not the appropriate approach. Immune discretionary activities can exist at all levels of government. Thus, this Court required an analysis predicated upon policy considerations.

In evaluating these policy considerations, this Court commended the utilization of the preliminary four-prong test described in Evangelical United Brethren Church

v. State, 67 Wash.2d 246, 407 P.2d 440 (1965).[1] In this Court's holding in the Commercial Carrier case, the four-prong test is regarded as a "preliminary test". 371 So.2d at 1022. In quoting from the Washington decision in the Commercial Carrier case, this Court made it clear that further inquiry and analysis is unnecessary concerning governmental immunity if the governmental action satisfies each prong of the four-prong test. 371 So.2d at 1019. Certainly, this same approach has been taken concerning different governmental activities even in cases cited by the Petitioners. See, e.g., Bellavance v. State, 390 So.2d 422 (Fla. 1st DCA 1980). In the Everton case, the Second District analyzed the public policy considerations requiring discretion for a police officer's decision to detain or arrest. Thereafter, that opinion analyzes the police officer's decision under the four-prong Evangelical test and determines that it satisifes each prong of the test. Under the anaysis established in the Commercial Carrier case, the Court then rules that the police officer's activity is immune from suit. Thus, the Second District's analysis in the Everton case is completely consistent with the Commercial Carrier case and its progeny.

Clearly, this Court's decision in the Commercial Carrier case and the other opinions applying that rule do

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[1] For purposes of brevity, that test is not restated in this brief.

not suggest that "planning-level" employees do not perform "operational" acts and vice versa.[2] Thus, even a high-level employee performing a function which does not require basic policy evaluation, judgment, or expertise may subject a state subdivision to suit. Hollis v. School Board of Leon County, 384 So.2d 661 (Fla. 1st DCA 1980), Sintros v. LaValle, 406 So.2d 483 (Fla. 5th DCA 1981). The Petitioner's first jurisdictional argument simply fails to accurately analyze the functional test described in the Commercial Carrier case and applied elsewhere.

In the second portion of the Petitioners' jurisdictional brief, the Petitioners suggest that the police officer's decision does not satisfy the four-prong test described in Evangelical. That may have been an interesting substantive argument in the lower court but it is not an argument which concerns express and direct conflict. These two cases are the first cases in which any court has applied the four-prong test to the quasi-judicial decision of a police officer not to arrest an individual. Certainly, this analysis under Section 768.28 does not conflict with City of Miami v. Horne, 198 So.2d 10 (Fla. 1967) since that decision not only predates the sovereign immunity statutes, it also predates Modlin v.

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[2] It is perhaps significant to note that the decision in Johnson v. State, supra., discusses "discretionary" decisions as compared to "unprotected ministerial acts" rather than "operational" acts. It is the governmental function and not the job title which must be analyzed.

City of Miami Beach, 201 So.2d 70 (Fla. 1967). Likewise, the operation of an automobile by a government employee is hardly a function which remotely compares with a quasi-judicial decision of a police officer not to arrest an individual. See, Sintros v. LaValle, 406 So.2d 483 (Fla. 5th DCA 1981).

In the Petitioners' final argument concerning conflict, it is argued that the Everton decision conflicts with Department of Transportation v. Nielson, 419 So.2d 1071 (Fla. 1982) and City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982). The Petitioners justify this argument by suggesting that the police officers "knew or should have known" that they had created a trap. First, the record proper contains no facts or analysis to suggest conflict on this subject. More importantly, the Respondent is concerned by the Petitioners' repeated suggestion that the Nielson and Collom decisions apply in cases where a governmental subdivision "should have known" about a dangerous condition. This Court's decision in City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982) repeatedly italicizes the word "known" in order to emphasize that the holding applies only to known dangers and not to dangers which should have been discovered. It is difficult to understand how the Petitioners overlooked this important, italicized holding.

CONCLUSION

No previous court has applied the four-prong preliminary test concerning sovereign immunity to a police

officer's quasi-judicial decision not to arrest or detain an individual. The Second District's decision does not expressly and directly create either "fact" or "rule" conflict. Accordingly, this Court should not exercise its certiorari jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 25 day of April, 1983 to Richard V.S. Roosa, Esquire, Post Office Box 535, Cape Coral, Florida 33804, Wagner, Cunningham, Vaughan & McLaughlin, P.A., 708 Jackson Street, Tampa, Florida 33602; Joe Unger, Esquire, 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130; and Joel S. Perwin, Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130-1780.

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