O/a 1-12-84

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

FILED

NOV 14 1983

SID J. WHITE
CLERK SUPREME COURT
By _____ Chief Deputy Clerk

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 BRIEF ON THE MERITS

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STATEMENT OF THE CASE

In 1976, four lawsuits were filed in the Twentieth Judicial Circuit of the State of Florida concerning an automobile accident which occurred on February 15, 1975 in the City of Cape Coral, Florida. (R. 1-7, 585-92, 682-89, 764-71)[1] The Plaintiffs/Appellees/Petitioners, Camita Beddow, as Administratrix of the Estate of Judy Lynn Scroggins, Richard Fontaine, as Administrator of the Estate of Donald Joseph Fontaine, Kathy Jean Duvall Ellis, and her parents, William R. Duvall and Judith Ann Duvall, as well as John Thomas Tkac and his wife, Angela Tkac, all brought suit not only against the City of Cape Coral, but also against John Patrick McNally, Margaret McNally, Randall Industries, Inc., d/b/a Jack's Radio Cabs, William Arthur Adkins, and three insurance companies.[2]

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1 All references to the consolidated record on appeal in these four proceedings will be referred to by reference to the symbol "R." followed by the appropriate page from that record. There is a 14-volume transcript of the trial proceeding contained within the record on appeal. Because that transcript is not consecutively paginated throughout, references to that transcript will be indicated by use of the page within the record itself.

2 The various Plaintiffs/Appellees/Petitioners will be referred to collectively herein as the Plaintiffs. Any specific Plaintiff will be identified by name. The Defendant/Appellant/Respondent, City of Cape Coral, will be referred to as Cape Coral. The other various Defendants settled their claims with the Plaintiffs as soon as the jury began its deliberations and they are no longer parties to this action. They will be referred to as Mr. McNally, Jack's Radio Cabs, and Mr. Adkins.

After initial pleadings, the Plaintiffs each filed an amended complaint which describes essentially the same ultimate facts and legal theories concerning liability. (R. 92-101, 611-20, 706-15, 790-99) (See Appendix "C") The amended complaint basically alleges that all of the Plaintiffs were occupants of a taxicab which was struck by an automobile operated by Mr. McNally shortly after 1:00 a.m. on February 15, 1975. The amended complaint alleges that Mr. McNally had been stopped a few hours earlier by the Cape Coral Police Department. He was very intoxicated. The department did not arrest Mr. McNally but rather delivered him into the custody of Mr. Adkins, as a cab driver for Jack's Radio Cabs. The Plaintiffs allege that the police officers negligently failed to determine the correct whereabouts for Mr. McNally's residence and that the cab company also failed to deliver Mr. McNally to his home. After attempting to find his home for nearly one hour, Jack's Radio Cabs returned Mr. McNally to his car and gave him his keys. Mr. McNally got back into his car and, a short while later, struck the taxicab in which the Plaintiffs were passengers.

Cape Coral moved to dismiss the amended complaints. (R. 102-04) The motions to dismiss were based upon the "special duty" doctrine as enunciated in Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967). The motions were granted with prejudice. (R. 115) Appeals were brought to the Second District Court of Appeals in July, 1977 concerning those

dismissals. (R. 119-20) Thereafter, this Court entered its decision in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). In light of that decision which abrogated the Modlin doctrine, the Second District Court reversed the dismissal of the amended complaints, held that the amended complaints did state a cause of action and remanded the cause to the lower court. Beddow v. City of Cape Coral, 375 So.2d 335 (Fla. 2d DCA 1979)

Following the remand, the Plaintiffs did not choose to further amend the amended complaint. Cape Coral answered the amended complaint and raised numerous defenses including the defense that Cape Coral's liability, if any, was limited by the terms and conditions contained in Section 768.28, Florida Statutes. (R. 187-210)

This case was initially set for trial before the Honorable R. Wallace Pack in the Twentieth Judicial Circuit in Fort Myers, Florida. In light of pre-trial publicity in Fort Myers, an order was entered changing the venue of the case for trial to the Thirteenth Judicial Circuit in Hillsborough County, Florida.[3] (R. 283-84) This case was tried in late

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3 Cape Coral's insurance carrier had offered its policy limits prior to trial and the City had attempted to limit its liability to its insurance coverage. (R. 272-273, 276-280) Unfortunately, these matters and other aspects of the case became front page news in Fort Myers on the day before the trial was to begin. (R. 283-284)

August and early September, 1980 before the Honorable Robert W. Patton. (R. 840-3039) The various insurance carriers were dropped as named parties at the beginning of the trial. The Plaintiffs settled with all of the remaining Defendants, other than the City of Cape Coral, for their total insurance coverage of $40,000.00 only after the jury had heard all of the evidence and had retired to deliberate. (R. 3038-39)

Although the Plaintiffs' amended complaints alleged a number of legal theories, the case was submitted to the jury concerning Cape Coral on the issue of whether the City was negligent in "the manner of handling John Patrick McNally after he was stopped by the employees of the City of Cape Coral". (R. 3001) The instructions concerning Cape Coral, however, indicated that the City's duties concerning Mr. McNally were non-delegable and that the City could also be responsible under a dangerous instrumentality theory for Mr. McNally's use of his own car.[4] (R. 3001)

During the jury instruction conference, the undersigned attorney expressed his concern that the lower court judge was

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4 The Plaintiff's Amended Complaint had contained several novel theories in an effort to avoid the Modlin doctrine. (R. 92-101) (Appendix "C") Thus, the Plaintiffs argued that the cab driver acted as an agent of Cape Coral. (Amended Complaint, paragraph 18) It was alleged that the City was liable under the dangerous instrumentality doctrine for Mr. McNally's use of his own car. (Amended Complaint, paragraph 26) There were also references to proprietary functions. These other issues resultd in incorrect and confusing jury instructions. (R. 3001)

submitting to the jury not only the basic issue concerning reasonable steps to remove Mr. McNally from the street, but also the non-delegable duty issue and "these other things". (R. 2799) If one examines the transcript of the jury instruction conference, it is clear that "these other things" are the other issues which were ultimately appealed to the Second District. The undersigned attorney indicated his concern that a specific verdict form would be needed to prevent a waiver argument on appeal. (R. 2799) The Plaintiffs' attorney objected to a special interrogatory verdict form and the undersigned attorney indicated his willingness to prepare such a verdict form. The lower court placed in the record a ruling that deemed Cape Coral to have requested the special interrogatories. (R. 2799-2800) Thus, the Second District's opinion in this case did not discuss and gave no credit to Plaintiff's argument concerning the "two-issue" rule.

The jury returned a verdict finding Mr. McNally, Jack's Radio Cabs and Cape Coral to be at fault, but finding Mr. Adkins to be free from fault. The total damages awarded were $1,296,000.00. Because the Plaintiffs had withdrawn their request for punitive damages against Mr. McNally when the jury asked a question about punitive damages, that portion of the verdict form was not filled in. (R. 454-56)

Amended final judgments were rendered on September 16, 1981 reflecting the jury's verdict, as well as the lower court's post-trial motions, the set-off for the $40,000.00 received from

the other Defendants, and the set-off for approximately $300,000.00 received from Cape Coral's insurance carrier. (R. 573-75, 672-74, 826-28)[5] These judgments were then appealed to the Second District. (R. 578, 675, 757-83)

Approximately a week before the Second District's decision in this case, the Second District issued its opinion in Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983). Cape Coral filed a notice of supplemental authority concerning that decision and the Second District then rendered its decision in City of Cape Coral v. Duvall, ___So.2d___ (Fla. 2d DCA 1983) [1983 FLW - DCA 366]. The Second District ruled that the lower court had failed to instruct the jury on Section 856.011(3), Florida Statutes as an applicable statute. This error would justify a new trial. In light of the Everton case, however, the Second District required that a judgment be entered in favor of Cape Coral.

In seeking jurisdiction before this Court, the Plaintiffs have not argued any conflict concerning the Second District's decision that the lower court erroneously handled Section 856.011(3), Florida Statutes. Thus, their arguments concerning that issue and the "two-issue" rule are simply efforts to obtain a second appeal without express conflict. Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982).

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5 Cape Coral's insurance carrier has paid its coverage and is no longer involved in this lawsuit. (R. 745-753, 663-671) Thus, the Plaintiffs merely desire this judgment in order to report it to the Florida Legislature in hopes that the legislature will compel the citizens of Cape Coral to pay the approximately $1,000,000.00 in excess of the limitations contained in Section 768.28, Florida Statutes.

STATEMENT OF THE FACTS

The statement of the facts provided by the Plaintiffs on pages 4-8 of their brief is basically accurate. Cape Coral will rely upon that portion of the Plaintiffs' statement of the facts. Pages 9-20 of the Plaintiffs' statement of the facts, however, is simply an argument which should have been placed elsewhere in the brief. It contains a number of inaccuracies and is not accepted by Cape Coral.

The officer who stopped Mr. McNally on February 14, 1975 was Ronald Ryckman. (R. 1668-72) Detective Ryckman had been a patrol officer for a considerable period of time and had made many arrests for drunk driving. At the time of this incident, however, he had been a non-uniformed detective for a little more than two months. (R. 1657) He did not drive a patrol vehicle, but rather he drove an unmarked detective's car with the little red light which is placed on the dash. (R. 1670) As a detective he had been told by his division commander that he should not work traffic offenses. (R. 1701, 1724-29) The fact that police departments have many officers with limited or specialized functions is common knowledge and the need for such specialization was discussed by one of the police experts, William Bopp. (R. 2460-61)

When Detective Ryckman stopped Mr. McNally, Mr. McNally produced a drivers license with a St. Petersburg address. (R. 1674) After a short period of time, he provided his

address as 1661 Crooked Arrow Court in North Fort Myers. (R. 1676) As indicated by the Plaintiffs, that address had recently been incorporated into Cape Coral. The transcript of the radio transmissions establishes that the dispatcher confirmed the address as 1661 Crooked Arrow.[6] (Appendix "A") Although there was testimony that his computer printout may have indicated Cape Coral instead of North Fort Myers, the dispatcher made no mention of that fact.

Initially, Mr. McNally suggested that Detective Ryckman call a friend, Fred Barr, to take him home. (See Transcript at 23:13 hours) When the dispatcher called the Barr residence, Mr. Barr was not at home and so the dispatcher explained to Mrs. Barr that the police department would have a cab called for Mr. McNally. (See Transcript at 23:17 hours) Before the accident, Mrs. Barr felt that idea was "very nice". (See Transcript at 23:17 hours)

As indicated in the Plaintiff's statement of the facts, the taxicab driver, Mr. Adkins, arrived at the scene at approximately midnight. (See Transcript at 23:49 hours - 00:07 hours) Because Mr. Adkins did not know where Crooked

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6 The transcript of the radio transmissions is contained in the Appendix as Appendix "A". A sheet which identifies various codes and symbols used in the radio transmissions is attached as Appendix "B". Detective Ryckman was identified as "Officer 133".

Arrow Court was located, he contacted his taxi dispatcher. That dispatcher confirmed that Crooked Arrow Court was in North Fort Myers and gave the taxi driver instructions on how to get to the vicinity of the street. (R. 1382) Unfortunately, the map at the taxi company contained an error. The map is a map of the entire Fort Myers region including both North Fort Myers and Cape Coral. It listed Crooked Arrow Court in the street index at quadrant C-2. (R. 2214) That quadrant is north of Cape Coral in part of North Fort Myers. In fact, Crooked Arrow Court is on the map in quadrant C-20 in the area that had recently become part of Cape Coral. (R. 2215) Thus, because of a typographical error, the taxi dispatcher sent Mr. Adkins to North Fort Myers rather than to the proper location.

Mr. Adkins searched for Mr. McNally's house for approximately an hour. (R. 1409) Mr. McNally kept telling Mr. Adkins that they were in the wrong place, but that his home was straight ahead. (R. 1384-85) After this long search, Mr. Adkins radioed to his dispatcher and she told him to return the passenger and his keys to the car. (R. 1385) Mr. Adkins then did return Mr. McNally to his car, gave him his keys and suggested that he go to sleep in the back of the car. (R. 1387-88) Mr. Adkins testified that he knew Mr. McNally would present a hazard if he drove and he knew the police should be called before Mr. McNally was ever released to drive his car. (R. 1392-1418) He apparently assumed that his taxi dispatcher would

call the police dispatcher, but that never occurred. (R. 1418-19)

At one in the morning, one of the neighbors who witnessed Mr. McNally return to his car, Mrs. Smith, did call the police department. (See Transcript 1:00 a.m.) A new dispatcher was on duty and was only indirectly aware of the incident which had occurred prior to his workshift. (R. 1839-60) Two officers who had been to the scene earlier were dispatched at 1:03 a.m. The officers did not use their lights and siren, but drove directly to the location. Although the record contains guestimates that the distance might be as little as one-half mile, the maps and odometer readings established the distance to be one and a half to one and three-quarter miles. (R. 1632-34, 2008, 2021, 2026) The two officers arrived at the scene and determined that Mr. McNally was gone by 1:08 a.m.

The Smiths were upset that the police did not rapidly pursue Mr. McNally down Pondella Road towards Highway 41 - - the direction in which they believe Mr. McNally drove. (R. 107-09) The police car did, however, eventually follow Mr. Smith's advise. Ironically, it is not clear that Mr. McNally ever went down Pondella Road towards Highway 41. The accident occurred four and a half minutes later a considerable distance away in essentially the opposite direction.

Although Mr. McNally had not accurately assisted the taxi-cab driver in finding his home, Mr. McNally drove himself several miles from Del Pine Road and was about two blocks from his house at the time of the accident. (R. 1180)

Footnote eleven in the Plaintiff's statement of the facts suggests that Dectective Ryckman was obligated to take Mr. McNally to a hospital pursuant to Section 396.072(1), Florida Statutes. This is the first time, to the knowledge of the undersigned attorney, that this statutory provision has ever been discussed in this case. Interestingly, that statute, in addition to Section 856.011(3), Florida Statutes, authorizes a police officer to assist an intoxicated person to his home. The Plaintiffs now argue that Mr. McNally was "incapacitated" and thus that Detective Ryckman had a statutory obligation to take Mr. McNally to a hospital. The new statute defines "incapacitated" to mean "in immediate need of emergency medical attention". Not only was this statute not raised in the lower courts, but the evidence is clear that Mr. McNally, although very intoxicated, did not need emergency medical treatment, was talking to people, and was able to drive his automobile at a high rate of speed toward his home. Thus, if any, this statutory provision supports Detective Ryckman's decision.

POINTS ON APPEAL

Cape Coral would respectfully suggest the following points on appeal:

I.

WHEN A STATE AGENCY OR MUNICIPALITY ASSUMES A DISCRETIONARY, QUASI-JUDICIAL DUTY TO PROTECT THE PUBLIC UNDER POLICE POWERS, THE DUTY OWED SHOULD BE NO GREATER THAN THE DUTY OWED BY A PRIVATE PERSON WHO ASSUMES SUCH A DUTY.

II.

THE DISTRICT COURT CORRECTLY RULED THAT THE LOWER COURT SHOULD HAVE GRANTED AN INSTRUCTION CONCERNING SECTION 856.011, FLORIDA STATUTES (1975).

III.

IF THIS COURT REVIEWS THE ISSUES WHICH DO NOT CREATE EXPRESS CONFLICT, OTHER ERRORS WARRANT A NEW TRIAL OR DIRECTED VERDICT.

ARGUMENT

I.

WHEN A STATE AGENCY OR MUNICIPALITY ASSUMES A DISCRETIONARY, QUASI-JUDICIAL DUTY TO PROTECT THE PUBLIC UNDER POLICE POWER THE DUTY OWED SHOULD BE NO GREATER THAN THE DUTY OWED BY A PRIVATE PERSON WHO ASSUMES SUCH A DUTY.

The Second District in this case and in Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983) struggled with an issue of governmental liability which has been examined by many other courts and analyzed in many different fashions. That Court and numerous other courts have been understandably hesitant to create broad governmental liability for decisions involving discretionary, quasi-judicial exercise of governmental police power.[7]

The decisions of the Second District in the Everton case and in this case are correct. Their concerns about governmental liability for the exercise of police power are valid. The undersigned attorney, however, would respectfully suggest that the Second District and many other courts have analyzed this problem primarily as a matter concerning the affirmative defense of governmental immunity. This problem can be more accurately analyzed as a problem involving the existence of a duty under governmental liability. Governmental immunity and governmental liability require totally separate analysis.

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[7] See cases cited in footnote 11.

Governmental immunity is an affirmative defense based upon the need to preserve separation of powers between the legislature, the executive, and the judiciary. The analysis contained in Commercial Carrier v. Indian River County, 371 So.2d 1010 (Fla. 1979) was only intended as an analysis of this limited issue. It was not and cannot be used as a framework to determine the separate issue concerning the existence of a duty under governmental liability.

Governmental liability, pursuant to Section 768.28, Florida Statutes (1975) and pursuant to numerous other state and federal statutes which waive sovereign immunity, requires governmental agencies to be treated like "private persons". Thus, to the fullest extent possible, governmental liability should be analyzed based upon the same tort duties which apply concerning private persons.

It is easy to compare the duties owed by private landowners and governmental landowners. Likewise, it is easy to compare public schools to private schools and public hospitals to private hospitals. At least on the surface, governmental police powers have no private counterpart.

The assumption of duties under the police powers can, however, be accurately compared to a private person's assumption of a duty to render services. Indian River Towing Company v. U.S., 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). Private persons typically have no duty to take affirmative steps to

aid or help another person or the public as a whole. Restatement (Second) of Torts §314 (1965). As a society, however, we praise and applaud the good samaritan and we encourage private persons to help one another. When a private person assumes a duty to protect another person or the public as a whole, that private person is liable only if his failure to exercise care increases the risk of harm or if harm is suffered because another person relies upon his voluntary undertaking.

> "§323. Negligent Performance of Undertaking to Render Services
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking."
> Restatement (Second) of Torts §323 (1965)

Under our constitutional form of government, the legislature or a municipal government is not compelled to invoke its police power. The legislature, however, may assume responsibility under the police power in appropriate cases involving the public's health, safety and welfare. The government should be encouraged to help the public through the use of police powers. If this Court places a greater duty upon the state than upon private persons concerning the rendering of assistance under the police powers, it will not only ignore the

"private person" test in Section 768.28, Florida Statutes, but it will also discourage the legislature and the government as a whole from providing the help and assistance which it might otherwise determine to be in the people's best interest.

It is the position of Cape Coral that quasi-judicial discretionary actions under the police power are duties assumed by the government and should be treated like duties assumed by private citizens.[8] Thus, if a law enforcement officer, in exercising his discretionary police power increases the risk of harm to the public or allows citizens to be harmed in direct reliance upon his undertaking, liability may exist. On the other hand, if the police officer's activity merely fails to solve a problem, that failure should not result in governmental liability any more than it would result in liability for a private person.

In this case and in the Everton case, the plaintiffs who were harmed did not even know that the police officer existed. Thus, there is no evidence that they were harmed because they relied upon the police officer's law enforcement activities. In both cases, the officers may have failed to remove a drunk

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[8] For example, if a private citizen stops a drunk driver outside the office after work and makes comparable arrangements for him to be sent home in a cab, it is inconceivable that the courts would place an actionable duty upon that good samaritan under facts comparable to this case. The good samaritan simply tried to help. He did not make matters worse and he did not create any condition of reliance.

driver from the public roads, but the efforts did not increase the risk associated with the drunk driver. Accordingly, judgments in favor of the police departments are appropriate.[9]

A. The Analysis in Commercial Carrier is an Excellent Basic Approach Concerning the Affirmative Defense of Governmental Immunity.

In 1979, this Court discarded the "governmental-propriety" analysis for governmental immunity and also the "special duty - general duty" analysis as enunciated in Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967). Commercial Carrier Corportion v. Indian River County, 371 So.2d 1010 (Fla. 1979). The Commercial Carrier case substituted a case-by-case method to analyze governmental immunity. This Court recommended that the four-prong test in Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965) be utilized to determine the parameters of govermental immunity and also recommended that the planning/ operational analysis in Johnson v. State, 69 Cal.2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968) be considered.

Since 1979, this Court has returned to that analysis frequently. Rupp v. Bryant, 417 So.2d 658 (Fla. 1982); Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982); Ingham v. Department of Transportation, 419 So.2d 1081 (1982); City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982); Harrison v.

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9 Obviously, Cape Coral would rely upon the reasoning in the Everton case as well as in the many out-of-state decisions in its favor. The undersigned attorney simply believes that the above-stated argument is the best analysis which fulfills the intent of the Florida Legislature and provides a fair and logical framework for governmental liability concerning such police power.

Escambia County School Board, 434 So.2d 316 (Fla. 1983); Perez v. Department of Transportation, 435 So.2d 830 (Fla. 1983); Ralph v. City of Daytona Beach, ___So.2d___ (Fla. 1983) [8 FLW 79, 2/18/83]; Department of Transporation v. Webb, ___ So.2d ___ (Fla. 1983) [8 FLW 323, 9/2/83] This Court's familiarity with this area of law should eliminate the need to discuss the basic issues in any detail.

The district courts of appeal, of course, have also applied the Commercial Carrier analysis with great frequency. There have been protests from some of the district courts that the Commercial Carrier analysis is unworkable. See, e.g., Carter v. Stuart, 433 So.2d 669 (Fla. 4th DCA 1983). The undersigned attorney believes that the Commercial Carrier analysis is an excellent analytical model to determine the issue of governmental immunity. It was never intended or designed by this Court, however, as a test to determine governmental liability. Unfortunately, many of the district courts implicitly or explicitly are attempting to force analysis of governmental liability into a framework only designed to handle governmental immunity. See, e.g., Penthouse, Inc. v. Saba, 399 So.2d 456, 458, see, ft. 2 (Fla. 2d DCA 1981). This understandably results in "square pegs in round holes". Neumann v. Davis Water and Waste, Inc., 433 So.2d 559 (Fla. 2d DCA 1983); Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983). Governmental immunity is an affirmative defense which the government can raise even if the allegations establish a breached duty in tort. Governmental liability, like any tort liability, requires the existence of a duty which has been breached. When the district courts attempt to analyze the existence of a duty

based upon a structure provided to analyze the existence of an affirmative defense, it is not surprising that they have difficulties.

B. The Analysis in Commercial Carrier is Intended Only to Preserve Immunity Concerning Decisions Which Should Not Be Scrutinized Under the Doctrine Of Separation of Powers.

The Commercial Carrier analysis of the affirmative defense of governmental immunity is founded upon the separation of powers concept which is fundamental to our form of government. Noting that Section 768.28, Florida Statutes (1975) contained no "discretionary exception" this Court stated:

> "The absence of a 'discretionary exception' in their waiver statute has not precluded several jurisdictions from holding that certain areas of governmental conduct remain immune from scrutiny by judge or jury as to the wisdom of that conduct."
>
> 371 So.2d at 1017-18

This Court relied upon Justice Jackson's famous statement that:

> "Of course, it is not a tort for government to govern . . . ."
>
> Dalehite v. United States, 346 U.S. 15, 57, 73 S.Ct. 956, 979, 97 L.Ed. 1427 (1953) (Jackson, J., dissenting).

As early as Marbury v. Madison, 1 Cranch 137, 170, 2 L.Ed. 60 (1803), Chief Justice Marshall was anxious to prevent the courts from controlling the decisions of the executive branch of government. While some judicial review of governmental activity is both necessary and essential in our form of government, it remains true that the legislature and the executive branches

of government cannot and should not be scrutinized by the judiciary concerning basic governmental policies which are established and altered on a frequent basis.

The four-prong test established in Evangelical United Brethren Church is clearly designed to provide immunity only for basic governmental policy decisions. Because the district courts have conceived this test as a test which both creates governmental liability and avoids governmental immunity, there has been a tendency to distort the test in order to allow governmental immunity merely when the district court intends to prohibit governmental liability.

The above-described distortion is most commonly observed in answer to the second and third question posed by the four-prong test:

> (2) Is the act or decision essential to the accomplishment of the policy, program or objective as opposed to one that which would not change the course or direction of the policy, program or objection?
>
> (3) Does the act, omission or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

Concerning many discretionary decisions made by government officers under the police power, these two questions are confusing. It is difficult to state that each individual decision is "essential" to a program. For example,

one can probably have a program of enforcing the 55 MPH speed limit even if a patrolman decides not to stop Mr. Smith when he is driving 68 MPH. Although the police officer's decision not to stop Mr. Smith involve judgment and expertise, it strains the analysis to suggest that the decision involves "basic policy" evaluation, judgment and expertise.

On the other hand, the overall policy is little more than the cumulation of small policy decisions which are made pursuant to the general decision to enforce the speed limit. Without the low level decisions, there is no manifested policy. The struggle concerning these two questions is reflected by Judge Campbell's decision in Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983). This problem is perhaps best discussed by Judge Booth's dissent in Bellavance v. State, 390 So.2d 422 (Fla. 1st DCA 1980).

The undersigned attorney could undoubtedly make a good argument that questions two and three in the four-prong test should be answered affirmatively concerning lower level discretionary police power decisions. The Second District so held in this case and in Everton. The undersigned attorney, however, does not believe such an analysis by this Court would be the best analysis. The concerns of Judge Campbell in the Everton case and in this case and the concerns of Judge Booth in the Bellavance case are matters which should be more appropriately analyzed in terms of governmental liability

rather than in terms of governmental immunity. This Court will destroy the excellent foundation created in the Commercial Carrier case if it allows that analysis to be utilized to create governmental liability. It should only be used for the limited purpose of preserving governmental immunity in those appropriate cases where separation of power warrants the retention of immunity.[10]

C. Governmental Liability Concerning Discretionary, Quasi-Judicial Police Powers Requires a Separate Analysis Which Recognizes the Fact that Police Powers are Powers Which are Merely Assumed by the Government.

Although legal analysis among the cases varies substantially, there is a universal tendency among courts to avoid governmental liability for many decisions involving discretionary, quasi-judicial police powers. This Court reflected such a concern in Wong v. City of Miami, 237 So.2d 132 (Fla. 1970). In Department of Transportation v. Neilson, 419 So.2d 1071, 1077 (Fla. 1982) this Court refused to allow liability for the decision to install traffic control devices because such an issue questioned the government's proper use of police power. This Court did not wish to waive immunity or create

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10 The undersigned attorney believes that this Court has accurately utilized the Commercial Carrier case only to analyze governmental immunity and not to analyze governmental liability in the Neilson trilogy and in Harrison v. Escambia County School Board, 434 So.2d 316 (Fla. 1983). The discussion of known dangerous conditions in City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982) clearly has been confusing to some of the district courts. This Court saw the problem of known dangerous conditions as a problem which did not involve separation of powers and was at the operational level. That analysis of governmental liability is comparable to private liability concerning the duty to warn the public about a dangerous condition on controlled premises. Wood v. Camp, 284 So.2d 691 (Fla. 1973).

governmental liability both because the decision was judgmental and because it concerned the implementation of governmental police power.

This concern has been repeated by the district courts not only in this case and in the Everton case, but also in such cases as Ellmer v. City of St. Petersburg, 378 So.2d 825 (Fla. 2d DCA 1979); Weston v. State, 373 So.2d 701 (Fla. 1st DCA 1979); Elliott v. City of Hollywood, 399 So.2d 507 (Fla. 4th DCA 1981); Carter v. City of Stuart, 433 So.2d 669 (Fla. 4th DCA 1983); Berry v. State, 400 So.2d 80 (Fla. 4th DCA 1981).

The hesitancy to create liability for such discretionary decisions is also expressed in the decisions from many other states.[11] Although the approaches to the problem vary substantially, these cases clearly establish a valid judicial concern that the use of police power by a governmental agency

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[11] Chambers-Castanes v. King County, 100 Wash.2d. 275 ___ P.2d___ (Wash. 9/1/83) (duty to provide police protection only if special relationship); Walters v. Hampton, 14 Wash. App. 548, 543 P.2d 648 (Wash. App. 1975) (no duty to enforce firearms law); Stone v. State, 106 Cal.App. 3d 924, 164 Cal. Rptr. 339 (Cal. App. 1980) (no duty to provide sufficient police protection); Hartzler v. City of San Jose, 46 Cal.App. 3d 6, 120 Cal.Rptr. 5 (Cal.App. 1975) (no liability concerning law enforcement activities); Antique Arts Corp. v. City of Torrance, 39 Cal.App. 3d 588, 114 Cal.Rptr. 332 (Cal.App. 1974) (no liability for delay in dispatching police); Tomlinson v. Pierce, 178 Cal.App.2d 112, 2 Cal.Rptr. 700 (Cal.App. 1960) (no actionable duty to arrest intoxicated driver); O'Connor v. City of New York, 58 N.Y.2d 184, 460 N.Y.S.2d 485 (N.Y. 1983) (no duty for inspector to discover gas leak); Evers v. Westerberg, 38 A.D.2d 751, 329 N.Y.S.2d 615 (N.Y.App. Div. 1972), aff'd., 32 N.Y.2d 684, 296 N.E.2d 257, 343 N.Y.S.2d 361 (N.Y. 1973) (no duty to arrest intoxicated driver); Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860

should not always create a correlative duty in tort.

There is a simple, excellent reason why a government's decision to exercise its police power should not always create a correlative duty in tort. Our society has many problems which either cannot or are not solved or improved by private persons. The health, safety and welfare of our society is frequently benefited by a legislative or executive decision to use police powers. When the legislature perceives a problem, such as drug addiction, to be a matter of public concern, it should be encouraged to use the state's police power to prohibit the sale

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11 (N.Y. 1968) (no duty to provide police protection to threatened citizen); Shore v. Town of Stonington, 187 Conn. 147, 444 A.2d 1379 (Conn. 1982) (no actionable duty concerning police failure to arrest known drunk driver); Trautman v. City of Stamford, 32 Conn.Supp. 258, 350 A.2d 782 (Conn.Sup. 1975) (no duty to arrest drag racers); Doe v. Hendricks, 92 N.M. 499, 590 P.2d 647 (N.M. App. 1979) (no duty to prevent reported assault); Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (Ariz. 1969) (no actionable duty upon part of police to arrest a reckless driver); Ryan v. State, 143 Ariz. 308, 656 P.2d 597 (Ariz. 1982)(Arizona shifts to Restatement analysis); Wuethrich v. Delia, 155 N.J. Super. 324, 382 A.2d 929 (N.J.App. 1978) (no statutory duty to protect against known danger of armed assailant); Jamison v. City of Chicago, 48 Ill. App. 3d 567, 6 Ill.Dec. 558, 363 N.E.2d 87 (Ill.App. 1977) (no statutory duty to arrest dangerous individual); Robertson v. City of Topeka, 231 Kan. 358, 644 P.2d 458 (Kan. 1982) (duty to preserve peace is not actionable absent special relationship); Hendrix v. City of Topeka, 231 Kan. 113, 643 P.2d 129 (Kan. 1982) (no duty concerning law enforcement absent special relationship); Zavala v. Zinser, 333 N.W.2d 278 (Mich.App. 1983) (no duty for police to stop a fight); See, "Police Liability for Negligent Failure to Prevent Crime", 94 Harv.L.Rev. 821 (1981).

of drugs and to promote the cure of citizens afflicted with drug addiction.

If the Courts of this State create duties in tort each time the legislature decides to help the public through the use of police powers, the legislature will be expanding the state's legal liability every time it attempts to solve a problem. The State of Florida should attempt to promote the health, safety and welfare of its citizens, but it cannot afford to become an insurer of that health, safety and welfare.

If this Court creates a correlative tort duty each time the legislature invokes its police power, the result will be a legislature which hesitates to solve public problems. The result will be an executive branch of government which hesitates to fulfill its legislative mandate because new solutions and innovative programs will result in expanded governmental liability. It is interesting to note in this case that Detective Ryckman would have created no problem for the City of Cape Coral if he had simply ignored Mr. McNally and never stopped him at all. Then no one would have known that the police had any opportunity to remove Mr. McNally from the roads. Expanding tort duties concerning police powers encourages governmental employees to simply ignore and not report problems which might involve tort liability.

The importance of this concern can hardly be overstated. Creating broad tort liability for discretionary police powers

would simply be unhealthy at all levels of the legislative and executive branches of government. In the area of governmental immunity, the Commercial Carrier decision recognizes that the judiciary must not interfere in legislative policy decisions. If one creates broad governmental liability concerning the implementation of police powers, the judiciary indirectly interferes in those same policy decisions.

While the undersigned attorney believes that this Court should not create broad duties in tort concerning discretionary quasi-judicial police powers, he nevertheless believes that some duties in tort do and should exist concerning the State's use of such police powers. Section 768.28(1), Florida Statutes has always stated that governmental liability would exist:

> "Under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state . . . ."

Section 768.28(5), Florida Statutes has always stated that:

> "The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances . . . ."

In the Commercial Carrier case some parties argued that this language avoided all tort liability for governmental functions because private persons do not perform such functions. Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010, 1014 (Fla. 1979). This was a specious argument and this Court

perceived that it was specious.

While it is true that private persons are not obligated to perform governmental functions and specifically are not obligated to perform discretionary quasi-judicial police powers, it is nevertheless true that private persons do frequently volunteer to perform those functions. Our society praises such persons, regards them as model citizens, and gives them public accolades and awards.

While we praise such citizens, the Courts have found it necessary to place a limited duty upon private persons concerning assumed duties. As Prosser states:

> "If there is no duty to come to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which make his situation worse."
>
> Prosser Law of Torts §56, p. 343 (1971).

As cited at the beginning of this brief, the Restatement (Second) of Torts accurately summarizes the law in stating that a person who assumes a duty may be liable:

> "(1) If the negligent performance of the assumed duty increases the risk of harm, or
>
> (2) if the harm is suffered because the other person relies upon the performance of the assumed duty."

It is respectfully suggested that this liability concerning private persons should be applied to governmental subdivisions concerning discretionary, quasi-judicial police

powers. Not only is this approach strongly supported by the language of Section 768.28, Florida Statutes, it is supported by analysis in cases under the Federal Tort Claims Act, 28 U.S.C. §2671 et seq. The analysis can also be utilized to reach the same result as many other decisions, but in a manner in which the undersigned attorney submits is more logical and appropriate.

In a leading U.S. Supreme Court decision concerning federal tort liability, Justice Frankfurter relied upon an analysis concerning duties assumed by private persons. Indian Towing Company v. U.S., 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). In that case, the Supreme Court held that the Coast Guard, having undertaken to provide a lighthouse service, was liable to individuals who relied upon the guidance afforded by the light. The Court states:

> "The government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual 'under the same circumstances.' But the statutory language is 'under like circumstances' and it is Hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."
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> 350 U.S. at 64-65

Later in the opinion, the Court states:

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance upon the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; . . ."
>
> 350 U.S. at 69

Thus, the concept of comparing governmental liability for police powers to privately assumed duties has a firm foundation in U.S. Supreme Court precedent.[12]

In Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1978), cert. den., 435 U.S. 1006, 98 S.Ct. 1876, 56 L.Ed.2d 388 (1978), Chief Judge Coffin ruled that passengers and crewmen killed in the crash of a private plane could not recover against the FAA for negligent failure to warn that the airplane was overweight and lacked the proper flight crew. The plaintiffs attempted to create an actionable duty in tort because of general FAA statutes and regulations requiring FAA employees to inspect airplanes and enforce certain regulations. Judge Coffin states:

> "Because the powers of the United States are so vast and because the government necessarily includes a wide variety of institutional forms and legal relationships, the United States cannot easily be envisioned as a single entity in the 'man in the street' world of common law torts.'
>
> . . . . Not all acts and orders of the United States Government are so sovereign that they must be treated as commands which create legal duties or standards, the violation of which involves breaking the law. A considerable part of the government's conduct is in the context of an employer-employee relationship, a relationship which includes reciprocal duties between the government and its staff, but not necessarily a legal duty to the

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12 In Florida, a municipality has similarly been held responsible to relying motorists for a defective warning system at a railroad crossing. Shealor v. Ruud, 211 So.2d 765 (Fla. 4th DCA 1969). See also, Sheridan v. Greenberg, 391 So.2d 234 (Fla. 3d DCA 1981).

citizenry."
567 F.2d at 1144

Relying upon the Restatement (Second) of Torts §323 and upon the Indian River Towing case, Judge Coffin holds that a private person would owe no duty in this case and that the relationship between the FAA employee and the passengers did not create a situation of reliance. Accordingly, the Court held that the government did not have a legal duty owing to the plaintiffs. See also, Roberson v. U.S., 382 F.2d 714 (9th Cir. 1967); Beason v. U.S., 396 F.2d 2 (5th Cir. 1968).[13]

In Johnston v. United States, 461 F.Supp. 991 (N.D. Fla. 1978), aff'd., 603 F.2d 858 (5th Cir. 1979), the Court held that the government's right to inspect for safety or its actual safety inspections do not subject the government to a duty in tort. The Court relied upon the Good Samaritan Doctrine and Restatement (Second) of Torts §323. See also, McCreary v. United States, 488 F.Supp. 538 (W.D. Penn. 1980).[14]

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13 In Trianon Park Condominium Association, Inc. v. City of Hialeah, presently pending in this Court as Case Number 63,115 the Respondent has briefed this same issue in substantially greater detail.

14 Some of these cases also discuss Section 324A, Restatement (Second) of Torts concerning third parties injuried by duties owed to others. In this case, the Plaintiffs claim the duty is owed to themselves. Although space does not permit full argument, that section of the Restatement should not affect Cape Coral's analysis.

The former Fifth Circuit decision in Payton v. United States, 679 F.2d 475 (Former 5th Cir. 1982) may deserve careful reading by this Court. It includes a number of concurring and dissenting opinions. Significantly, it does hold that the ultimate decision to release a prisoner by the parole board was discretionary and non-actionable. That decision certainly is not authority for the proposition that discretionary, quasi-judicial police decisions create general duties in tort.

In the Everton case, Judge Campbell indicated his disagreement with three out-of-state decisions. Under the analysis proposed in this brief, those decisions can be reconciled.

In Downs v. United States, 522 F.2d 990 (6th Cir. 1975) FBI agents attempted to stop an airplane hijacking. The FBI agents bungled this attempt and innocent citizens were killed. Under the Good Samaritan Doctrine, it could easily be argued that the police officers' "help" substantially increased the risk of harm by the hijacking. Such an analysis would also be appropriate concerning this Court's decision in Cleveland v City of Miami, 263 So.2d 573 (Fla. 1982).

In Liuzzo v. United States, 508 F.Supp. 923 (E.D. Mich. 1981) (see also, Liuzzo v. United States, 485 F.Supp. 1274 (E.D. Mich. 1980), the FBI recruited and trained an unreliable and unstable informant who allegedly participated in acts of violence with FBI consent which lead to the death of Viola

Liuzzo, a civil rights worker. Again, the law enforcement activity actually increased the risk of harm. Much of the analysis in the Liuzzo decision supports the Second District's decision in this case and in Everton.

In Simon v. Heald, 359 A.2d 666 (Del.Supp.Ct. 1976) a police officer signaled a vehicle to stop. As a result of the rapid stop, a serious automobile accident occurred. Again, the police officer's actions, although perhaps intended to help the public, negligently resulted in a substantial increase in the risk of danger.

When law enforcement officers substantially increase the risk of harm at the scene of an automobile accident, a crime, or elsewhere as a result of negligent decisions, it may be be inappropriate to create liability. Likewise, when police officers convince witnesses to testify or citizens to become informants in reliance upon police protection, it may not be inappropriate for the police to be liable when they do not provide the police protection upon which the citizen had a direct right to rely. To expand this theory from specific cases of reliance and to allow recovery on the general hope or expectation that the police can and always will enforce the law would dramatically increase government liability.

It is worth commenting that the concept of "reliance" and the concept of "special duty" are similar, but distinguishable, theories. The special duty concept concerning public officers still applies in many of the out-of-state cases

cited by Cape Coral to this Court. The U.S. Supreme Court has never overruled South v. Maryland, 59 U.S. 396, 18 How. 396, 15 L.Ed. 433 (1856). A special relationship is still required in federal court concerning civil rights actions pursuant to 42 U.S.C. §1983. Wright v. City of Ozark, ___F.2d ___(11th Cir. 1983) [slip op. 9/26/83, p. 5059] The concepts of reliance and increased risk under the Good Samaritan Doctrine are more precise than the "special duty" doctrine and do not lead to the occasional unjust results which encouraged the downfall of Modlin v. City of Miami, 201 So.2d 70 (Fla. 1967). For example, the outcome in Clifton v. City of Fort Pierce, 319 So.2d 195 (Fla. 4th DCA 1975) would certainly be different.

In this case, Detective Ryckman took steps to remove Mr. McNally from the street. He sttempted to solve a public problem. There is no dispute that his decision involved discretion. The Plaintiffs simply feel that the discretion resulted in negligent decision.

There is no dispute that Detective Ryckman's actions did not solve the problem of a drunk driver on the public highways. Whether one condemns his decisions as the Plaintiffs do in this case or regards them as "very nice" as did Mrs. Barr before the accident, there is no dispute that Detective Ryckman's efforts were not successful.

On the other hand, the Plaintiffs in this case did not rely to their detriment upon Detective Ryckman. They did

not know he even existed. Likewise, although Detective Ryckman's efforts were unsuccessful, they did not increase the risk of harm. Mr. McNally simply continued to be the same risk on the public highways which he had been prior to the stop.

In the Everton case, the officer is in a comparable position. He stopped the driver for a driving infraction. His efforts may not have removed a drunk driver from the road, but they did not increase the risk of harm. The plaintiffs did not rely upon the fact that he undertook to use his discretionary police power. Accordingly, the judgments in favor of both police departments should be affirmed.

D . Governmental Liability Could Be Analyzed Differently In a Case Involving a Ministerial Duty.

This case and the preceding analysis involve a discretionary, quasi-judicial police power. It is significant to note that the legislature does not always enact police powers in a discretionary manner. There are occasions when the legislature enacts a police power statute which specifically places clear, unambiguous, ministerial duties upon a governmental agency or officer. So long as the legislature clearly understands that such statutes create duties in tort for the government, it may be appropriate for such statutes to create broader tort duties.

For example, this Court in Harrison v. Escambia County School Board, 434 So.2d 316 (Fla. 1983) ruled that Section 234.122, Florida Statutes did not create a duty giving rise to tort liability concerning the placement of school bus stops because the statutory words "most reasonably safe locations available" had no fixed or readily ascertainable meaning. In the earlier case of A.L. Lewis Elementary School v. Metropolitan Dade County, 376 So.2d 32 (Fla. 3d DCA 1979), the Third District held that Section 316.1895, Florida Statutes created a mandatory obligation to install specific traffic control and protective devices on streets surrounding schools.

Comparing governmental agencies to private persons, there is support for the proposition that specific statutory obligations can create actionable duties in tort. Florida

Standard Jury Instructions 4.9; de Jesus v. Seaboard Coastline Railroad Co., 281 So.2d 198 (Fla. 1983).

Although this case does not involve such a ministerial statute, it may be important for this Court to explain to the legislature that ministerial statutes can create correlative tort duties. The legislature should understand the process to create such a duty on behalf of the government when it wants to create such a duty.

Of equal importance, the legislature may currently be enacting ministerial statutes which they do not intend to create governmental tort liability. Mandatory language may seem politically useful or rhetorically pleasing even when the legislature has no desire to expand governmental liability. Under the guidelines of Commercial Carrier, it should be a legislative policy-making decision whether a ministerial police power statute results in a correlative tort duty. The undersigned attorney has some concern that the legislature may be creating many ministerial statutes which they would not intend to create tort liability.[15]

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15 Certainly if this analysis applies to agency regulations, there is an even greater concern that the governmental agencies must understand the legal effect of their regulations concerning governmental tort liability. e.g., Florida Freight Terminals, Inc. v. Cabanas, 354 So.2d 1222 (Fla. 3d DCA 1978); Jackson v. Havsco Corp., 364 So.2d 808 (Fla. 3d DCA 1978)(Barkdull, Jr., concurr.)

E. The Duty to Warn of a Known Danger Has No Application In This Case.

The Plaintiffs rely upon City of St. Petersburg v. Collom, 319 So.2d 1082 (Fla. 1982) and argue that Mr. McNally was a "trap" created by Cape Coral for which it had a duty to warn. (Plaintiff's Brief, pp. 31, 32) There are several basic problems with this argument. First, it is clear that Cape Coral did not create the problem of Mr. McNally as a drunk driver. As a practical matter, the concept of "dangerous condition" is typically a concept of premises liability. Assuming that Mr. McNally is a dangerous condition, that dangerous condition was created by Mr. McNally. The City of Cape Coral admittedly attempted to eliminate this dangerous condition without success. It would be, however, a major extension of the Collom doctrine to require municipalities to warn persons of all known dangers in the city which were not created by the city.

Secondly, the knowledge that Mr. McNally had returned to the road was known to Cape Coral only for a few minutes before the accident. Their initial reports from Mr. and Mrs. Smith indicated that Mr. McNally was driving in the opposite direction on Pondella Road. It is difficult to understand how Cape Coral could have warned these Plaintiffs about Mr. McNally or how that would have prevented this rearend accident.

In Ralph v. City of Daytona Beach, ___So.2d___ (Fla. 1983) [8 FLW 79 2/18/83] this Court considered the duty to warn sunbathers of a long-term, existing traffic risk. It was

a risk created by the City when they allowed automobiles upon the beach. There would appear to be little logic or merit in extending that duty to require cities to warn the public about individual drivers who pose a potential risk.

Presumably, the Plaintiffs wish to extend the Collom doctrine to require Cape Coral not only to warn about a known risk but also to remedy the known risk. In this particular case, Mrs. Smith advised Cape Coral about Mr. McNally's return to his automobile at approximately 1:00 a.m. The new dispatcher, while handling another emergency call as well, managed to dispatch officers to the scene by 1:03 a.m. Those officers arrived at the scene, determined that Mr. McNally was gone, and reported back to the dispatcher by 1:08 a.m. At approximately that same time, the Smith's were reporting that Mr. McNally had already left the scene and was travelling in a direction away from the direction where the accident actually took place. The Plaintiffs basically argue that the police officers should have been dispatched with lights and siren and should have driven over the speed limit to the location of Del Pine Road. Obviously, the officers were required to obey the safety requirements of Section 316.126(5), Florida Statutes.

There was no testimony that this additional speed would have allowed the police officers to arrive at Del Pine Road before Mr. McNally left. Even assuming that the police officers had a duty to respond faster, the Plaintiffs' case still

required the jury to speculate on the time savings involved, the actual whereabouts of Mr. McNally after he left Del Pine Road, and the ability of the police officers to stop Mr. McNally even if they located him. Thus, assuming such a duty, the Plaintiff's theory is based upon pyramided inferences which should not be submitted to a jury. Voelker v. Combined Insurance Co. of America, 73 So.2d 403 (Fla. 1954); King v. Weis-Patterson Lumber Co., 168 So. 858 (Fla. 1936).

It should be noted that the lower court refused to direct a verdict on this issue even though he felt the issue would call for "conjecture" upon the part of the jury. (R. 2049-55) The inadequacy of the evidence on this issue was argued to the Second District in this case and the Second District simply found no need to rule upon that issue in light of the opinion which is now before this Court.

Finally, the Plaintiff's brief emphasizes their "nine theories" of negligence. (Plaintiff's Brief, p. 9) To a very great extent, these arguments establish the great danger in allowing Plaintiffs to second guess discretionary, quasi-judicial police power decisions. With the benefit of hindsight, citizens can criticize virtually any decision made by a police officer. It is essential that police liability be limited to cases in which their decisions are either directly relied upon by citizens to their detriment or actually increase the hazard to the public. Except for the eighth and ninth alleged acts

of negligence which relate to the response time of the police after Mr. McNally returned to his car, the other seven theories simply allege different steps which the police department could have taken in their attempt to remove Mr. McNally from the street. All of these theories are non-actionable under the Second District's decision in Everton and they would be non-actionable under the alternative theory suggested by this brief.

II.

THE DISTRICT COURT CORRECTLY RULED THAT AN INSTRUCTION ON SECTION 856.011(3), FLORIDA STATUTES SHOULD HAVE BEEN GIVEN IN THIS CASE.

As indicated in the statement of the case, this point on appeal involves an issue which does not create any express conflict. The Plaintiffs have never even suggested that the issue creates any express conflict invoking this Court's jurisdiction. Under the guidelines of Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982) it would appear that the Plaintiffs are simply attempting to obtain a second appeal without express conflict. This should not be allowed.

If this Court considers the issue, it is nevertheless clear that the Second District's opinion is correct. In the lower court, Cape Coral specifically asked for a jury instruction which read Section 856.011(3), Florida Statutes to the jury as applicable law. (R. 2786) That requested jury instruction was denied. The lower court judge had concluded that the statute did not apply because of his reliance upon B.A.A. v. State, 356 So.2d 304 (Fla. 1978) - - even though that case involved an entirely different statute - - a matter which the undersigned attorney pointed out to the lower court. (R. 2718-2719)

As explained in the Plaintiff's brief, their police expert, who was a licensed attorney in the State of Florida, tesitified that in his opinion Section 856.011 was not an

applicable statute. The Chief of Police had testified that the statute did apply. Detective Ryckman had testified that sending Mr. McNally home in a cab was an option available to him. (T. 1729)

Clearly the attorneys for Cape Coral did argue that the statute should be introduced into evidence, even if it was not applicable, because the law enforcment officers in good faith may have believed the statute applied. (R. 1249) On the other hand, the record is also clear that Cape Coral requested the jury instruction because they felt the statute did apply. The Defendants were precluded from telling the jury in closing argument that the judge would read the statute to them because it was applicable. They were precluded from pointing out that the Chief of Police correctly interpreted the statute and that the Plaintiff's expert was incorrect. The Plaintiff's primary argument throughout this case was that Detective Ryckman should have arrested Mr. McNally rather than send him home in a cab. The Second District hardly committed error in ruling that Cape Coral was prejudiced when the lower court judge ruled the statute inapplicable and failed to give an instruction that it was the law of Florida that a police officer shall be considered as carrying out his official duty when he sends an intoxicated person home by commercial transportation. Section 856.011(3), Florida Statutes (1975).

Cape Coral admittedly combined this point on appeal with another issue in its brief before the Second District.

It appeared to be a logical fashion in which to avoid numerous points on appeal. The failure to give this instruction was clearly argued as harmful error to the Second District Court of Appeal.

Interestingly, the Plaintiff does not now vigorously argue that the statute is inapplicable under the facts of this case. Indeed, for the first time in this lengthy proceeding, the Plaintiffs have located another statute allowing an intoxicated person to be taken home. Section 396.072(1), Florida Statutes (1981). (Plaintiff's Brief, pp. 13-14) This statute was frankly overlooked by Cape Coral during the lower court proceedings. It would have assisted the City if they had discovered it. The Plaintiffs now argue that the City had a duty to take Mr. McNally to a hospital under the above-described statute because he was "incapacitated". As described in the statement of the facts, Mr. McNally was not in any "immediate need of emergency medical attention" at the time he was placed in a cab. The Plaintiffs, of course, did not have any testimony that Mr. McNally was in immediate need of emergency medical attention since this statute was not invokved by them at the time of trial.

III.

IF THIS COURT REVIEWS THE ISSUES WHICH DO NOT CREATE EXPRESS CONFLICT, OTHER ERRORS WARRANT A NEW TRIAL OR DIRECTED VERDICT.

Under the guidelines of Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982), Cape Coral has previously argued that this Court should not consider issues which were argued before the Second District and which do not create express conflict. If this Court, however, considers the Plaintiff's issue concerning Section 856.011, Florida Statutes, there are several additional issues which were presented by Cape Coral to the Second District which this Court would also need to review. The Second District, in light of its opinion, had no need to reach these additional issues. These issues were argued at length before the Second District and are only summarized in this brief.

A. The Lower Court Improperly Instructed the Jury That The Handling of Mr. McNally Was a Non-Delegable Duty Which Made Cape Coral Liable for the Subsequent Negligence of Jack's Radio Cabs and Mr. McNally.

In the pleadings, the Plaintiffs argued that the cab driver was an agent of Cape Coral concerning the transporation of Mr. McNally. (R. 92-101) During arguments on the motions for directed verdict, the lower court indicated his intention to grant a directed verdict on that theory. (R. 2649) Ultimately, the Court refused to give instructions on the Plaintiffs' issues other than the issue concerning the handling of Mr. McNally. (R. 2706-14)

Nevertheless, the Court granted an incorrect instruction describing non-delegable duties. (R. 2717, 2720, 3001) There is no case law suggesting that the transporation of a drunk by a police department is a non-delegable duty. Section 856.011, Florida Statutes (1975) would suggest to the contrary. Plaintiff's counsel in rebuttal argument emphasized that the City's duty to transport Mr. McNally was so important that it could not be delegated. (R. 2976-77)

The Plaintiffs had never alleged a non-delegable duty by an independent contractor. They had merely alleged an agency relationship subject to respondeat superior. Thus, it had been in the City's interest to establish that the cab driver was an independent contractor.

In summary, without an issue in the pleadings and without describing the legal issue to the jury in the jury instructions, the lower court provided an incorrect and ambiguous instruction on non-delegable duties to the jury which purported to make the City liable for the negligence of the cab company and the cab driver.

B. The Lower Court Improperly Instructed the Jury That Cape Coral, as a Person With The Right to Control Mr. McNally's Vehicle, Was Responbible For Its Subsequent Use by Mr. McNally.

Although the lower court judge agreed that the Plaintiffs could not submit an issue to the jury concerning Cape Coral's responsibility under dangerous instrumentality for Mr. McNally's

operation of his own motor vehicle, (R. 2756-63), he nevertheless, over objection by Cape Coral, read a jury instruction on dangerous instrumentality concerning the City. (R. 2723-24, 3001)

It is now clear that a governmental subdivision is not liable under the dangerous instrumentality doctrine even for vehicles which are titled in the name of the state. Rabideau v. State, 409 So.2d 1045 (Fla. 1982) In this case in a confusing jury instruction, the lower court suggested that the City could be liable under dangerous instrumentality for a vehicle which it did not own when it was being operated by its owner.

C. The Lower Court Improperly Failed to Direct a Verdict Concerning the Police Department's Alleged Negligent Failure to Reapprehend Mr. McNally.

This point has been previously discussed in this brief. Supra., p. 38. The Plaintiffs never proved without reliance upon speculation and pyramided inferences that Cape Coral could have prevented this accident after it was reported that Mr. McNally had returned to his car. The lower court had serious doubts that the issue should be submitted to the jury. (R. 2655) If the Second District had not made their present ruling, they should have granted a directed verdict on this issue and remanded for a new trial on any remaining issues.

D. The Lower Court Improperly Submitted the Issue of Forseeability to the Jury.

Cape Coral should have received a directed verdict on the issue of proximate cause and forseeability. In this

case, the basic question of forseeability is whether an ordinary, reasonable and prudent person should be expected to anticipate the return of Mr. McNally to the road in his car because such an event happens so frequently from the placing of a drunk in a taxicab that in the field of human experience it should be expected to happen again. The Plaintiffs are expecting Dectective Ryckman not only to forsee Mr. McNally's criminal behaviour but also the prior intentional acts of the taxi company in placing Mr. McNally back in his car with his keys. There was no evidence of similar acts in the past nor any reason to be believe that such activity was probable as compared to possible. Forseeability is not clairvoyance. Under the guidelines of Cone v. Inter-County Telphone and Telegraph Co., 40 So.2d 143 (Fla. 1949) and Pinkerton-Hayes Lumber Company v. Pope, 127 So.2d 441 (Fla. 1961) it cannot be objectively suggested that this accident was a probability as compared to a possibility. Bryant v. Jax Liquors, 352 So.2d 542 (Fla. 1st DCA 1977). Thus, even in the absence of the affirmative defense of governmental immunity and even if an actionable duty existed under a proper analysis of governmental liability, the Plaintiffs could not establish an issue of proximate cause which should have been submitted to the jury.

CONCLUSION

The Second District in this case and in the Everton case struggled with a difficult issue concerning governmental liability for the exercise of discretionary, quasi-judicial police powers. Whether this Court adopts the Second District's reasoning concerning governmental immunity or utilizes a separate analysis of governmental liability, this Court should be very hesitant to create general duties owing by governmental agencies concerning such police powers. Cape Coral believes that the duty owed in these circumstances by the government should be no greater than the duty owed by a private person who assumes such a duty. Because the efforts of the police officers in this case did not increase the risks of harm and did not result in any reliance by the plaintiffs, there should be no governmental liability - - just as a private person under similar circumstances would have no liability.

If this Court considers the other non-conflict issues submitted to the Second District, the Second District should be affirmed concerning its discussion of Section 856.011, Florida Statutes. The remaining issues not discussed by the Second District in their opinion do involve errors which would warrant a new trial or a directed verdict in favor of Cape Coral.

Respectfully submitted,

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and

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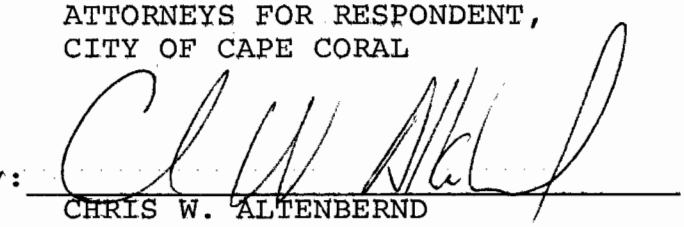
By: 
CHRIS W. ALTENBERND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 7th day of November, 1983 to 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, Esquire, 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130-1780.

ATTORNEY