IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,441

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.

CITY OF CAPE CORAL,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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I

STATEMENT OF THE CASE AND FACTS

In the decision sought to be reviewed--CITY OF CAPE CORAL v. DUVALL, et al., _____ So.2d _____ (Fla. 2nd DCA 1983) (A. 1)--which decision adopts and incorporates the same court's decision two weeks earlier in EVERTON v. WILLARD, _____ So.2d _____ (Fla. 2nd DCA 1983) (A. 5), the Court of Appeal, Second District, has held that the determination of a police officer not to arrest a drunk driver is protected by the sovereign immunity doctrine even though such a decision admittedly is made at the "operational" level rather than the "planning" level.

Thus in EVERTON, the court held:

> We believe that merely because an activity is "operational", it should not necessarily be removed from the "category of governmental activity which involves broad policy or planning decisions." . . . We believe that though Deputy Parker's activities were clearly operational, they also involved basic governmental policy and the implementation thereof . . . . Certainly, law enforcement is basic to government.
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> * * * * *
>
> We have determined that the unique situation presented here is the square peg that will not fit either the "operational," "planning," or "discretionary"--"nondiscretionary" tests as set forth in [COMMERCIAL CARRIER CORP. v. INDIAN RIVER COUNTY, 371 So.2d 1010 (Fla. 1979)] and its progeny. We feel, however, that our supreme court in Commercial Carrier did not impose the "operational" test as an absolute restriction on immunity, and we therefore conclude that this case meets the four-pronged [test of EVANGELICAL UNITED BRETHREN CHURCH v. STATE, 67 Wash.2d 246, 254, 407 P.2d 440, 444 (1965)] adopted in Commercial Carrier . . . .
>
> We, therefore, determine that 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 governmental entity should be held liable in tort for the consequences of the exercise of that discretion (A. 7, 8-9).

The instant case also involved the failure of a police officer to arrest a drunk driver:

> Additionally, during the pendency of this appeal, this court has considered a case with nearly identical facts. In EVERTON v. WILLARD, No. 81-2085 (Fla. 2nd DCA Jan. 5, 1983), we held that neither a county nor deputy sheriff may be held liable for the exercise of discretion not to arrest a drinking driver, when that driver subsequently causes injury. We adopt the holding and rationale of Everton, and hold that it precludes relief for appellees below.
>
> Accordingly, the judgments below are vacated and the cases remanded for entry of judgment for appellant (A. 4).1/

The facts of this case are set forth briefly in the appellate court's decision. The central fact is that instead of arresting a drunk driver, a police officer put him in a cab and sent him home.2/ The cab driver was unable to locate the home and returned the drunk to his car. Only a few moments later, the drunk's car collided with another car.3/ If permitted to

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1/ The court also held in the instant case that the trial judge had erred in failing to give a requested instruction to the jury. But any such error at most would have warranted a remand for a new trial, which was all the respondent requested. The sole basis for the court's remand for entry of judgment for the respondent in this case was its sovereign-immunity holding. If permitted to brief this case on the merits, we will demonstrate that not even a new trial is necessary, because there was no error in the refusal of the trial judge to give the requested instruction.

2/ If permitted to brief this case, we will demonstrate that this was not just an ordinary drunk. The uncontradicted evidence established at trial that the drunk's blood alcohol level was .21 nine hours after the accident. The legal limit at that time was .10. Since alcohol burns off in the body at a rate of anywhere from 15% to 33% per hour, this drunk's level of intoxication was at least .345 at the time of this accident. According to an expert, a level of .35 produces a coma and death. Thus, at the time of this accident, according to the expert, this drunk must have been in a state somewhere between a stuper and a coma. He was mumbling and slurring his words at the time the officer first stopped him. He was obviously unable to drive, and he fell down at least twice during the first interrogation. Indeed, the officer himself said that the drunk had almost killed him by driving on the wrong side of the road. He said that this was the worst drunk he had ever seen. And he was specifically told by an observer that this drunk was "going to kill somebody."

3/ Judy Scroggins, age 16, was killed. Her boyfriend Donnie Fontaine, age 16, was killed. Kathy Duvall, age 16, suffered the most severly fractured spine her neurosurgeon had ever seen. And John Tkac, age 29,

brief this case, we will demonstrate that the plaintiffs presented to the jury not only their contention that the police officer was negligent in failing to arrest the drunk, but a number of independent acts of negligence as well.[4/] Wholly apart from the failure of the officer to arrest this drunk, every one of these acts of negligence was an actual and proximate cause of the tragedy which followed.

II
ARGUMENT

A. THE DISTRICT COURT'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT OR OTHER DISTRICT COURTS OF APPEAL, HOLDING THAT THE SOVEREIGN IMMUNITY DOCTRINE DOES NOT PROTECT OPERATIONAL-LEVEL DECISIONS, HOWEVER DISCRETIONARY.

The decision in EVERTON, adopted by the instant decision, acknowledged that the discretionary determination of a police officer not to arrest a drunk driver is "clearly operational . . ." (A. 7). But COMMERCIAL CARRIER expressly declined to hold that all discretionary actions are protected, holding instead that only those discretionary decisions at the planning level are protected, 371 So.2d at 1020, 1022:

> [I]n Johnson v. State, 69 Cal.2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968) . . . the California Supreme Court

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whose face literally was blasted apart, and whose frontal lobe was removed, ended up in the 10th IQ percentile, a borderline retarded.

4/ These included 1) the officer's failure to look into the drunk's wallet to find out his address; 2) the police dispatcher's patent negligence in confirming the address given by the drunk, which turned out to be the wrong city; 3) the officer's failure either to keep the drunk's car keys, or otherwise to assure that they were not returned to him; 4) the officer's failure to take the drunk home himself, or to send him home with two other officers who were on the scene; 5) the officer's failure to take the drunk into custody even if not arresting him; 6) the officer's failure to call the drunk's home before putting him in a cab (such a call would have revealed that no one was home, and under established police policy, the officer never would have sent the drunk home under such circumstances); 7) the failure of two other police officers in the vicinity to hurry back to the location of the drunk's car after being specifically informed that the cab driver had brought him back; and 8) the failure of these two officers to hurry after the drunk upon discovery that he had already left the scene in his car.

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> recognized that all governmental functions, no matter how seemingly ministerial, can be characterized as embracing the exercise of some discretion in the manner of their performance (our emphasis). Consequently, that court opted for an analysis predicated on policy considerations . . . .
>
> * * * * *
>
> So we, too, hold that although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain "discretionary" governmental functions remain immune from tort liability. . . (our emphasis). In order to identify those functions, we adopt the analysis of Johnson v. State, supra, which distinguishes between the "planning" and "operational" levels of decision-making by governmental agencies. In pursuance of this case-by-case method of proceeding, we commend utilization of the preliminary [four-pronged] test iterated in Evangelical United Brethran Church v. State [67 Wash.2d 246, 407 P.2d 440 (1965)] as a useful tool for analysis.5/

This Court has returned to the sovereign-immunity question five times since COMMERCIAL CARRIER. Every one of these decisions has drawn the identical distinction between planning-level and operational-level decisions, indicating that no decisions at the operational level, however discretionary, are protected by the sovereign immunity doctrine.6/ The decision in this

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5/ This conclusion comports with this Court's repeated observation that the statute constitutes a "broad" waiver of sovereign immunity, and thus that the exception should be narrowly construed. BEARD v. HAMBRICK, 396 So.2d 708, 711 (Fla. 1981); DISTRICT SCHOOL BOARD OF LAKE COUNTY v. TALMADGE, 381 So.2d 698, 703 (Fla. 1980); COMMERCIAL CARRIER, supra, 371 So.2d at 1022. Accord, FOLEY v. STATE DEPARTMENT OF TRANSPORTATION, 422 So.2d 978, 979 (Fla. 1st DCA 1982).

6/ In CITY OF LAUDERDALE LAKES v. CORN, 415 So.2d 1270, 1272 (Fla. 1982), this Court noted that in COMMERCIAL CARRIER, "[w]e distinguished between "operational-level" and "planning-level" governmental functions . . . ." In RUPP v. BRYANT, 417 So.2d 658 (Fla. 1982)--a case which involved the issue of personal liability--this Court noted: "Commerical Carrier, although discarding the distinction of discretionary/ministerial in the context of governmental immunity nevertheless recognized that certain 'discretionary' acts were still covered by sovereign immunity, equating these acts to 'planning' as opposed to 'operational' actions." Id. at 663 n.11 (our emphasis). In DEPARTMENT OF TRANSPORTATION v. NEILSON, 419 So.2d 1071, 1075 (Fla. 1982), this Court noted that "Commercial Carrier established that discretionary, judgmental, planning-level decisions were immune from suit, but that operational decisions were not so immune" (our emphasis). In INGHAM v. STATE DEPARTMENT OF TRANSPORTATION, 419 So.2d 1081, 1082 (Fla. 1982),

case directly and expressly contravenes that distinction. It also contravenes a number of decisions in a number of other districts, which draw the identical line. Thus in HOLLIS v. SCHOOL BOARD OF LEON COUNTY, 384 So.2d 661, 665 (Fla. 1st DCA 1980), the court held:

> We cannot accept the lower court's conclusion that the [school] superintendent is absolved from any liability because he acted within the appropriate limits of his discretion. The discretionary function exception to tort claims against the state, judicially adopted in [COMMERCIAL CARRIER], is limited to functions occurring only at the planning level, not at the operational level, defined as the level at which policy is implemented.

This language collides directly with that of the second district in this case.[7/] And a number of other cases simply repeat the distinction drawn by this Court between planning-level and operational-level decisions.[8/]

Thus in WILLIS v. DADE COUNTY SCHOOL BOARD, 411 So.2d 245 (Fla. 3rd DCA 1982), the court found actionable the negligent hiring or retention of a teacher by a school board: "Though the creation of a teaching position is

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this Court repeated that the analysis dictated by COMMERCIAL CARRIER "requires a determination of whether this conduct constitutes an "operational-level" or a "judgmental, planning-level" governmental function . . . ." And in CITY OF ST. PETERSBURG v. COLLOM, 419 So.2d 1082, 1083 (Fla. 1982), this Court repeated: "Each of these cases involves an interpretation of "operational-level" as distinguished from "judgmental planning-level" functions of government . . . ."

7/ Accord, DEPARTMENT OF TRANSPORTATION v. WEBB, 409 So.2d 1061, 1064 (Fla. 1st DCA 1982) (per curiam) ("[DOT's] analysis is unhelpful because every operational activity taken by DOT must at some point entail planning, which would cloak the department in absolute immunity"); JONES v. CITY OF LONGWOOD, 404 So.2d 1083, 1085 (Fla. 5th DCA 1981) ("The word 'periodically' does not leave sufficient discretion in those officials to elevate, to a planning level, their decisions as to when and how often to make inspections") (our emphasis); BELLAVANCE v. STATE, 390 So.2d 422, 423 (Fla. 1st DCA 1980) (only "certain" discretionary governmental functions remain immune).

8/ See, e.g., WILLIS v. DADE COUNTY SCHOOL BOARD, 411 So.2d 245, 246 (Fla. 3rd DCA 1982); GRIFFIN v. CITY OF QUINCY, 410 So.2d 170, 172 (Fla. 1st DCA 1982); McCLUNG v. CITY OF BOYNTON BEACH, 399 So.2d 453, 454 (Fla. 4th DCA 1981) (per curiam); WOJTAN v. HERNANDO COUNTY, 379 So.2d 198, 199 (Fla. 5th DCA 1980); WALLACE v. NATIONWIDE MUTUAL FIRE INSURANCE CO., 376 So.2d 39, 40 (Fla. 4th DCA 1979); FERLA v. METROPOLITAN DADE COUNTY, 374 So.2d 64, 66 (Fla. 3rd DCA 1979), cert. denied, 385 So.2d 759 (Fla. 1980).

a planning function, the actual filling of that position is operational." In PITTS v. METROPOLITAN DADE COUNTY, 374 So.2d 996 (Fla. 3rd DCA 1979), the failure of security guards employed by the Dade County Safety Department adequately to patrol the parking lot of a hospital was held to be actionable.[9/] In HOLLIS v. SCHOOL BOARD OF LEON COUNTY, 384 So.2d 661 (Fla. 1st DCA 1980), the school board's failure to devise a method by which bus drivers could report defects in their buses was held to be actionable. And in PAUL v. OSCEOLA COUNTY, 388 So.2d 40 (Fla. 5th DCA 1980), the decision of a county exterminator to depart from common practice and kill a stray cat within three days of its discovery was actionable.[10/] Every one of these cases involves the exercise of substantial discretion at the operational level--no less than that exercised by the officer here. Every one of them found that the sovereign immunity doctrine was no barrier to recov-

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9/ We are aware of at least three cases in other jurisdictions holding that the decisions of police officers--about whether to make an arrest or about analogous matters--is not protected by the sovereign immunity doctrine. See, e.g., DOWNS v. UNITED STATES, 522 F.2d 990, 998 (6th Cir. 1975); LIUZZO v. UNITED STATES, 508 F. Supp. 923, 931-32 (E.D. Mich. 1981); SIMON v. HEALD, 359 A.2d 666 (Del. Super. Ct. 1976). We are aware of no decision anywhere which goes the other way.

10/ The same reasoning applies to the failure to put warning devices at a railroad crossing, DEPARTMENT OF TRANSPORTATION v. WEBB, 409 So.2d 1061 (Fla. 1st DCA 1982) (per curiam); or the decision about where to locate power lines, GRIFFIN v. CITY OF QUINCY, 410 So.2d 170 (Fla. 1st DCA 1982); or even to the discretionary decision of a traffic policeman to take a break and rest on the roadway, WEISSBERG v. CITY OF MIAMI BEACH, 383 So.2d 1158 (Fla. 3rd DCA 1980).

The same reasoning is found in two of this Court's decisions concerning the individual liability of governmental officials. In DISTRICT SCHOOL BOARD OF LAKE COUNTY v. TALMADGE, 381 So.2d 698 (Fla. 1980), this Court held to be actionable the negligent decision of a teacher to order a student to perform on a trampolene. Obviously that decision involved some discretion--discretion in choosing the day's activity, discretion in choosing the student to perform, discretion in insisting that the student perform despite his protest. But this discretion was exercised at the operational level, and it was actionable. Likewise in RUPP v. BRYANT, 417 So.2d 658 (Fla. 1982), the decision of a principal and school teacher not to supervise a club's activity obviously involved some discretion, but that was no defense: "Because the duty [to supervise the club] does not involve discretion in the policy-making sense, neither the principal nor the teacher may raise the shield of official immunity." Id. at 665 (our emphasis).

ery. Every one of them conflicts with the decision sought to be reviewed in this case.[11/]

B. THE DISTRICT COURT'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH THOSE CASES IN THE SUPREME COURT OR OTHER DISTRICTS HOLDING THAT THE NEGLIGENT IMPLEMENTATION OF A PLANNING-LEVEL DECISION IS NOT PROTECTED BY THE SOVEREIGN IMMUNITY DOCTRINE.

Even if the initial decision not to arrest the drunk driver was a planning-level decision (or was a protected operational-level decision) the manner in which members of the police department chose to implement that decision was clearly not protected. As we have noted, the plaintiffs in this case took a number of theories of negligence to the jury.[12/] But for any one of these

11/ Perhaps another way of stating the same conclusion is that, even if it were conceded arguendo that some operational-level decisions implicate basic governmental policies, it is simply impossible that such an individual operational-level decision might be considered "essential to the realization or accomplishment of that policy" under the test of EVANGELICAL UNITED BRETHRAN CHURCH v. STATE, 67 Wash.2d 246, 407 P.2d 440, 445 (1965) adopted in COMMERCIAL CARRIER. That was the conclusion of the court in BELLAVANCE v. STATE, 390 So.2d 422, 424 (Fla. 1st DCA 1980)--a case which found actionable the decision of a state mental hospital to release a patient before he was cured. Acknowledging that "the act of releasing a mental patient involves a basic governmental policy," the court continued: "[W]e are hard pressed to see how [that act] would materially affect the ends and purposes of [the law]." Accord, FERLA v. METROPOLITAN DADE COUNTY, 374 So.2d 64, 66-67 (Fla 3rd DCA 1979), cert. denied, 385 So.2d 759 (Fla. 1980) (decision about where to locate a median strip is not a decision inherent in the act of governing).

In the EVERTON case, the court concluded that the individual decision of whether or not to arrest a drunk is essential to the accomplishment of a law-enforcement program "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" (A. 8). But the recognition that the removal of all discretion from all officers would hurt the law enforcement system does not address the question whether the individual exercise of that discretion in-and-of-itself is essential to the accomplishment of the objectives of the law-enforcement system. Like the court in BELLAVANCE, we are "hard pressed to see" how a single, individual exercise of discretion "would materially affect the ends and purposes" of this law-enforcement system. If that were true--if every operational-level decision to some marginal extent were seen to further policy objectives--then of course every operational-level decision would be protected. That is implication of the decision reviewed here, and that implication conflicts directly with the conclusion of the court in BELLAVANCE.

12/ These theories are listed in footnote 4, supra.

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actions, two people would not be dead today, and two people would not be horribly injured. And none of these actions has anything to do with planning or policymaking. They have to do with common sense. They were simple, naked acts of negligence wholly outside of the purposes and parameters of the sovereign immunity doctrine. Yet the opinion in this case not only insulated from liability the officer's decision not to make the arrest, but in the process insulated all of the negligent acts by which the officer and other officers sought to implement that decision.

That aspect of this case conflicts expressly and directly with the decisions of this Court and other courts of appeal. Thus in CITY OF MIAMI v. HORNE, 198 So.2d 10 (Fla. 1967), this Court held that whether or not the decision of a police officer to pursue a vehicle is protected, the manner in which the police officer implements that decision and gives chase is not protected. That principle was most recently expressed in SINTROS v. LaVALLE, 406 So.2d 483, 484 (Fla. 5th DCA 1981):

> Without sophistry we hold that, without regard to the "planning or discretionary" level of the reason for the activity, the operation of a motor vehicle by a governmental employee within the scope of governmental employment is an "operational level" activity and that a complaint properly alleging that such activity was negligently performed and that such negligence was the legal cause of plaintiff's injury states a cause of action for compensatory damages against a governmental agency, against the argument of sovereign immunity.13/

13/ Accord, REED v. CITY OF WINTER PARK, 253 So.2d 475 (Fla. 4th DCA 1971). The same point was made in a different context in BELLAVANCE v. STATE, 390 So.2d 422 (Fla. 1st DCA 1980)--the case in which a state hospital was not protected in its decision prematurely to release a mental patient. There the court quoted with approval a passage from the decision in JOHNSON v. STATE, 69 Cal.2d 782, 73 Cal Rptr. 240, 250, 447 P.2d 352, 362 (1968):

> "[A]lthough a basic policy decision (such as standards for parole) may be discretionary and hence warrant governmental immunity, subsequent ministerial actions in the implementation of that basic decision still must face case-by-

If we are permitted to brief this case, we will establish that all of the various theories of negligence in this case were presented to the jury in the absence of any request by the respondent for a special verdict itemizing these various theories of negligence.[14/] Thus, we will argue that even if the single decision not to arrest was protected (which we dispute), the judgment against the respondent in this case should have been affirmed.[15/]

C. THE DISTRICT COURT'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT HOLDING THAT EVEN A PLANNING-LEVEL DECISION IS NOT PROTECTED BY THE SOVEREIGN IMMUNITY DOCTRINE IF THAT DECISION CREATES A DANGER AT THE OPERATIONAL LEVEL OF WHICH THE GOVERNMENTAL ENTITY IS OR SHOULD BE AWARE.

In DEPARTMENT OF TRANSPORTATION v. NEILSON, 419 So.2d 1071, 1078 (Fla. 1982), this Court declared that if an "alleged defect is one that results from the overall plan itself, it is not actionable unless a known dangerous condition is established (our emphasis)." Accord, CITY OF ST. PETERSBURG v. COLLOM, 419 So.2d 1082, 1083, 1086 (Fla. 1982). We think this case fits within that qualification, even if the initial decision of the officer not to make an arrest was the kind of policy-making decision otherwise

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> case adjudication on the question of negligence."
>
> Similarly, while the State's standards for releasing mental patients may be discretionary and thus immune from review, the subsequent ministerial action of releasing [the patient] pursuant to those standards does not achieve the status of a "basic policy evaluation."

14/ There was a request by the respondent for a special verdict on one narrow theory of liability other than those listed here--the theory that the City was liable for the negligence of the cab company because it had delegated a non-delegable duty. But there was no request for a special verdict on any of the theories attributing negligence to the City.

15/ But even if the respondent had requested a special verdict, any conclusion that the decision not to arrest enjoys protection at most would require a remand for a new trial on all of the other theories of liability which arose after that decision had been made. Thus, one way or the other, this point--that there can be no protection for the negligent implementation of a decision not to arrest--will require reversal of the appellate court's ruling that the case must be remanded for entry of judgment for the respondent.

entitled to protection--because that decision itself created a known dangerous condition which was not readily apparent to persons who could be injured by that condition--like the four persons who were injured or killed in this case. In this case the police department knew or should have known that this cab driver was looking for a house in the wrong city; that the keys to this drunk's car had not been secured; and that this drunk had been returned to his car. Thus, the decision-making process in this case created a trap awaiting all of the unsuspecting drivers on this road--the trap of putting a drunk driver--an accident waiting to happen--on the road with them. And for that reason, the decision sought to be reviewed conflicts with this Court's decisions in yet another way.

III
CONCLUSION

It is respectfully urged that this Court exercise its discretion to resolve the conflicts which appear upon the face of the district court's decision, and accept jurisdiction to review the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was mailed this 31st day of March, 1983, to: CHRIS W. ALTENBERND, ESQ., Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., P.O. Box 1438, Tampa, Florida 33601; and to RICHARD V. S. ROOSA, ESQ., P.O. Box 535, Cape Coral, Florida 33804.

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