O/C 1-12-84

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.

_____/

FILED

OCT 3 1983

SID J. WHITE
CLERK, SUPREME COURT
Chief Deputy Clerk

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

PETITIONERS' BRIEF ON THE MERITS

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I
STATEMENT OF THE CASE

This case happened because an experienced police detective put an extremely drunk driver into a cab without first ascertaining his correct address and its location--and because the police dispatcher carelessly confirmed an address given by the drunk in the wrong city--as a result of which the cab driver returned the drunk to his car an hour later after searching unsuccessfully for his home. Less than five minutes later, as a result of these reckless actions--by the drunk, by the cab company, and by the police --the drunk collided into another car. Judy Scroggins, age 16, was killed. Her boyfriend Donnie Fontaine, age 16 was killed. Kathy Duvall, age 16, suffered the most severely fractured spine her neurosurgeon had ever seen. And John Tkac, age 29, whose face literally was blasted apart, and whose frontal lobe was removed, ended up in the 10th IQ percentile--a borderline retarded. Five years later, after seven days of trial, the jury returned its verdict for a total amount of $1,296,000. By that time the plaintiffs had settled with all of the defendants except the respondent, CITY OF CAPE CORAL (hereinafter "City"), which appealed. The Court of Appeal, Second District, held that the City was insulated from liability by the sovereign immunity doctrine. CITY OF CAPE CORAL v. DUVALL, _____ So.2d _____ (Fla. 2nd DCA 1983) (1983 FLW DCA 366). This Court accepted jurisdiction by an order dated September 9, 1983.

The named defendants included the drunk driver (John McNally), the cab company (Jack's Radio Cabs), and the City (R. 1-7, 585-92, 682-89, 764-71).[1/] As amended, the four complaints alleged not only that the City

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1/ "R." refers to the Record on Appeal. "Tr." refers to the separately-paginated 14 volumes of trial testimony, beginning at R. 834. Because these volumes are not consecutively paginated, we have found it difficult to identify the precise page of the record for each bit of testimony we wish to cite. Wherever possible we have provided the precise citation, e.g., "R. 1191." At other times we will designate a citation to the transcript by both the volume of the transcript and the page within that volume--for example, "Tr. VIII at 138."

had been negligent for failing to take McNally into custody, but also that the City had negligently failed to determine the correct whereabouts of his residence (R. 92-101, 611-20, 706-15, 790-99). The City moved to dismiss the amended complaint on the basis of the "special duty" doctrine of MODLIN v. CITY OF MIAMI BEACH, 201 So.2d 70 (Fla. 1967) (R. 102-04). The motion was granted with prejudice (R. 115), and during the pendency of the plaintiffs' appeal this Court decided COMMERCIAL CARRIER CORP. v. INDIAN RIVER COUNTY, 371 So.2d 1010 (Fla. 1979). In light of COMMERCIAL CARRIER the district court reversed the dismissal of the petitioners' complaints and remanded the case to the trial court. BEDDOW v. CITY OF CAPE CORAL, 375 So.2d 335 (Fla. 2nd DCA 1979).

Upon remand, the City answered the amended complaint and raised a number of defenses, but did not resurrect the defense of sovereign immunity (R. 187-210). Later the City filed a motion for summary judgment (R. 243-46), in which the City raised the sovereign immunity defense only in the very narrow context of responding to the plaintiffs' nuisance claims (R. 244). That was the only mention of the sovereign immunity doctrine at the trial level after remand.[2/] The jury returned a verdict for all four plaintiffs against McNally, the cab company and the City in the total amount of $1,296,000 (R. 454-56, 3029).[3/]

2/ The motion for summary judgment was denied in all respects (R. 268-69), the case was transferred from the Twentieth to the Thirteenth Judicial Circuit (R. 283-84), and it was tried in the summer of 1980 (R. 840-3039). Various insurance companies were dropped as named parties at the beginning of the trial, and after the jury had retired to deliberate, the plaintiffs settled with all of the defendants other than the City for their total insurance coverage of $40,000 (R. 3038-39).

3/ In two post-trial orders (R. 467-68, 576-77), the trial court reduced the verdict to the Beddow estate by $1,395.33 and reduced the verdict to the Fontaine estate by $2,751.42, and granted the City's motion to limit its damages to the amount prescribed by §768.28, Fla. Stat., as upheld by this Court in CAULEY v. CITY OF JACKSONVILLE, 403 So.2d 379 (Fla. 1981). The amended final judgments reflect these post-trial orders, a set-off for the $40,000 received from the other defendants, and a set-off for money received from the City's insurance carrier (R. 573-75, 672-74, 754-56, 826-28).

On appeal, as we have noted, the City did not raise any contention that it was protected from liability by the sovereign immunity doctrine. Instead the City raised four arguments: that the trial court had improperly instructed the jury that its treatment of McNally constituted a non-delegable duty; that the trial court had improperly instructed the jury that its right to control McNally's vehicle would render it responsible for his conduct; that the trial court improperly failed to direct a verdict for the City on one particular theory of negligence--the theory that the City was negligent in failing to reapprehend McNally after he was returned to his car; and finally, that the trial court improperly submitted to the jury the issue of proximate causation.[4/]

In the context of the first argument--concerning the trial court's instruction on the theory of non-delegable duties--the City argued that the trial court erred in giving the instruction because §856.011, Fla. Stat. (1975) allows a police officer to send an intoxicated individual home by public transportation, and considers the officer to have carried out his official obligations in so doing (brief at 20-21).[5/] The City's brief raised no contention that the

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4/ In the context of the third of these arguments--concerning the City's negligence in failing to reapprehend McNally after he was returned to his car--the City included one sentence to the effect that its utilization of only one nighttime dispatcher was a policy decision insulated from liability under COMMERCIAL CARRIER (brief at 31). That was the only mention of the sovereign immunity doctrine in the entire brief, and that particular argument was raised for the first time on appeal.

5/ Section 856.011, Fla. Stat. (1981) provides as follows:

> (1) No person in the state shall be intoxicated and endanger the safety of another person or property, and no person in the state shall be intoxicated or drink any alcoholic beverage in a public place or in or upon any public conveyance and cause a public disturbance.
>
> (2) Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.
>
> (3) Any person who shall have been convicted or have forfeited collateral under the provisions of subsection (1) three times in the preceding 12 months shall be

trial court should have instructed the jury on this statute--only that the statute should have precluded the instruction given on the non-delegable duty doctrine.

Of all the arguments advanced in the City's brief, the district court chose to adopt its own variation of this one--concluding that the trial court had erred in failing to instruct the jury about the language of this statute. We will address that conclusion at the end of this brief, establishing that the City failed to preserve this point for appellate review, that the statute does not apply in this case, and that any error in failing to give such an instruction was harmless. But even if this point were correct, it would not have required a reversal with instructions to enter judgment for the City; at most it would have required a new trial. The remand for entry of judgment was based entirely upon an argument which the City had not raised--that the decision of the officers not to arrest McNally was protected by the sovereign immunity doctrine under the district court's recent decision in EVERTON v. WILLARD, 426 So.2d 996 (Fla. 2nd DCA 1983). The district court expressly declined to address any of the other points raised by the City.

II
STATEMENT OF THE FACTS

In February of 1975, John McNally lived with his wife and mother-in-law at 1661 Crooked Arrow Court in the City of Cape Coral (R. 1163-65).[6/]

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deemed a habitual offender and may be committed by the court to an appropriate treatment resource for a period of not more than 60 days. Any peace officer, in lieu of incarcerating an intoxicated person for violation of subsection (1), may take or send the intoxicated person to his home or to a public or private health facility, and the law enforcement officer may take reasonable measures to ascertain the commercial transportation used for such purposes, is paid for by such person in advance. Any law enforcement officers so acting shall be considered as carrying out their official duty.

6/ Crooked Arrow Court was incorporated into the City of Cape Coral in either late 1973 or early 1974, and thus had been a part of the city for more than a year at the time of this accident (R. 1165). It is part of a small

Throughout most of his life, McNally had experienced problems with alcohol, and had become a member of Alcoholics Anonymous in 1967 (R. 1190-92). For about two years before this accident, he had been successful in avoiding alcohol (R. 1191). But on the day of this accident, February 14, 1975, McNally's wife and mother-in-law had gone to St. Petersburg, and McNally was left alone (R. 1168). McNally had nothing to eat the entire day; he took two antihistamines and two antibiotics in the morning, two more antihistamines and two more antibiotics in the evening, and two five-milligram tablets of Valium as well (Tr. III at 328-29). He then decided to go to a drive-in movie (R. 1170), and after leaving the movie succumbed to his problem and purchased a bottle of liquor (R. 1173). He returned to the drive-in movie, remembers drinking one drink and starting a second drink, and apparently as the result of an alcoholic black-out, could remember nothing after that (R. 1173-76).

Nine hours after the accident, McNally's blood alcohol level was .21 (Tr. V at 650). The legal limit at that time was .10 (Tr. VI at 9; Tr. VIII at 33, 123; Tr. XIV at 1124). Since alcohol burns off in the body at a rate of anywhere from 15% to about 30% per hour (Tr. VIII at 31, 122), that means that McNally's level of intoxication was at least .345 at the time of this accident (id. at 33, 123). According to the plaintiffs' expert, a level of .35 produces a coma and death (Tr. VIII at 33). Thus, at the time of this accident, McNally must have been in a state somewhere between a stuper and a coma (id. at 33-34). As the plaintiffs' expert testified, "this man was as

developed area involving only a few houses and a few dead-end streets (R. 1186-87). The City of Cape Coral is north of North Fort Myers, and most of the peninsula north of Fort Myers had been incorporated into the City of Cape Coral as part of a General Development project earlier than 1973 and 1974 (R. 1185). At the time of this accident McNally had lived on Crooked Arrow Court for approximately two years (R. 1163-64); thus, he had lived at this address for about a year in which it was part of North Forth Myers, and then for another year in which it was part of the City of Cape Coral.

drunk as anybody you will see that could still drive a car. I can't think of a--I just simply can't think of a more serious DUI case or DWI case" (Tr. VIII at 36).

In the late evening hours of February 14, Officer Ron Ryckman of the Cape Coral police encountered McNally on Pinella Road in Cape Coral (Tr. VI at 17). Ryckman was heading west in his police car, and McNally passed him driving east on the wrong side of Pinella Road, so that Ryckman had to pull off the road to avoid being hit (id. at 17-18). He said later that McNally had almost killed him by driving on the wrong side of the road (Tr. II at 154). Ryckman turned his car around to give chase, and eventually pulled McNally over after he had turned south onto Del Pine Road (Tr. VI at 20-21). But after Ryckman walked over to McNally's car and asked him for his driver's license, McNally let his own car roll forward another 25 feet (id. at 21-22). Ryckman then told him to get out of the car, but as McNally tried to do so he fell back into the seat (id. at 23). Ryckman said later that McNally was mumbling and slurring his words at the time he was stopped, and obviously was unable to drive, and that McNally fell down twice after he was stopped (Tr. II at 157, 218-20, 223-24, 231, 242, 244; Tr. IV at 546, 552, 558; Tr. VI at 23, 31). He later told three people that McNally was the worst drunk he had ever seen (Tr. II at 154, 157). Nevertheless, although he had no doubt that McNally was guilty of driving while intoxicated, Ryckman made an immediate decision, before even getting out of his car, to send McNally home rather than arresting him (Tr. VI at 37; Tr. VIII at 28).

What happened next is described not only in the testimony, but in a written summary of police radio transmissions which the plaintiffs introduced into evidence (R. 3050).[7/] We will discuss below the detailed testimony--ex-

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7/ A list of the shorthand terms used in that exhibit is found at R. 3061; the officer identified as "133" in the transcript is Ryckman (R. 936).

pert and otherwise--describing the several distinct acts of negligence committed by the police from the point at which Ryckman stopped McNally. Before doing so, we offer a quick chronological narrative. As the transcript shows, Ryckman called the police dispatcher at about 11:00 p.m. to advise that McNally was so drunk "he can't stand up," and that Ryckman intended to call a cab as soon as he obtained a precise address. A few moments later Ryckman called in to advise that McNally had given an address of 1661 Crooked Arrow Court in North Fort Myers (R. 3050 at 1-2). The dispatcher then called a cab company and radioed back to Ryckman that a cab would be sent as soon as possible (R. 3050 at 2). Ryckman then asked the dispatcher to check out the address which McNally had given, because "I don't think this guy even knows for sure if that's his own address" (R. 3050 at 3). The dispatcher answered: "That's a proper address . . ." (R. 3050 at 3) (our emphasis). That of course was incorrect, because McNally lived in Cape Coral. Ryckman then asked the dispatcher to try to call a friend of McNally's to pick him up, but the friend was not at home (R. 3050 at 4). The dispatcher then called another cab company to pick up McNally and take him "to 1661 Crooked Arrow in North Ft. Myers" (our emphasis) (R. 3050 at 5). At 11:48 p.m. the dispatcher confirmed that the cab was on the way, and there were no further transmissions until seven minutes after midnight on February 15 (R. 3050 at 6).

Ryckman and McNally were parked outside of the home of William and Virginia Smith at 1200 Del Pine Road in North Fort Myers (Tr. II at 144). While Mrs. Smith watched, a patrol car containing officers Mobley and Schwartz pulled up to the scene (R. 995, 1629, 2001), but these officers left before the taxi arrived (R. 2003-04). The cab arrived at about seven minutes after midnight, when Ryckman informed the dispatcher that the cabbie had picked up McNally and was taking him home (R. 3050 at 6). Although the cab driver

told Ryckman that he did not know how to locate McNally's address (R. 1379), and although McNally also said that he did not know where he lived (R. 1001), Ryckman gave the cabbie the keys to McNally's car and sent him away (R. 1690, 1733, 1382-83). The cab driver called his own dispatcher, who like the police dispatcher erroneously confirmed the address in North Fort Myers (R. 1382). The cab driver then spent the next hour searching in vain for McNally's house in the wrong city (R. 1409). The cab driver finally gave up, and his own dispatcher told him to return McNally to his car and to give him the keys (R. 1385). Assuming that his dispatcher would call the police, the cab driver followed this instruction (R. 1418-19).

At 1:00 a.m. that morning--about an hour after the cab had left with McNally--Mrs. Smith called the police to say that McNally had been brought back to his car and "is ready to take off in it again" (R. 3050 at 6-7). The dispatcher took the address, but then put Mrs. Smith on hold while the dispatcher took another call (R. 3050 at 6). Mrs. Smith then told the dispatcher that McNally was back in his car, but despite this information the dispatcher put her on hold again (R. 3050 at 7). Two minutes after the time Mrs. Smith first called, the dispatcher came back on the line and talked to Mr. Smith, who told the dispatcher that McNally was "so drunk he can't even see straight" (R. 3050 at 7). He added: "Send somebody up here or he's going to kill somebody" (id.). A minute later the dispatcher radioed officers Mobley and Schwartz to tell them to return to the scene (Tr. 3050 at 8). A full five minutes later the officers radioed back to say that McNally had left (R. 3050 at 8). At the same moment, Mr. Smith called the police again to say that McNally had driven away and "he was flying" (id.). He repeated that McNally was "going to kill somebody" (R. 3050 at 9). About four minutes later, McNally slammed into the car containing Judy Scroggins, Donnie Fontaine, Kathy Duvall, and John Tkac. Two of them were killed, two of them

were horribly injured.

We have described in general terms the sequence of events leading to this tragedy. It remains to take a microscope to that sequence, and to isolate in detail the various acts of negligence committed by the City. By our count, the evidence established that members of the police department were negligent in at least nine different ways. All of them flow from the primary assumption--unanimously endorsed by the witnesses--that the officers' first responsibility was to get this man off the street (See, e.g., Tr. III 412-13, 428-29; Tr. XI at 583, 640, 753-54). To a greater or lesser extent, the plaintiffs touched upon all nine theories of negligence in closing (Tr. XII at 929-48).

First, there was ample evidence that Officer Ryckman was negligent in making up his mind to send McNally home before Ryckman ever got out of his car. See Tr. VI at 37; Tr. VIII at 28. In other words, he failed to exercise the discretion which he enjoyed.

Second, there was overwhelming evidence that Officer Ryckman was negligent in failing to take the simple step of calling McNally's home to confirm McNally's statement--which turned out to be a lie--that his wife was at home. Even though Ryckman acknowledged that an officer should arrest a drunken driver if there is no one at home to receive him (Tr. VI at 130),[8/] he saw no reason to confirm McNally's unsupported assertion that his wife

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8/ The City's expert, however, testified that it simply "doesn't matter whether nobody is home" (Tr. XI at 623). We invite the Court's attention to the expert's explanation for this astounding conclusion. It included his belief that "I think it's perfectly okay to send the drunk home to an empty house because the other factor, if he goes home and his wife is there, there is a possibility of a domestic disturbance" (id. at 624). In addition the expert noted: "There are homes across the country that are full of drunks, sir. Home is where you want them to be drunk. There are all kinds of things they can do while they are there. It is not police business" (id. at 623). In other words, "you can't get into that kind of detail . . . ." (id. at 625). For this reason, "[y]ou don't even ask what the circumstances are. You just take him out of there and get him home" (id. at 626). See generally id. at 623-24, 625-26, 626-27, 628-29, 631, 673, 677.

was at home (Tr. VI at 38-39). The plaintiffs' witnesses, however--including Officer Ryckman's chief of police--all vigorously maintained that for the obvious reason that a drunk might have another car or other keys to his own car at home, an officer should never send a drunk home without ascertaining that someone is there to meet him (Tr. III at 418-19, 448-50; Tr. VIII at 53-54). And with equal vigor, they stressed that the officer should never take a drunk's word for the fact that someone is home to meet him (Tr. III at 418, 448; Tr. VIII at 53).

Third, the police dispatcher was negligent in failing to correct the address given to Ryckman by McNally. The transcript shows that the dispatcher explicitly confirmed the incorrect city; when Ryckman repeated the incorrect "North Fort Myers" address, the dispatcher answered: "That's a proper address" (R. 3050 at 3). And later the dispatcher explicitly gave the incorrect "North Ft. Myers" address to the cab company (R. 3050 at 5). Especially since 1) the very computer which the dispatcher utilized to confirm the number and street of McNally's address also showed that he was wrong about the city;[9/] and 2) because the dispatcher admitted that even he was unable to locate the incorrect address on his own map, which should have stimulated further inquiry; and 3) because the dispatcher had available a street index, and a telephone directory, and a telephone tie-in to the local sheriff's office, and utilized none of them--the evidence was overwhelming that the dispatcher was tragically negligent in failing to inform Ryckman that McNally had given him the wrong address. See Tr. II at 278; Tr. III at 356, 371-72; Tr. VIII at 138. Even the City's expert said that it was wrong--and bad police work--for the dispatcher to fail to provide the correct city. Tr. XI at 612,

9/ That same computer showed the correct Cape Coral address only a few hours after this accident (Tr. VIII at 138). The plaintiffs also offered expert testimony from a state official that the computer did show the correct Cape Coral address at the precise moment the dispatcher misread it (Tr. II at 277-78).

637. This was an inexcusably careless act by a public official charged with enormous responsibility, and it cost the lives of two people and the health of two others.

Fourth, the evidence was strong that Officer Ryckman was negligent in failing himself to confirm McNally's address--given the easy availablility of evidence for doing so--and in failing to ascertain its location. At the beginning, of course, McNally could not even remember his address, and Officer Ryckman thought he did not know what it was (Tr. II at 158; Tr. VI at 24-25). Then he gave the street address and the wrong city, and the dispatcher confirmed them. McNally never told anyone that he knew how to get to the house (Tr. IV at 544). And the cab driver did not know how to get there either (Tr. IV at 536; Tr. VI at 58). Yet McNally's correct address was right at Ryckman's fingertips--on all of his business cards, on all of his credit cards, on his voter registration card, and on the car registration in his glove compartment (Tr. III at 335-36). The plaintiffs' experts testified flatly that Ryckman should have checked this information, or otherwise secured the correct address, and in addition that he should have obtained the precise location of that address before putting McNally into the cab (Tr. III at 417, 443, 450; Tr. VIII at 56, 118). Even Ryckman acknowledged that it would have been better to take McNally home personally if McNally did not himself know how to get there (Tr. VI at 129-30).[10/]

Fifth, Officer Ryckman was negligent in failing to keep McNally's keys, or otherwise to assure that they were not returned to him. Even if Ryckman had obtained the correct address and the correct directions, and even if he had been careful enough to make sure that someone would be at home to re-

10/ But not the City's expert; he insisted that the officer had the right to expect that the cabbie would ascertain and find the correct address, or else he would not have taken the fare. In short, this expert believed that Ryckman had discharged his responsibility entirely when the cabbie agreed to take the fare. Tr. XI at 586, 641-42, 655.

ceive McNally, Ryckman still would have been negligent for failing to ensure that McNally did not get his own keys back before arriving home. There was clear evidence that the cab driver had no authority over McNally, and that indeed the cab company might have been liable for refusing any demand by McNally to be given back his keys and be returned to his car. See Tr. III at 419-20, 547; Tr. VI at 60, 115; Tr. VIII at 98; Tr. IX at 299-300. As the cabbie himself testified, when someone wants out, he lets them out (Tr. IV at 547). In this light, it may have been that the officer had no real option to instruct the cabbie not to return the keys to McNally should he demand them, and only one witness--the plaintiff's expert--suggested that he should have done so (Tr. VIII at 94). Of course, the jury could have credited this testimony, and thus it is significant that the officer never told the cabbie not to obey any instructions by McNally (Tr. IV at 547), nor told him what to do with McNally's keys after he got him home (id. at 539).

In addition, however, the plaintiff's expert suggested what seems to us the more viable alternative--for Ryckman to have kept McNally's keys himself (Tr. VIII at 56-57). Both the cabbie and the owner of the cab company testified that while the company regularly carried drunks for the police department, there had never been a single prior occasion in which the cabbie had been given the keys to the drunk's car (Tr. IV at 530; Tr. IX at 298-99, 337). Thus, if the police department was empowered to immunize the cab company from civil or criminal liability by instructing the cabbie to keep the keys should McNally want them back, at the least Ryckman should have given that instruction. And assuming that Ryckman did not have that authority, he should have kept the keys for himself. And at the very least--if Ryckman intended to give the cabbie the keys without instructing him not to return them to McNally--he certainly should have told the cabbie what to do in case McNally did demand them back--that is, to call the police immediately. See

Tr. VIII at 57-58. It was simply unreasonable to leave that kind of decision up the cabbie, and to hope that he would have the good sense to call the police if his drunk passenger was about to take to the street again (Tr. VIII at 98). Yet Ryckman told the cabbie nothing. It never even occurred to him that the cabbie might be induced to bring McNally back to his car (Tr. VI at 93). In fact, he never even bothered to make sure that McNally had the money to pay for the cab (id. at 64-65). Thus, the manner in which Ryckman put McNally into the cab was patently negligent.

Sixth, if Ryckman did determine to send McNally home rather than arrest him--and even if he had gotten the right address and the right location, and even if he had made sure that someone was home to meet him, and even if he had secured his keys--he should have either taken McNally home himself, or sent McNally home with one of the other officers (Mobley and Schwartz) who were on the scene. Mobley and Schwartz hung around for a while, then they left, then they returned, then they left again. Schwartz testified that they would have done whatever Ryckman asked them to do to assist him--including taking McNally home or to the station (Tr. VIII at 126-27). Ryckman himself acknowledged that he could have asked the patrol car to take McNally home, or asked one of the officers to drive McNally home in his own car, or that he could have driven McNally home by himself (Tr. VI at 61-62, 103). He just never thought of it (Tr. VI at 120, 121, 123). He should have thought of it.

Seventh, Ryckman should have arrested McNally or otherwise taken him into custody instead of sending him home. Both officer Ryckman's chief and the plaintiffs' expert testified unequivocally that Ryckman should have arrested McNally (Tr. III at 415, 448; Tr. VIII at 61).[11/] Indeed, both experts testi-

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11/ At the least, the plaintiffs' expert testified, Ryckman should have taken McNally into custody and down to the station without arresting him (Tr. VIII at 98). As an alternative, Ryckman should have taken McNally to a hospital or to an alcohol treatment center. Section 396.072(1), Fla. Stat.

fied flatly that they could not think of a single reason why Ryckman should not have arrested McNally (Tr. III at 416, 424; Tr. VIII at 61). The plaintiffs' expert itemized eight factors which an officer should consider in deciding whether or not to make an arrest, and concluded that every one of them was amply satisfied in this case: 1) as a generality, the crime of drunk driving is very serious (Tr. VIII at 30-31)[12/]; 2) this particular drunk driving offense was extremely serious (id. at 31, 34); 3) this offense was particularly serious in the residential area in which it happened (id. at 37); 4) there were people in the area who complained about the offense (id. at 38); 5) this was a very good case to prosecute (id. at 38);[13/] 6) there was no apparent danger that an arrest might lead to physical violence toward the officer or toward anyone else (id. at 39); 7) there was no apparent danger that an arrest would cause unusual harm to the suspect, as for example would the arrest of a student

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(1981), provides as follows:

> Any person who is intoxicated in a public place and who appears in need of help, if he consents to the proffered help, may be assisted to his home or to an appropriate treatment resource, whether public or private, by a peace officer. Any person who is intoxicated in a public place and appears to be incapacitated shall be taken by the peace officer to a hospital or other appropriate treatment resource. A person shall be deemed incapacitated when he appears to be in immediate need of emergency medical attention, or when he appears to be unable to make a rational decision about his need for care.

This statute says that when an intoxicated person appears to be incapacitated --as McNally surely did here--he "shall" be taken for treatment. Arguably, therefore, Officer Ryckman had no discretion to send McNally home, even if he had the discretion not to arrest him.

12/ The City's expert agreed that one factor to be considered is the seriousness of the offense. However, he was unwilling to agree that drunk driving is the most serious of traffic offenses, and in fact was unwilling to say that a drunk driver is more dangerous than a drunk pedestrian (Tr. XI at 644-45, 648).

13/ Officer Ryckman acknowledged that he knew he had a good case (Tr. VI at 56), but the City's expert testified that the strength of the officer's case should have no weight in his decision whether or not to arrest (Tr. XI at 651).

(id. at 39-40); and 8) this was a case in which the officer could make his arrest on the merits, since the officer had no personal bias toward McNally (id. at 40-41). Thus, every factor indicated that Ryckman should have made an arrest, and the plaintiffs' expert concluded:

> Q. Can you think of any factor in this case with the hypothetical in this case that would mitigate in favor of letting this man go home as opposed to arresting him?
>
> A. Well that's the problem that I have had with the case from the beginning. When I went through--I have eight factors that I think the authorities in the field discuss. They discuss at least six; and I talked about two more. And I can't find one. If this were a 50/50 case, I would find half on this side and half on the other side. It might be debatable. But I couldn't find one of the discretionary keys that would work in favor of releasing this defendant. I think it's a serious case, DWI. I think it's the most serious--I can't think of anything worse the guy could have been doing. I think the community would have been upset about it. I think the officer would have felt better about it if he had done it. I think it would have been a good case in trial to prosecute. I can't think of any reason why this officer should have--any good reason--why this officer should have released him. Not one of the eight that I counted--and that's why I reached that opinion that I gave.
>
> Q. . . . In your opinion, should he have arrested the man?
>
> A. Yes, sir.
>
> Q. Should an arrest have been made?
>
> A. Yes, sir.
>
> Q. Is it proper police procedure to try to shift the responsibility for this inebrated person from the police system to that of a cab driver who is not a deputized cab driver and has no authority under the law?
>
> A. In this case, no, sir. I don't think so (Tr. VIII at 60-62).

There can be no question that the jury was permitted to conclude that the officer was negligent in failing to make an arrest.[14/]

14/ Clearly that conclusion must be reached "objectively, rather than from the subjective viewpoint of the particular law enforcement officer . . . ."

Eighth, officers Mobley and Schwartz took too long to return to the location of McNally's car after they were told that he had been brought back. By the evidence most favorable to the plaintiffs, they took five minutes to travel a distance of one-half mile (Tr. II at 198-99; Tr. VI at 21). The summary of radio transmissions (R. 3050 at 6) shows that Mrs. Smith called the police at 1:00 a.m. and told the dispatcher that McNally had returned to his car; that this call was interrupted twice when the dispatcher chose to take other calls; that Mr. Smith got on the phone at 1:02 and informed the dispatcher of the urgency of the situation by noting "he's going to kill somebody"; that the dispatcher called officers Mobley and Schwartz at 1:03 to tell them that McNally had returned to his car; that the officers called back at

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CROSS v. STATE, 374 So.2d 519, 521 (Fla. 1979). Nevertheless, we should acknowledge that officer Ryckman at various times suggested three reasons for his decision not to arrest McNally, and that none of them are sufficient. First, Ryckman acknowledged on deposition that he had told the Smiths that he could not make an arrest because he had no ticket book; that was obviously ridiculous (Tr. II at 150, 183; Tr. III at 389; Tr. VI at 132-33; Tr. IX at 620-21). Second, at one point Ryckman said that there were no police cars available to take McNally in; since there were two police cars on the scene, and since one of the officers could have taken McNally home in his own car, that reason too is insufficient (Tr. II at 150; Tr. III at 360).

Third, the City elicited a good deal of testimony establishing that before he became a detective officer Ryckman had been about the most productive officer on the force in making arrests for traffic offenses, and that he had had some trouble breaking that habit after he became a detective with far more important responsibilities than traffic. In fact, on one occasion Ryckman had been reprimanded for his zeal in making a traffic arrest while a detective, and he expressed some fear that if he made an arrest in this case he would be reprimanded as well (see Tr. VI at 46, 51, 71, 74, 134, 173). As the plaintiffs' expert testified, however, while a detective generally should avoid traffic offenses, that hardly extends to drunk driving offenses (Tr. VIII at 79-80). Both the expert and the chief testified that the fact that Ryckman was a detective was irrelevant to the propriety of an arrest (Tr. III at 415, 416; Tr. VIII at 78-80). Even Ryckman acknowledged that when he was a patrolman, he generally arrested drunk drivers (Tr. VI at 103).

Thus, this jury could have concluded--on the basis of evidence provided by the City--that this officer failed to make an arrest either because he did not have a ticket book, or because he did not think that the City could spare a car, or because he was afraid of being reprimanded. In conjunction with the jury's consideration of those factors which should be considered in deciding whether or not to make an arrest, this evidence could only have served to reinforce the conclusion that officer Ryckman was negligent in failing to make an arrest.

1:08 to say that McNally was gone; and that Mr. Smith called at 1:08 to say that McNally had driven away and "he was flying." The dispatcher testified initially that he had told the officers to hurry back to the scene (Tr. VII at 47), but the transcript proved otherwise. After reviewing the transcript, the dispatcher testified that officer Swartz must have known that it was important to get back to the scene, because Swartz signed off without waiting for the dispatcher to provide directions as to whether to use the lights or siren (Tr. VII at 55, 58). In addition, the dispatcher testified that the officers themselves had the authority to use their lights and siren and to exceed the speed limit (id. at 58-59).

The officers did not exercise that authority. Officer Mobley testified that he and Swartz drove back to the scene a little faster than normal, not using their siren or lights (Tr. V at 789-90). He confirmed that they were not dispatched with instructions to use their lights or siren (id. at 797). Officer Swartz testified that the two drove back at "normal" speed (Tr. VIII at 132). Swartz also testified that the officers had to travel a distance of one and one-half to one and three-quarter miles to reach the location of McNally's car; he testified that he had clocked that mileage on his police cruiser (id. at 145, 150). He acknowledged, however, that on deposition he had testified that the distance was only one-half mile (id. at 145). And officer Ryckman had suggested, obliquely, that the distance might be less than one-half mile (Tr. VI at 121). Finally, Mrs. Smith testified that between the time of her call to the police and the time that McNally drove away, anywhere from three to five minutes elapsed (Tr. II at 198-99; see id. at 224).

The City moved for a directed verdict on the issue of its negligence in not getting back to the scene before McNally had left (Tr. XII at 769). The plaintiffs answered that even assuming the distance to have been 1.8 miles, the officers would have had to have been driving at only 23 miles per hour to

travel that distance in a span of five minutes (id. at 771, 774). And if the officers had to travel only one-half mile, they would have been driving only six miles per hour to cover that distance in five minutes; and only ten miles per hour to cover it in three minutes;[15/] And even if the distance was as much as one and three-quarter miles, the officers would have had to have been driving only twenty-one miles per hour to travel it in five minutes, and only thirty-five miles per hour to travel it in three minutes. Thus, the inference was readily available that the officers did not hurry back to the scene.[16/]

Ninth, the officers were negligent in failing to hurry after McNally when they discovered that he had left the scene. The transcript (R. 3050) shows that at 1:08--when Swartz and Mobley called in to say that McNally had already left--Mr. Smith also called to report that McNally had left and that "he was flying." Mrs. Smith testified that while her husband was making this second call, she looked out the window at the police car which had just arrived:

> A. Well, while my husband was talking on the phone I just happened to look out the front window and I saw the Cape Coral Policemen, police car, sitting out on the corner.
>
> Q. Did it have its lights on?
>
> A. No, sir.
>
> Q. It was just sitting there when you saw it?

15/ As one counsel argued in its opening statement, he could have run one-half mile in two minutes (Tr. I at 93).

16/ Moreover, it should not escape notice that it took three minutes before the dispatcher even informed the officers of McNally's return, because the dispatcher twice put Mrs. Smith on hold to take other calls. Clearly the jury could have concluded that it was negligent to put the Smiths on hold and take other calls despite actual knowledge that a drunk driver had just re-entered his vehicle; the jury could have concluded that this carelessness cost a minute or more before the dispatcher was able to contact the officers. Thus, there was as much as eight full minutes between the time Mrs. Smith first called the police to inform them of McNally's return, and the time McNally left the scene.

A. Just sitting there, yes.

Q. What did you do then?

A. I went out the front door, right away, to see if I could tell them where he had gone.

Q. And what took place then when you went out?

A. I went running to the corner and I said are you looking for that car? And you want me to go on?

Q. Yes, ma'am.

A. The policeman that was driving said no, not really. If he is headed in that direction, its their problem, not ours.

Q. Okay. Were those apparently the same two policemen that had been there before?

A. Yes, sir.

* * * * *

Q. And then what happened, what did you do when they said that?

A. I go real disgusted with them. I said it's going to be someone's problem because he's going to kill somebody and it's going to be your problem if he does. Something to that effect. But I said those words in a nasty tone.

Q. You were mad at that time?

A. Very angry.

Q. What did the patrolmen do then?

A. Well, they sat there for a minute. I thought they were backing up to say something to me and--but then my husband came out of the house. And--

Q. Okay.

A. So my husband he had talked to the Cape Coral Police, he came out and he said if you're looking for--he may have said that drunk--he went down Pondella Road. So, I said to my husband, there's no use talking to those two. They are the two same policemen that had been out here earlier. They had their chance to take him in then.

Q. What did the patrol car do?

A. It went Pondella Road the same way they said they wouldn't go (Tr. II at 164-66) (our emphasis).

That testimony supports a clear inference that the officers failed to exercise reasonable care after they returned to the scene and found McNally gone. That was the ninth act of negligence by members of the police department on the night of this tragedy.

III
ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT ITS RECENT INTERPRETATION OF THE SOVEREIGN IMMUNITY DOCTRINE REQUIRED REVERSAL OF THE JUDGMENT IN THIS CASE.

B. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT THE SOVEREIGN IMMUNITY DOCTRINE INSULATES THE DECISION OF A POLICE OFFICER ABOUT WHETHER OR NOT TO MAKE AN ARREST.

C. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY REGARDING §856.011(3), FLA. STAT. (1981), REQUIRED REVERSAL OF THE JUDGMENT IN THIS CASE.

IV
ARGUMENT

A. THE DISTRICT COURT ERRED IN CONCLUDING THAT ITS RECENT INTERPRETATION OF THE SOVEREIGN IMMUNITY DOCTRINE REQUIRED REVERSAL OF THE JUDGMENT IN THIS CASE.

We will discuss in a moment the far-reaching implications of the district court's conclusion that certain discretionary operational-level acts are insulated by the sovereign immunity doctrine. However, we cannot stress too strongly that the propriety of the district court's reversal of the judgment in this case does not depend upon the correctness of its interpretation of the sovereign immunity doctrine. To the contrary, regardless of the correctness of its decision in EVERTON v. WILLARD, which was the basis of its decision here, the district court erred in this case.

As we have noted, the evidence in this case established the City's negligence in at least nine different ways. Only one of them was that the officers were negligent in failing to arrest McNally or otherwise take him into

custody--the one decision which the district court found to be insulated by the sovereign immunity doctrine. However, the City did not request a special verdict form itemizing the various theories of negligence--including the alleged negligence in not making an arrest--which were advanced by the plaintiffs. Such a request in writing is required by Rule 1.470(b), Fla. R. Civ. P.[17/] Since the City did not request a special interrogatory in writing on that point, it did not preserve for appellate review any contention that the trial court erred in allowing that theory of liability to reach the jury.[18/]

Even if the City had made an oral request regarding all of the various theories of liability, that would have been far too late. The plaintiffs' complaint clearly put the City on notice of any necessity of submitting a special verdict form, in writing, regarding the City's failure to make an arrest and the other theories of liability in this case. Indeed, the City's counsel admitted during discussion of the jury charge that he had planned before trial to raise no objection to the verdict form submitted by the plaintiffs (Tr. XII at 891-92); only after losing his argument to exclude any consideration by the jury of the theory of non-delegable duty did he decide that a special interrogatory on that point might be necessary (id. at 919-20). There can simply be no question that the City failed to preserve for review any contention that the

17/ See MARLOWE v. STATE, 139 Fla. 307, 190 So. 602 (1939); PREVATT v. STATE, 135 Fla. 226, 184 So. 860 (1939). We should acknowledge that at the very end of the trial, in the discussion of one particular jury instruction--an instruction concerning the plaintiffs' theory that the City owed them a non-delegable duty--the City did make an oral request for a special verdict regarding that particular theory of liability (Tr. XII at 919-20). As the trial court summarized: "Well, we'll have the record show that you requested Special Interrogatories concerning this question of non-delegable duty" (our emphasis) (Tr. XII at 919). That was the only request for a special verdict, and it had nothing to do with the nine theories of negligence which we have outlined above, including the theory that the City was negligent in failing to arrest or apprehend McNally.

18/ See generally WHITMAN v. CASTLEWOOD INTERNATIONAL CORP., 383 So.2d 618 (Fla. 1980) (per curiam); COLONIAL STORES, INC. v. SCARBROUGH, 355 So.2d 1181 (Fla. 1978); ALLSTATE INSURANCE CO. v. A.D.H., INC., 397 So.2d 928 (Fla. 3rd DCA 1981); ROSENFELT v. HALL, 387 So.2d 544 (Fla. 5th DCA 1980).

specific theory of liability based upon its failure to make an arrest was erroneously submitted to the jury.

Moreover, even if the intervening EVERTON decision by the district court were held to have relieved the City of that obligation, that decision at most would require remand for a new trial in this case--not a reversal with instructions to enter judgment for the City. We say this because the district court's decision in this case is based only on the discretion of a police officer about whether or not to make an arrest, and has nothing whatsoever to do with the other theories of liability which the plaintiffs presented.[19/] But for any one of these negligent acts, two people would not be dead today and two people would not be horribly injured. Yet none of them has anything to do with the kind of discretionary governmental function insulated by the sovereign immunity doctrine. The failure to look into a wallet to confirm an address--the failure of the dispatcher to look on the machine and get the city right--the failure to keep McNally's car keys, or to call his home, or to hurry after him when he left the scene--all of these were simple, naked acts of negligence wholly outside of the purposes and parameters of the sovereign immunity doctrine. Yet the decision of the district court in this case not only insulated from liability the officers' decision not to arrest McNally, but

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19/ The plaintiffs established, among other things: 1) that the officer was negligent for failing to look into McNally's wallet to find his address; 2) that the police dispatcher was patently negligent in confirming the address given by McNally, which turned out to be in the wrong city; 3) that the officer was negligent in failing either to keep McNally's car keys, or otherwise to assure that they were not returned to him; 4) that the officer was negligent in failing to take McNally home himself, or send him home with two other officers on the scene; 5) that the officer was negligent in failing to take the drunk into custody--perhaps for treatment--even if not arresting him; 6) that the officer was negligent in failing to call McNally'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 McNally home under such circumstances); 7) that two officers were negligent in failing to hurry back to the location of McNally's car after being specifically informed that the cab driver had brought him back; and 8) that these two officers were negligent in failing to hurry after McNally after discovering that he had left the scene in his car.

in the process insulated all of the negligent acts by which they sought to implement that decision. That was obviously incorrect.

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 he 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 the governmental agency, against the argument of sovereign immunity.

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), rev. denied, 399 So.2d 1145 (Fla. 1981)--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 is the implementation of that basic decision still must face case-by-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."

Even when a basic governmental decision is entitled to protection, the

governmental official is not insulated from liability for negligent acts committed in the implementation of that decision.[20/] Thus, even if the officer was protected here in deciding whether or not to arrest McNally, he was not protected in the manner in which he chose to implement that decision. At the very least, acknowledging the various theories of liability--wholly apart from the decision whether or not to arrest McNally--which the plaintiffs took to the jury in this case, the district court should have remanded for a new trial on those theories. It certainly had no basis for remanding with instructions to enter judgment for the City.

B. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE SOVEREIGN IMMUNITY DOCTRINE INSULATES THE DECISION OF A POLICE OFFICER ABOUT WHETHER OR NOT TO MAKE AN ARREST.

Here we want to make two points: that the district court's decision is inconsistent with every other case in this state on the issue; and that the district court's decision is wrong.

1. The District Court's Decision is Inconsistent With this Court's Definition of the Sovereign Immunity Doctrine.

a. A Review of the Cases.

The EVERTON opinion expressly acknowledges that an officer's decision about arrest is an operational-level decision rather than a planning-level decision. 426 So.2d at 998-99. Nevertheless, the district court held that the discretion exercised at the operational level was enough to insulate such a decision under the sovereign immunity doctrine. That departure from the distinction between planning-level and operational-level decisions is inconsistent with every other case in this state on the subject. Starting with

20/ Decisions under the Federal Tort Claims Act have made the same point. See, e.g., PAYTON v. UNITED STATES, 679 F.2d 475 (5th Cir. 1982) (en banc) (decision to parole prisoner protected, but not negligent implementation); REMINGA v. UNITED STATES, 631 F.2d 449 (6th Cir. 1980) (negligent publication of aeronautical chart showing control tower in wrong place); SAMI v. UNITED STATES, 617 F.2d 755 (D.C. Cir. 1979) (negligent transmission of erroneous message, resulting in plaintiff's arrest).

COMMERCIAL CARRIER, this Court has repeatedly declined to hold that all discretionary actions are protected, holding instead that only those discretionary decisions at the planning level are entitled to protection, 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 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. Consequently, that court opted for any 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. . . . 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 Brethren Church v. State, [67 Wash.2d 246, 407 P.2d 440 (1965)] as a useful tool for analysis.21/

By our count, this Court has returned to the sovereign immunity question eight times since COMMERCIAL CARRIER. Every one of these decisions has drawn the identical distinction between planning-level and operational-level decisions. In DEPARTMENT OF TRANSPORTATION v. WEBB, ____ So.2d ____ (Fla. 1983) (1983 FLW SCO 323), this Court emphasized that the failure to place warning signs at a railroad crossing which is known to be dangerous, and the failure to maintain that crossing, are "operational-level functions" not protected by the sovereign immunity doctrine.22/ In CITY OF ST. PETERS-

21/ Even before COMMERCIAL CARRIER, this Court's historic decision recognizing the potential liability of municipalities--HARGROVE v. TOWN OF COCOA BEACH, 96 So.2d 130 (Fla. 1957) (en banc)--was a case involving negligence by a police officer at the operational level.

22/ The WEBB opinion approves in relevant part the district court's declaration that operational-level activities are not protected even if they

BURG v. COLLOM, 419 So.2d 1082, 1083 (Fla. 1982), this Court emphasized: "Each of these [sovereign immunity] cases involves an interpretation of 'operational-level' as distinguished from 'judgmental planning-level' functions of government . . . ." In INGHAM v. STATE DEPARTMENT OF TRANSPORTATION, 419 So.2d 1081, 1082 (Fla. 1982), 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 DEPARTMENT OF TRANSPORTATION v. NEILSON, 419 So.2d 1071, 1075 (Fla. 1982), this Court said that "Commercial Carrier established that discretionary, judgmental, planning-level decisions were immune from suit, but that operational decisions were not so immune." That language could not be more clear.

Likewise in RUPP v. BRYANT, 417 So.2d 658, 663 n.11 (Fla. 1982)--a case which involved the issue of personal liability--this Court noted: "Commercial 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." Thus, the decision of a principal and school teacher not to supervise a club's activity, though obviously involving discretion, was not protected: "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). And 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'

involve some planning: "[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." DEPARTMENT OF TRANSPORTATION v. WEBB, 409 So.2d 1061, 1064 (Fla. 1st DCA) (per curiam), rev. denied, 419 So.2d 1200 (Fla. 1982).

governmental functions . . . ." Finally, in DISTRICT SCHOOL BOARD OF LAKE COUNTY v. TALMADGE, 381 So.2d 698 (Fla. 1980)--a case also involving the issue of personal liability--this Court held to be actionable the negligent decision of a teacher to order a student to perform on a trampolene, despite the obvious discretion involved in such a decision.

In each of these cases, this Court has repeated without variation the distinction between planning-level and operational-level decisionmaking which initially was drawn in COMMERCIAL CARRIER. Never has this Court departed from that central distinction. And that distinction 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.[23/]

Except for the EVERTON and DUVALL decisions, every district court decision in this State has echoed the same distinction.[24/] Thus in NEWSOME v. DEPARTMENT OF TRANSPORTATION, _____ So.2d _____ (Fla. 1st DCA 1983) (1983 FLW DCA 1838), the court held that the State Department of Corrections (DOC) was not immune from liability for the conduct of an inmate

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23/ See 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). As the U.S. Supreme Court said regarding the Federal Tort Claims Act, where a statute constitutes a broad waiver of immunity, it is "inconsistent to whittle it down by refinements." UNITED STATES v. YELLOW CAB CO., 340 U.S. 543, 550, 71 S. Ct. 399, 95 L. Ed. 523 (1951).

24/ The following cases draw an explicit distinction between planning-level and operational-level decisions. See, e.g., BRYAN v. STATE DEPT. OF BUSINESS REGULATION, _____ So.2d _____ (Fla. 1st DCA 1983) (1983 FLW DCA 2241); TRIANON PARK CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, 423 So.2d 911, 912 (Fla. 3rd DCA 1982); WILLIS v. DADE COUNTY SCHOOL BOARD, 411 So.2d 245, 246 (Fla. 3rd DCA), rev. denied, 418 So.2d 1278 (Fla. 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) (per curiam), rev. denied, 411 So.2d 380 (Fla. 1981); WOJTAN v. HERNANDO COUNTY, 379 So.2d 198, 199 (Fla. 5th DCA 1980); WALLACE v. NATIONWIDE MUTUAL FIRE INS. 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).

assigned to the Department of Transportation (DOT), even though the DOC's supervisory responsibility involves some discretion: "DOC is not entitled to the shield of sovereign immunity in carrying out its statutory operational duty of supervising such inmates . . . ." Likewise in SMITH v. DEPARTMENT OF CORRECTIONS, ____ So.2d ____ (Fla. 1st DCA 1983) (1983 FLW DCA 1155), the court found actionable the assignment of a dangerous prisoner to a minimum custody facility: "The fact that prison officials have some discretion in assignments of inmates does not require immunity, Rupp v. Bryant, 417 So.2d 658 (Fla. 1982)." In TRIANON PARK CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, 423 So.2d 911 (Fla. 3rd DCA 1983), the court found actionable certain acts and omissions in inspecting a condominium building, though of course the inspectors enjoy enormous discretion. Accord, BRYAN v. STATE DEPT. OF BUSINESS REGULATION, ____ So.2d ____ (Fla. 1st DCA 1983) (1983 FLW DCA 2241). And 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.

In WILLIS v. DADE COUNTY SCHOOL BOARD, 411 So.2d 245 (Fla. 3rd DCA), rev. denied, 418 So.2d 1278 (Fla. 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 a planning function, the actual filling of that position is operational." Yet the hiring of a teacher obviously involves enormous discretion--no less discretion than that exercised by the police officers in this case--and the exercise of that discretion is no less important to society. In PITTS v. METROPOLITAN DADE COUNTY, 374 So.2d 996 (Fla. 3rd DCA 1979), the failure of security guards adequately to patrol the

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parking lot of a hospital was held to be actionable--even though of course the manner of patroling was committed to their discretion.

Likewise 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, even though of course the school board's administration of the buses involved enormous discretion. And any parent will tell you that the safety of a school bus system is no less important to society than the effective operation of the police force.[25/] 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 recovery.

b. The Rationale of COMMERCIAL CARRIER.

Moreover, we think that all of these decisions were dictated by the analytical framework established in COMMERCIAL CARRIER. COMMERCIAL CARRIER adopted the four-pronged test of EVANGELICAL UNITED BRETHREN CHURCH OF ADNA v. STATE, 67 Wash.2d 246, 407 P.2d 440, 445 (1966) (en banc). One part of the EVANGELICAL test is that, even if the conduct in question does implicate some important governmental policy, that conduct must itself be considered "essential to the realization or accomplishment of that policy." It is simply inconceivable that the individual act of an individual

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25/ The same reasoning applies to the failure to put warning devices at a known dangerous railroad crossing or unmarked culvert, FOLEY v. STATE DEPARTMENT OF TRANSPORTATION, 422 So.2d 978 (Fla. 1st DCA 1982); REINHART v. SEABOARD COASTLINE R. CO., 422 So.2d 41, 44 (Fla. 2nd DCA 1982), rev. denied, 431 So.2d 989 (Fla. 1983); or to the decision about where to locate power lines, GRIFFIN v. CITY OF QUINCY, 410 So.2d 170 (Fla. 1st DCA 1982); or 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); or even to the decision of a county exterminator, in the exercise of his discretion, to depart from common practice and to kill a stray cat within three days of its discovery, PAUL v. OSCEOLA COUNTY, 388 So.2d 40 (Fla. 5th DCA 1980).

police officer in an individual case can be considered "essential" to the realization or accomplishment of a general policy. That was the conclusion of the court in BELLAVANCE v. STATE, 390 So.2d 422, 424 (Fla. 1st DCA 1980), rev. denied, 399 So.2d 1145 (Fla. 1981)--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]."[26/] The identical reasoning is found in TRIANON PARK CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, 423 So.2d 911, 913 (Fla. 3rd DCA 1983).[27/]

In the EVERTON case adopted in DUVALL, the district 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." 426 So.2d at 1003. 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 mate-

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26/ The holding of BELLAVANCE was endorsed in SMITH v. DEPARTMENT OF CORRECTIONS, ____ So.2d ____ (Fla. 1st DCA 1983) (1983 FLW DCA 1155). Cf. KIRKLAND v. STATE, 424 So.2d 925 (Fla. 1st DCA 1983) (remand for development of factual record on decision to release a mental patient on a "buddy pass").

27/ There the court held that the failure properly to enforce a building code does not satisfy the EVANGELICAL test adopted in COMMERCIAL CARRIER: "Inspections, plan reviews and certification for this particular condominium did not change the overall direction or policy of the general program of building inspection in the city." Accord, BRYAN v. STATE DEPT. OF BUSINESS REGULATION, ____ So.2d ____ (Fla. 1st DCA 1983) (1983 FLW DCA 2241).

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rially affect the ends and purposes" of the law-enforcement system. If that were true--if every discretionary operational-level decision to some marginal extent were seen to further policy objectives--then of course every discretionary operational-level decision would be protected. And of course, almost every governmental decision involves some discretion. As one court said: "Unless government officials (at no matter of eschelon) make their choices by flipping coins, their acts involve discretion in making decisions." SMITH v. UNITED STATES, 375 F.2d 243, 246 (5th Cir.), cert. denied, 389 U.S. 841, 88 S. Ct. 76, 19 L. Ed.2d 106 (1967).

We think that if the legislature--or perhaps the governor or attorney general (or even a mayor or police chief)--made a decision to prescribe specific mandatory guidelines governing the arrest decision, and in the process removed all discretion from individual police officers in making that decision, such a policy judgment would satisfy the EVANGELICAL test and would be entitled to immunity even if an officer's strict and non-negligence compliance with such guidelines resulted in injury.[28/] In the words of the EVERTON court, that kind of decision "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." Such a decision, made at the planning level, would be entitled to protection. But no such decision was made in this case. This case involved one isolated street-level decision by an individual officer, which cannot possibly "materially affect the ends and purposes" of the law enforcement system.

c. The "Trap" Theory of Liability.

Finally, we would point out that the decision in this case also conflicts

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28/ See WONG v. CITY OF MIAMI, 237 So.2d 132 (Fla. 1970), cited in COMMERCIAL CARRIER, 371 So.2d at 1019-20 (mayor's decision to withdraw police from riot area protected). Accord, SILVER v. CITY OF MINNEAPOLIS, 284 Minn. 266, 170 N.W.2d 206 (1969), cited in COMMERCIAL CARRIER at 1022.

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with this Court's holdings that even a governmental decision which might otherwise be entitled to protection will not enjoy such protection if the decision is made with conscious knowledge that it creates a danger to individuals. Thus 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." Accord, CITY OF ST. PETERSBURG v. COLLOM, 419 So.2d 1082, 1083, 1086 (Fla. 1982). We think this case fits squarely within that qualification, even if in some abstract sense the decision of an officer not to make an arrest is the kind of policy-making decision otherwise entitled to protection.

In this particular case, 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 killed or injured in this case. In this case the police officers knew or should have known that this cab driver was looking for a house in the wrong city; that the keys to the drunk's car had not been secured; and that this drunk had been returned to his car. They also should have known that a drunk driver with access to a car is an accident waiting to happen--a classic definition of a trap for unwary motorists. The negligent decisions made by the officers in this case created that trap awaiting all the unsuspecting drivers on the road--by putting a drunk driver on the road with them.

We have demonstrated that the EVERTON and DUVALL decisions conflict with every other case concerning the sovereign immunity doctrine decided since COMMERCIAL CARRIER; conflict with the underlying analytical framework adopted in COMMERCIAL CARRIER; and conflict with decisions of this Court holding that even governmental actions otherwise entitled to protection lose immunity if they create a known dangerous condition. Thus, if this

Court is to follow its own decisions, and those numerous district court decisions in their wake, the decision in this case must be reversed. It remains to discuss briefly the broader policy question--whether this Court should depart from its own prior decisions and make new law.

2. The EVERTON Rationale is Wrong.

There is a surface logic to the decision in EVERTON. There is a sense in which police officers may be seen as deputy mayors and deputy judges, because the guidelines within which they operate necessarily are very broad--because the exercise of discretion is inherent in their jobs--and because it might be said that they are "sovereign" in the streets. But however romantic, that characterization is extremely dangerous, and the question here is not whether police officers perform inherently "sovereign" functions on the street, but whether they perform the type of sovereign functions which the legislature intended to insulate from liability. After all, our legislature waived sovereign immunity. It concluded that the mere "sovereign" character of an activity is not enough to deny redress (except by legislative action) to people who are injured by governmental decisions.[29/] And in COMMERCIAL CARRIER, this Court expressly rejected any interpretation of the statute which would insulate from liability those functions which are inherently or uniquely governmental because they are not performed by private persons. 371 So.2d at 1016-17, citing INDIAN TOWING CO. v. UNITED STATES, 350 U.S. 61, 64-65, 76 S. Ct. 122, 124-25, 100 L. Ed. 48 (1955). Indeed, our legislative waiver of sovereign immunity expressly obliterates that distinction, by providing that government officials should be no better off than private

29/ As Justice Traynor wrote for the California Supreme Court in MUSKOPF v. CORNING HOSPITAL DISTRICT, 55 Cal.2d 211, 214-15, 359 P.2d 457, 458-59, 11 Cal. Rep. 89, 90-91 (1961), citing Borchard, Government Liability in Tort, 34 YALE L.J. 1, 4 (1924): "How [the sovereign immunity doctrine] became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.'"

individuals. Thus, the fact that private individuals typically do not make arrests (or for that matter, put out fires or inspect buildings) is simply not enough to excuse their carelessness when they injure people.[30/]

It seems to us that the central question with which this Court grappled in COMMERCIAL CARRIER--when confronted with a statute which contains no exceptions and in fact declares that the government should be just as accountable for its conduct as private individuals--was this: how to maintain the broadest scope of liability for governmental negligence while insulating from accountability only those governmental functions whose inhibition by the threat of civil liability would constitute a threat to government itself--because it would undermine the quality of those broad public policies from which derive the myriad day-to-day actions and decisions which are the concrete fabric of government. When any of those day-to-day decisions and actions themselves are careless, the system can survive their prosecution. But when the process of formulating the broad guiding principles is inhibited by the threat of civil prosecution, then government itself is threatened, and the threat to government outweighs the right of individuals to compensation for injuries negligently caused.[31/]

30/ And anyway, private individuals do make arrests. See generally Comment, Municipal Liability For Torts Committed By Voluntary Anticrime Groups, 10 FORDHAM URB. L.J. 595 (1981).

31/ As one court said regarding the Federal Tort Claims Act:

> The modern policy basis justifying sovereign immunity from suit has three principal themes. First, and most important, under traditional principles of separation of powers, courts should refrain from reviewing or judging the propriety of the policymaking acts of coordinate branches. Second, consistent with the related doctrine of official immunity, courts should not subject the sovereign to liability where doing so would inhibit vigorous decision-making by government policymakers. Third, in the interest of preserving public revenues and property, courts should be wary of creating huge and unpredictable governmental liabilities by exposing the sovereign to damage claims for broad policy decisions that necessarily

That, we think, is the essence of COMMERCIAL CARRIER. Thus, the decision quotes with approval a statement from WEISS v. FOTE, 7 N.Y.2d 579, 586, 200 N.Y.S.2d 409, 413, 167 N.E.2d 63, 66 (1960), that to allow a jury to assess "the reasonableness and safety of a plan of governmental services . . . would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts" (our emphasis). It is the plan which must be protected, not its implementation. Likewise, COMMERCIAL CARRIER cites an article which reasons that immunity is appropriate "when condemnation of the acts or omissions relied upon necessarily brings into question the propriety of governmental objectives or programs . . ." (our emphasis). 371 So.2d at 1019, citing Peck, The Federal Tort Claims Act, 31 WASH. L. REV. 207 (1956). And COMMERCIAL CARRIER then adopts the EVANGELICAL test, including the crucial question of whether or not the conduct at issue is "essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective," 371 So.2d at 1019. This is more than just a distinction between planning-level and operational-level decisions. It is a distinction

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> impact large numbers of people. Framed in different fashions, each of these themes appears again and again, alone or in combination, as a modern justification for retaining a form of immunity, under the general rationale that courts should not "interfere" with government operations and policymaking.

GRAY v. BELL, 712 F.2d 490, 511 (D.C. Cir. 1983). Under this rationale, the judicial task is "to preserve an immunity broad enough 'to [prevent] tort actions from becoming a vehicle for judicial interference' with the conduct of government." Id. at 513, citing SAMI v. UNITED STATES, 617 F.2d 755, 766 (D.C. Cir. 1979). SAMI in turn cites BLESSING v. UNITED STATES, 447 F. Supp. 1160, 1170 (E.D. Pa. 1978). Thus, government decisions are protected only if they are "fraught with foreign relations or other public policy considerations." SAMI v. UNITED STATES, supra, 617 F.2d at 767. To deny such protection would "subject the sovereign to liability where doing so would inhibit vigorous decisionmaking by government policymakers." GRAY v. BELL, supra, 712 F.2d at 511.

between two forms of governing--the protected form of making policy, and the unprotected form of implementing policy even in the necessary exercise of discretion.

From this perspective, the individual decision of a police officer cannot be protected. In light of the fundamental distinction between making policy and implementing policy, the resolution by a police officer of one isolated question does not make policy. It does resolve a dispute. It does require discretion. But as this Court said in RUPP v. BRYANT, 417 So.2d 658, 655 (Fla. 1982), it "does not involve discretion in the policy-making sense . . ." (our emphasis). It is simply inconceivable that a single judgment by a single officer on a single occasion has anything whatsoever to do with the overriding definition of governmental policy as defined by this Court in COMMERCIAL CARRIER. It is not simply a decision made at a different level of government. It is a different kind of decision.

If that kind of decision is entitled to protection, then the legislature's broad waiver of sovereign immunity will have almost no meaning at all. For if a policeman's judgments are entitled to protection, then why not a fireman's judgments, or a teacher's judgments, or a building inspector's judgments, or any discretionary judgments made by public officials at the operational level, which by definition reflect a choice or a decision by the official? Such choices inherently involve no less discretion than that exercised by the officer here. And if your house is burning, or your children go to school, or your building is unsafe, such decisions are no less important to society. If the single decision of a police officer under EVERTON is essential to the accomplishment of the law-enforcement system, then the individual decisions of these officials are no less essential to the accomplishment of the systems in which they operate. So if EVERTON is the right decision, then all of the decisions quoted above about teachers and firemen and building inspectors are wrong--

and when the legislature said that governmental officials should be liable to the same extent as private individuals, it must have meant that all people are equal only when they are driving cars.

Of course the City would turn this argument around. Just as we have contended that affirmance of the EVERTON rationale would invite all the other public officials to tag along, so the City would argue that an adverse decision would open the floodgates of litigation against police officers and other public officials who exercise discretion. The short answer is that that is a risk which the legislature accepted; it permitted people who are injured by governmental officials to sue those officials in the same way that they would sue private individuals. It said that the government--at least in the operational functions of its employees--is not entitled to any greater protection than anybody else. And thus it was the legislature which made the judgment that the possibility of an increased number of lawsuits--and the consequent risk of inhibiting public officials at the operational level--was not significant enough to deny injured people their day in court. Perhaps operational officials will become a bit more circumspect in their conduct, but that might be a good thing; it might avoid the kind of incalculable human misery which the police department occasioned in this case.

Moreover, there is no evidence that it will do so at a cost to our law enforcement system. Police officers have long operated under the risk of civil liability when they make a false arrest, and they continue to function.[32/] Police officers daily operate under the risk of discharge, or discipline, or public reprimand for their actions, and they continue to function. There is

32/ Section 812.015(3)(1), Fla. Stat. (1981), permits such an action. See HARRIS v. SOLVONIC, 386 So.2d 19 (Fla. 3rd DCA 1980); PHILLIPS v. STATE, 314 So.2d 619 (Fla. 4th DCA 1975). So do other jurisdictions. See ZIMMERMAN v. POINDEXTER, 78 F. Supp. 421 (D. Hawaii 1947); O'ROURKE v. O'ROURKE, 227 La. 262, 79 So.2d 87 (1955) (wrongful commitment); WARNER v. STATE, 297 N.Y. 395, 79 N.E.2d 459 (1948) (wrongful commitment).

no evidence that these possibilities have hurt the system of law enforcement.[33/] But on the other hand, we know with certainty that application of the sovereign immunity doctrine in this case will hurt the plaintiffs immeasureably--and with them all potential plaintiffs in actions against the government. The legislature, as interpreted by this Court in COMMERCIAL CARRIER, has struck the right balance.

In closing on this point, we should emphasize that this reasoning is not ours alone--and it is not found only in the Florida cases. We were surprised to discover that only a few jurisdictions have considered the specific question of an officer's discretion to make or not make an arrest, but (except for one case) all of those which do support us--and dozens of analogous cases support us also. We start with two cases decided under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671-80 (1970)--which of course contains an explicit exception for "discretionary" functions, §2680(a). In DOWNS v. UNITED STATES, 522 F.2d 990, 995-98 (6th Cir. 1975), the court considered whether that exception insulated the United States from liability for the decision of some FBI agents to attack a hijacked aircraft, with the result that the hijacker shot and killed his prisoners:

> We recognize that the agent was called upon to use judgment in dealing with the hijacking. Judgment is exercised in almost every human endeavor. It is not the mere exercise of judgment, however, which immunizes the United States from liability for the torts of its employees.
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> [T]he discretionary function exception, immunizes Government employees while they are formulating policy.
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33/ And there is no evidence that reversal in this case would flood the courts. Suits for false arrest do not flood the courts. And liability for acts of omission--for failing to arrest--are much harder to prove than false arrest. It is much tougher to show negligence and proximate causation in such cases. Only in a blatant case like this one can litigation be successful.

> The functions which this sparse legislative history indicates were to be excepted are those involving policy formulation, as distinguished from the day-to-day activities of persons not engaged in determining the general nature of the Government's business.
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> We believe that the basic question concerning the exception is whether the judgments of a Government employee are of "the nature and quality" which Congress intended to put beyond judicial review. . . . Congress intended "discretionary functions" to encompass those activities which entail the formulation of governmental policy, whatever the rank of those so engaged.
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> In this case, the FBI agents were not involved in formulating governmental policy. Rather, the chief agent was engaged in directing the actions of other Government agents in the handling of a particular situation. FBI hijacking policy was not being set as an ad hoc or exemplary matter since it had been formulated before this hijacking.
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> It is clear that making an arrest involves the exercise of discretion. For purposes of official immunity, however, the fiction that making an arrest is not "discretionary" is maintained because protection of personal liberties is thought to outweigh the danger of less effective law enforcement out of fear of personal tort liability. . . .
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> The prospect of governmental liability for the actions of law enforcement officers should not cause those officers less vigorously to enforce the law. The need for compensation to citizens injured by the torts of government employees outweighs whatever slight effect vicarious government liability might have on law enforcement efforts.

In reliance upon DOWNS, the court held in LIUZZO v. UNITED STATES, 508 F. Supp. 923, 930-32 (E.D. Mich. 1981) that the plaintiff had stated a cause of action against the United States after a civil rights protester was killed by members of the Ku Klux Klan in the company of an undercover FBI informant:

> The discretionary function exception immunizes the government from liability for acts or omissions of its employees while formulating policy . . . . However, day-to-day activities of persons not engaged in determining the general nature of the government's business are not excepted from the general waiver of sovereign immunity by operation of §2680(a). . . . The desirability of a convenient test for assessing whether governmental conduct amounts to the exercise of a discretionary function has led to the development of the "planning level--operational level" distinction, with only conduct falling into the former area excepted from the government's potential liability.
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> From the foregoing it is clear that any claims relating to the formulation of government policy are barred by operation of §2680(a), but that claims which arise out of the manner in which a particular situation is handled, and which are based on allegations that existing, valid regulations were wrongfully or negligently implemented are not so barred. . . . Moreover, the mere exercise of judgment does not automatically insulate the government for liability for, as the court in Downs has noted, almost every human endeavor involves the exercise of judgment to some degree.
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> The decision of [the agent's] contact agent to authorize [the agent's] participation in the mission which ended Mrs. Liuzzio's life is of the same nature--a response to a particular situation. . . . [The agent] was not formulating policy when making this decision, and his actions were not meant to guide the actions of other government officials faced with similar situations. Compare United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), cert. den. 380 U.S. 971, 85 S. Ct. 1327, 14 L. Ed.2d 268 (1965).34/

These two cases--both dealing with discretionary decisions of law-enforcement agents under a statute which explicitly exempts discretionary activities--are directly analogous to the instant case. Also instructive are those cases recognizing a cause of action against police officers either under 42 U.S.C.

34/ In FANECA, the court insulated from liability the judgments of the Deputy Attorney General of the United States and the Chief of the Executive Office of the United States Marshals in effecting the safe enrollment of a black student at the University of Mississippi, because the policy which these high-level officials formulated was meant to influence and guide the actions of other government officials in other situations. See DOWNS v. UNITED STATES, supra, 522 F.2d at 997.

§1983, or implied in the Constitution.[35/] And there are many analogous cases not involving police officers, in which various governmental officials have exercised enormous discretion at the operational level--though not discretion in formulating policy.[36/] There can be no question that the actions insulated by the district court in this case would not be protected under the FTCA.

The cases in other states support the same conclusion. We were surprised to find that there are only a few cases which address this particular issue, but Professor Jaffe's survey produced the following generalization:

> [T]here are areas, notably actions against police officers for false arrest, battery, and trespass, and actions for summary destruction of property and improper collection of taxes, where recovery has long been allowed, despite the exercise by the officers of more than a "merely ministerial" function. This is particularly clear in the case of police officers, who are called upon to make extremely difficult factual choices, and important, if unarticulated, policy decisions: for example, whether to regard certain conduct or certain appearances as sufficient evidence to arrest or search. In fact the law recognizes the discretionary element here when in its definition of the power

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35/ See SCHEUER v. RHODES, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed.2d 90 (1974); BIVENS v. SIX UNKNOWN NAMED AGENTS OF F.B.I., 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed.2d 619 (1971); MONROE v. PAPE, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed.2d 492 (1961); HOWELL v. CATALDI, 464 F.2d 272 (3rd Cir. 1972); JONES v. PERRIGAN, 459 F.2d 81 (6th Cir. 1972); CARTER v. CARLSON, 144 U.S. App. D. C. 388, 447 F.2d 358 (1971), rev'd on other grounds, 409 U.S. 418, 93 S. Ct. 602, 34 L. Ed.2d 613 (1972).

36/ See generally RAYONIER, INC. v. UNITED STATES, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed.2d 354 (1956) (negligence in method of fighting forest fire); INDIAN TOWING CO. v. UNITED STATES, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955) (negligent maintenance of lighthouse); CANADIAN TRANSPORT CO. v. UNITED STATES, 663 F.2d 1081, 1089 (D.C. Cir. 1980) (discretionary decision to refuse entry into U.S. port); MILLER v. UNITED STATES, 583 F.2d 857 (6th Cir. 1978) (negligent operation of flood gates); JACKSON v. KELLY, 557 F.2d 735 (10th Cir. 1977) (negligent performance of surgery); GRIFFIN v. UNITED STATES, 500 F.2d 1059 (3rd Cir. 1974) (negligent approval of harmful polio vaccine); EASTERN AIRLINES v. UNION TRUST CO., 95 U.S. App. D. C. 189, 221 F.2d 62, aff'd per curiam sub nom UNITED STATES v. UNION TRUST CO., 350 U.S. 907, 96 S. Ct. 193, 100 L. Ed. 799 (1955) (negligent decisions by air traffic controller); SWANNER v. UNITED STATES, 309 F. Supp. 1183 (M.D. Ala. 1970) (negligent failure to protect informant). Cf. DOE v. McMILLAN, 412 U.S. 306, 93 S. Ct. 2018, 2028, 36 L. Ed.2d 912 (1973) (publication of defamatory material). For an excellent recent discussion of the statute, see GRAY v. BELL, 712 F.2d 490, 506-514 (D.C. Cir. 1983).

> to arrest it immunizes certain "reasonable" judgments of the officer. However, the officer's immunity is limited to his reasonable actions; it is not that total immunity usual in an area classified as discretionary.

Jaffe, Suits Against Governments and Officers: Damage Actions, 77 HARV. L. REV. 209, 218-19 (1963).

Thus in SIMON v. HEALD, 359 A.2d 666, 668 (Super. Ct. Del. 1976), the court found actionable a negligent directional signal given by a police officer because, although that action was clearly discretionary, "it is one of the routine duties of a highway patrol officer to investigate cars stopped on highway shoulders and to render aid to those stranded on a highway because of accidents or mechanical failures." The court was unimpressed with the discretionary nature of the action, because "much of a police officer's conduct involves discretion. . . . Discretion is a constant factor in a police officer's day." Id.

We feel compelled to acknowledge that the only other state case we have found in this area goes the other way.[37/] However, there are a number of analogous state cases not involving police officers, but involving officials with like discretion, in which no immunity has attached. These include fire inspectors, building inspectors, licensing agents, and other kinds of officials who daily exercise enormous discretion in the performance of their functions.[38/]

37/ In ROBERTSON v. CITY OF TOPEKA, 231 Kan. 358, 644 P.2d 458 (1982), the court insulated from liability a police officer's negligent decision, made in the midst of an altercation, to remove an owner from his own house rather than the actual trespasser, after which the house burned down. Part of the opinion is based on a Kansas statute which specifically exempts a police officer from liability for his failure to enforce the law or adequately to provide police protection. However, we must acknowledge that another part does suggest that the nature and quality of the discretion exercised by the officer were deserving of protection. Obviously we disagree. There is one other case on the subject--TOMLINSON v. PIERCE, 178 Cal. App.2d 112, 2 Cal. Rep. 700 (D. Ct. App. 1960)--but that was decided under the special-duty exception which this Court rejected in COMMERCIAL CARRIER.

38/ See, e.g., BRENNEN v. CITY OF EUGENE, 285 Or. 401, 591 P.2d 719 (1979); WILSON v. NEPSTAD, 282 N.W.2d 664 (Iowa 1979); ADAMS v. STATE, 555 P.2d 235, 243-44 (Alaska 1976); COFFEY v. CITY OF MILWAUKEE,

The clear majority of states will not insulate from liability even discretionary decisions made at the operational level. That conclusion comports with the decisions of this Court and other courts in this state, and with the reasoning which underlies both the waiver of sovereign immunity and the enforcement of narrow exceptions to that waiver. The decision in this case is inconsistent with that reasoning, and it should be reversed.

C. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY REGARDING §856.011(3), FLA. STAT. (1981), REQUIRED REVERSAL OF THE JUDGMENT IN THIS CASE.

As an alternative holding, the district court also decided in this case that the trial court had erred in refusing to instruct the jury about §856.011 (3), which we have quoted earlier, which empowers an officer to send home an intoxicated person, and provides that officers who do so "shall be considered as carrying out their official duty." The district court's opinion declares: "Upon appellant's request to so instruct the jury, the court ruled that the statute did not apply and refused the request." That statement is simply wrong. We think it vitally important to review the specific context in which the statute was invoked by the City below.

The statute first came up in the opening statements of both the plaintiff and the City. The plaintiffs' counsel informed the jury that there is no provision in the statutes governing driving while intoxicated (Chapter 316) which permits a drunk driver to be sent home in a cab; but that there is a provision in the statutes governing drunkenness and vagrancy (Chapter 856) which permits the police to put a drunk into a cab (Tr. I at 47). In response, the City's counsel said in opening that as a generality the Florida statutes do permit a police officer to send a drunk driver home by commercial

74 Wis.2d 526, 247 N.W.2d 132 (1976); CAMPBELL v. CITY OF BELLEVUE, 85 Wash.2d 1, 7, 530 P.2d 234, 241 (1975). See generally 18 McQUILLIN THE LAW OF MUNICIPAL CORPORATIONS, §§53.01-02 (Rev. ed. & Supp. 1981); 2 F. HARPER & F. JAMES, THE LAW OF TORTS §29.1 n.2 (Supp. 1968).

transportation (Tr. I at 63). Then the plaintiffs called the City's police chief, and during direct examination he offered the opinion that a state statute permits a drunk driver to be sent home by commercial transportation (Tr. III at 381). A few pages later, however, the chief admitted that this statute applies not to people who are driving but to people who are disorderly (Tr. III at 387). The plaintiff then marked Chapter 856 for identification (Tr. III at 388). On cross-examination, however, the chief changed his mind again and declared that the statute does permit an officer to send a drunk driver home by commercial transportation (Tr. III at 444).

The statute next came up during direct examination of the plaintiffs' expert, who testified that in his opinion §856.011 is not a statute which is applicable to drunk drivers as opposed to vagrants (Tr. VIII at 51, 116). The statute next came up when the plaintiffs moved into evidence a copy of certain parts of Chapter 316, dealing with drunk driving (Tr. X at 515). The court said it would take the matter up in connection with jury instructions, and would consider reading the jury portions of Chapter 316. To this the City answered that it wanted to reserve the right to retender both statutes--Chapter 316 and also §856.011 (id. at 516). The trial court was not sure that §856.011 was applicable to a drunk driver (id. at 516-17), and the City answered that the specific reason that it wanted the jury to hear the statute was because the police chief had testified that he construed that statute to permit his officers to send drunk drivers home in a cab (id. at 518); in other words, the only particular reason offered for either introducing the statute or reading it to the jury was to show the police chief's state of mind. The trial court responded to that specific offer by noting that the chief already "has testified and I don't think his testimony would necessarily justify a reading to the jury the portions of the Statute. He has testified to what he considered the policy was" (id. at 518). The City answered: "True. But it might

authorize introducing the statute into evidence because there has been a lot of testimony. I believe we need to reserve that" (id.). He offered no additional reason for wanting the statute introduced or read. The trial court then agreed to allow the jury to see the statute about drunk driving (Chapter 316), and the parties went on to other matters (id. at 518-19).

The statute was next raised in an entirely different context--the context of discussing the plaintiffs' proposed jury instruction that the City might be liable for any negligence by the cab company if it had delegated a non-delegable duty to the cab company (R. 370). That discussion is found at Tr. XII at 835-42. In the course of that discussion, the City argued that because §856.011(3) empowers an officer to delegate responsibility to a cab company, the theory of non-delegable duty was inapplicable and the instruction should not be given. The trial court answered that Chapter 856 applies to vagrants and loitering, but not to drunk drivers (Tr. XII at 838-39). The City argued further that the question of whether its actions here constituted a non-delegable duty was a question of law for the court, but the court found it to be a question of fact for the jury (Tr. XII at 840-41). Thus, the court agreed to give the instruction on the non-delegable standard. At no time during this colloquy did the City ever request its own instruction on the statute, or invoke the statute for any purpose other than to obtain a legal ruling on the plaintiffs' theory of non-delegable duty, and thus foreclose any instruction on that theory.

The last mention of the statute is found at Tr. XII at 905-06, in which the City again asked the court to instruct the jury about the provisions of §856.011, but did not give any additional specific reason for wanting the jury to hear about this statute. The court denied the request. We have summarized every mention of this statute during the trial.

On appeal, the City invoked the statute only in two specific contexts. First, it resurrected the argument that the trial court erred in instructing the jury on the theory of non-delegable responsibilities because the statute allows such delegation (brief at 20-21). Second, it argued that the trial court should have directed a verdict for the City on the issue of foreseeability, in part because §856.011 negates any thesis that the legislature has specified injuries to drunk drivers sent home by public transportation as a harm for which a tortfeasor might be liable (brief at 38-39). Those were the only two contexts in which the statute was raised on appeal. At no time on appeal did the City argue that the trial court should have instructed the jury about the statute. Yet without mentioning any of the foregoing, the district court reversed the judgment with the generalization that the City had requested a jury instruction regarding the statute and the trial court had erred in declining to give it.

That point was not even mentioned in the City's brief on appeal. It is axiomatic that only those issues framed in an appellant's brief are appropriate for appellate consideration.[39/] The appellate court was not empowered to base its decision upon a point not framed by the appellant.[40/] Moreover, as we have noted, the City failed even to preserve the issue at the trial level. There the City raised the statute only in two contexts. It invoked the statute to preclude an instruction on the plaintiffs' theory of non-delegable duty, without asking for any instruction in that context. And it sought an instruction only as collateral evidence in support of the police chief's testimony about

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39/ GIFFORD v. GALAXIE HOMES OF TAMPA, INC., 204 So.2d 1 (Fla. 1967); CITY OF MIAMI v. STECKLOFF, 111 So.2d 446 (Fla. 1959); TRUXELL v. TRUXELL, 259 So.2d 766 (Fla. 1st DCA 1972); LESPERANCE v. LESPERANCE, 257 So.2d 66 (Fla. 3rd DCA 1972).

40/ See DOBER v. WORRELL, 401 So.2d 1322 (Fla. 1981); 6551 COLLINS AVENUE CORP. v. MILLEN, 104 So.2d 337 (Fla. 1958); GULF HEATING & REFRIGERATION CO. v. IOWA MUTUAL INS. CO., 193 So.2d 4 (Fla. 1967); KEYES CO. v. SHEA, 372 So.2d 493 (Fla. 4th DCA 1979).

his own state of mind in instructing his officers. It is axiomatic that the propriety of a trial court's ruling must stand or fall with the specific objection raised by the complaining party. LINEBERGER v. DOMINO CANNING CO., 68 So.2d 357, 359 (Fla. 1953). The only ground given for seeking to introduce this statute was to show the chief's state of mind. Yet the chief had testified explicitly about that state of mind anyway, and had described the statute to the jury, and had told the jury that the statute informed his state of mind--and thus introduction of the statute or a reading of the statute would have been cumulative at best. The trial court had ample discretion to keep it out on that basis.

Moreover, even if the City had requested a general instruction about the statute as evidence of the standard of care (and had preserved the point on appeal), the trial court would have been right to keep it out. The trial court felt that §856.011 applies to vagrants and loiterers, but not drivers. And of the six appellate decisions which Shepard's lists on the statute, none appears to involve a drunk driver.[41/] But even if in proper cases the statute might apply to drunk drivers, it did not in this case. Section 856.011 says that an officer can send home an "intoxicated person." And as we have noted earlier, note 11, supra, §396.072(1) also says that an intoxicated person "may" be sent home. But §396.072(1) then adds that when the intoxicated person appears to be incapacitated, he "shall" be sent to a treatment facility.[42/] The only way to reconcile the two statutes is to conclude that an

41/ FALCO v. STATE, 407 So.2d 203 (Fla. 1981); CROSS v. STATE, 374 So.2d 519 (Fla. 1979); VERNOLD v. STATE, 376 So.2d 1166 (Fla. 1979); STATE v. HOLDEN, 299 So.2d 8 (Fla. 1974); LAUXMAN v. STATE, 402 So.2d 432 (Fla. 5th DCA 1981); T.L.M. v. STATE, 371 So.2d 688 (Fla. 1st DCA 1979); SEARS v. STATE, 319 So.2d 69 (Fla. 2nd DCA 1975). The police chief also testified that he would use §316.193--not §856.011--to arrest a drunk driver (Tr. 111 at 386).

42/ A statute cannot be construed to mean other than what it plainly says. HEREDIA v. ALLSTATE INS. CO., 358 So.2d 1353 (Fla. 1978); REINO v. STATE, 352 So.2d 853 (Fla. 1977). Unless a statute says otherwise, the

officer has discretion to send home a drunk only if he does not appear to be incapacitated. If he is incapacitated, as McNally was here, he must be taken for treatment. Thus, §856.011 did not apply here.

Moreover, we should note that even if the statute were applicable here, the trial court's refusal to instruct about the statute was harmless at best. We say this because the jury heard about this statute repeatedly during the course of the trial.[43/] It was never the plaintiffs' contention in this case that an officer does not have discretion in proper cases to send home a drunk by cab.[44/] The plaintiffs' contention here was that the officer abused his discretion in failing to make an arrest in this particular case; and in the method by which he chose to send the drunk home in the cab. Thus, at best the statute was collateral to the central issues, and in any event the jury heard repeatedly that as a generality an officer does act within his discretion when he sends a drunk home in a cab.

Finally, we should note that this statute relates only to one of at least nine different theories of negligence which the plaintiffs presented to the

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word "shall" has a mandatory connotation. NEAL v. BRYANT, 149 So.2d 529, 532 (Fla. 1962); FLORIDA STATE RACING COMM'N v. BOURQUARDEZ, 42 So.2d 87 (Fla. 1949); WHITE v. MEANS, 280 So.2d 20 (Fla. 1st DCA 1973); FLORIDA TALLOW CORP. v. BRYAN, 237 So.2d 398, 309 (Fla. 4th DCA 1970). And this statute uses both permissive and mandatory language; it says that an officer "may" seek treatment for an intoxicated person, but "shall" seek treatment for an intoxicated person who appears to be incapacitated. That use of both permissive and mandatory language leaves no question that the legislature understood the difference. See BROOKS v. ANASTASIA MOSQUITO CONTROL DISTRICT, 148 So.2d 64, 66 (Fla. 1st DCA 1963).

43/ It was mentioned in two opening statements (Tr. I at 47, 63). It was specifically mentioned in the testimony of the police chief as authority for the officer's decision (Tr. III at 381, 443-44). And even apart from the specific language of the statute, there was ample testimony to the effect that an officer clearly has the discretion to put a drunk into a cab and send him home (Tr. III at 376, 381-82, 392, 408, 427-28; Tr. VI at 79; Tr. VIII at 29-31, 87-89; Tr. XI at 584, 587, 635).

44/ Indeed, the plaintiffs' expert testified flatly that the option of sending home a drunk in a cab is not per se unreasonable--only that it was unreasonable in this case (Tr. VIII at 89).

jury--the theory that the officer was wrong to send the drunk home rather than making an arrest. But there were a number of other theories of negligence which have nothing to do with the statute, which we have listed several times already. The other theories are amply supported by the evidence of record, and thus we again invoke the two-issue rule in light of the City's failure to request in writing a special verdict itemizing the various theories of negligence. The City was on notice from the outset that the plaintiffs were complaining that the officer did not make an arrest, and bore the obligation from the outset to make certain that the jury's assessment of that issue was specifically itemized in the verdict. It failed to do so, and thus it failed to preserve the point--which was not made at the trial or on appeal anyway--for appellate review.[44/]

IV
CONCLUSION

It is respectfully submitted that the opinion of the district court should be reversed, and the cause remanded to the district court for further proceedings.[45/]

44/ In closing on this point, we should note that even if the district court had been correct that the trial court committed reversible error in declining to instruct the jury about the statute, any such error at most would require remand for a new trial--and not remand for entry of judgment for the City. Thus, even if this Court should agree with the district court's assessment of this issue, a remand for a new trial is required.

45/ We have addressed in this brief the two legal conclusions advanced by the district court in its opinion. In the course of that opinion, the district court expressly noted that because of these two conclusions it would "not discuss the other issues raised." Those issues were thoroughly briefed by both parties, and were simply not resolved by the district court. For this reason, we have not addressed the other issues either. Should the City advance any of these other arguments in support of the contention that the district court was right for the wrong reason, we will do our best to address these other arguments in the space allowed us for reply. However, we would think that since the district court did not consider these issues, it would be more appropriate--should this Court agree with us that the two reasons advanced for its decision by the district court are invalid--to remand the case back to the district court for consideration of those issue which it passed the first time around.

V

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was mailed this 29th day of September, 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.

Respectfully submitted,

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