SUPREME COURT OF FLORIDA

DEPARTMENT OF CORRECTIONS OF THE STATE OF FLORIDA; J.R. REDDISH, Individually, Petitioners,	)	
vs.	:	CASE NO.#63,950
CHARLES W. SMITH and EMMA L. SMITH, his wife, Respondents.	)	

PETITIONERS' REPLY BRIEF

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Attorneys for Petitioners.

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The Respondents, in their Brief, admit that the classification of a prisoner by the Department of Corrections involves a discretionary, judgmental, planning-level function and, therefore, immune from tort liability (SEE: Pages 7, 8, 10 and 11 of Respondents' Brief). Then apparently Respondents wish to argue that even though the classification of a prisoner by the Department of Corrections is a discretionary, judgmental, planning-level function, it should not be immune from tort liability and attempt to argue with the discretionary, judgmental, planning-level decision made by the Department of Corrections, which just cannot be done under the law of the State of Florida.

The Respondents cite the case of Johnson v. State, 447 Pacific 2d 352 (Calif. 1968), cited in this Court's decision in Commercial Carrier Corp. v. Indian River Cty, 317 So.2d 1010 (1979). Respondents correctly state the fact that the case involved a sixteen year old with known homicidal tendencies, with a known background of violence, being released from custody and placed in a foster home but, as pointed out by Justice Ervin on page -5- of his Opinion (App. 26), the California Supreme Court stated such action by the "California Youth Authority properly exercised its discretion to release a youthful offender;". Respondents' argument losses all merit (if it had any to begin with) compared to the instant case when Respondents set forth the fact that the California Youth Authority had knowledge of the youth's homicidal tendencies and violent character but failed to tell the foster parents "when there was full and ample opportunity to do so." In the Johnson, supra, case there were factual allegations of negligence and the failure to tell the foster

parents after there was a planning-level function or planning-level decision made to release the youth. There is no factual similarity between the Johnson, supra, case and the instant case as relates to the failure to do something after the discretionary, judgmental, planning-level decision to classify (reclassify) the prisoner was made by the Department of Corrections. The Department of Corrections made a discretionary, judgmental, planning-level decision only. The Department of Corrections did not subsequently place the prisoner in anyone's home. The prisoner escaped almost two years after the classification by the Department of Corrections. Hence, the subsequent ministerial actions complained of in the Johnson, supra, case are just not present in any form in the instant case.

Respondents further attempt to argue with the discretionary, judgmental, planning-level decision of the Department of Corrections in classifying (reclassifying) the prisoner was simply one that the Respondents do not agree with (is without any merit because that is the very reason that the reclassification is not the subject of tort liability and is immune so that the Department of Corrections will not be second guessed when it makes a discretionary, judgmental, planning-level decision). There are absolutely no facts alleged of any action by the Department of Corrections that it violated any statute, rule or regulation or anything else and, as pointed out on Page -9- of Petitioners' original Brief, the Trial Court gave the Respondents (Plaintiffs at that time) ample opportunity to amend their Complaint to allege some factual basis to state a cause of action and the Respondents failed to do so and subsequently elected not to amend the Complaint further and the Second Amended Complaint was dismissed with prejudice.

This Court clearly held in Harrison v. Escambia County School Board, 434 So.2d 316, Case No.#62,629; July 7, 1983, that the decision of the school board where to place a school bus stop was a discretionary, planning-level decision and, therefore, immune from tort liability and further held that there were no allegations of fact or insufficient allegations of fact to state a cause of action. This Court clearly holding that if there were subsequent actions taken after a discretionary, judgmental, planning-level decision has been made, that there must be allegations of fact sufficient to state a cause of action and that mere generalities and conclusions would not be sufficient.

It is respectfully submitted that Plaintiffs' (Respondents) Second Amended Complaint in the instant case is utterly devoid of any facts to state a cause of action and that any statements contained therein are mere generalities or vague conclusions.

We would respectfully refer this Court to the Opinion of Judge Thompson when he discusses the Commercial Carrier, supra, citing of the four-point test adopted by Evangelical United Brethren (67 Wash. 2d 246; 407 P.2d 440; 1965) case and his succinct and analytical, point by point, analysis of the facts in the instant case to the four-point test adopted by this Court, and clearly showing that all four points are answered in the affirmative and why they are answered in the affirmative.

Respondents' argument again attempts to second guess or criticize the discretionary, judgmental, planning-level decision of the Department of Corrections in the classification of a prisoner and, therefore, being immune from tort liability. Respondents state once again that

"...a prisoner was classified through the normal channels pursuant to DOC plan of reclassification, there could be no question that the Department would have immunity just because injury results." Respondents go on to argue that there is a valid policy reason for the sovereign immunity but then attempt to argue that "...reclassification outside of normal channels should be subject to tort liability." Plaintiffs fail in their Complaint to allege factually that any reclassification was outside of normal channels and fails to point out or to show in any way in their Complaint (Second Amended Complaint) that was dismissed wherein the Department of Corrections deviated from "normal channels" or procedure by alleging any factual matters in this regard. The Respondents merely attempt to argue something that doesn't exist; that was not alleged; did not take place; and amounts to improper and inappropriate argument. Again, if the Respondents had something to say or allege in their Complaint, they should have done so when they were given complete and ample opportunity to do so and they elected not to further amend their Complaint (Second Amended Complaint).

The Respondents, in discussing this Court's decision of Department of Transportation v. Neilson, 419 So.2d 1071 (1982), again state that the reclassification (and we would insert the classification) of a prisoner, is a planning-level function. But then Respondents wish to engage in some hypothetical and factually inconsistent argument that the failure to follow "such a plan" should be the basis of a suit. The Respondents never define what the Respondents mean when they say "failure to follow such a plan" and there is nothing in Respondents'

Second Amended Complaint alleged about failure to follow such a plan. This constitutes argument without any basis therefor. As we stated on Page -12- of Petitioners' initial Brief, this case is a simple issue of the Department of Corrections (prison authority) classifying a prisoner under the police power of the state, in an appropriate and proper manner, there being no allegations, factual or otherwise, to the contrary, and that this exercise of the police power by the Department of Corrections was simply a discretionary, judgmental, planning-level function, immune from tort liability, and we would reiterate the continuing argument we made pertaining to the Harrison, supra, case.

Respondents in citing the Bellavance v. State, 390 So.2d 422 (Fla. 1st DCA, 1980; Cert. Denied) decision, set out that the Bellavance case and "the present case are not identical", is certainly correct and had the Respondents further stated that there is nothing similar, legally or factually between the "present" (instant) case and the Bellavance case is equally true. The Bellavance, supra, case involved a mental patient being released by an individual doctor against the recommendation and report of the staff that he should not be released two days before his release and the staff report warning of the patient's then homicidal tendencies. We also argued this point and, without consuming additional pages herein, would invite this Court's attention to Petitioners' Appendix at Pages 8 and 9, Motion for Rehearing and for Clarification En Banc, where a more exhaustive discussion is made of the complete dissimilarity of the Bellavance case to the instant case may be found, including the statement by the 1st District Court of Appeal

in the Bellavance case that they "assume but do not decide that the Complaint states a cause of action" (page 423).

Respondents conclude their argument by again asking this Court, even though they admit that the classification of a prisoner is a discretionary, judgmental, planning-level function of the Department of Corrections, to ignore the law of the State of Florida that such a decision is immune from tort liability and to violate this Court's decision of the law of the State of Florida and to allow a second guessing contrary to this Court's announced law of the State of Florida in Harrison, supra, and what would require the Department of Corrections to decide classification of prisoners under threat of liability in the event a judge or jury at some later date might determine that another classification could have been made.

In short, Respondents would ask this Court to reverse itself on all of its now legion number of opinions on the question of a governmental body's discretionary, judgmental, planning-level function.

WHEREFORE, Petitioners respectfully request this Court to quash the decision of the First District Court of Appeal and to reinstate the Dismissal With Prejudice of the Trial Court in accordance with the law of the State of Florida. The certified question might then properly be answered by this Court that the classification of a prisoner by the Department of Corrections is a discretionary, judgmental, planning-level function and the only circumstances wherein such classification would give rise to tort liability would be if a proper factual basis were asserted and substantiated wherein the Department of Corrections violated

a statute or a rule or regulation, such might give rise, depending upon the facts, to liability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing PETITIONERS' REPLY BRIEF has been furnished to: KENNETH VICKERS, ESQ., Attorney for Respondents, 437 E. Monroe Street, Jacksonville, Fla. 32202; to MIGUEL A. OLIVELLA, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Fla. 32301; and to BARRY RICHARD, ESQ., Roberts, Baggett, LaFace, Richard & Wiser, P. O. Drawer 1838, Tallahassee, Fla. 32302, by U.S. Mail, this 6th day of October, 1983.

Attorney