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IN THE SUPREME COURT OF THE STATE OF FLORIDA

LEILA CARTER, mother and natural guardian of CHARLES DURHAM, a minor Petitioner, vs. CITY OF STUART, and AETNA CASUALTY & SURETY COMPANY Respondents	)	Case No. 64,001

A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

AMICUS CURIAE BRIEF ON BEHALF OF FLORIDA LEAGUE OF CITIES, INC.

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INTRODUCTION

The Florida League of Cities, Inc., appears as amicus curiae for the purpose of representing the interests of Florida municipalities and assisting the Court in making its determination of a question of tremendous importance to all municipalities in Florida.

This brief, which supports the position of the Respondent, City of Stuart, considers the issue of whether, under Sec. 768.28, Fla. Stat., a city's failure to enforce a valid ordinance is a planning decision as opposed to an operational one.

The statement of the case and facts in Respondent's, City of Stuart, brief is adopted in this brief.

II.

QUESTION CERTIFIED

WHETHER A CITY'S FAILURE TO ENFORCE A VALID ORDINANCE IS A PLANNING DECISION AS OPPOSED TO AN OPERATIONAL ONE.

III.

ARGUMENT

In Marth v. City of Kingfisher, 98 P. 436 (Okla. 1908), the Supreme Court of Oklahoma held that a municipal corporation was not liable for its failure to exercise its governmental power to enact an ordinance prohibiting horse racing upon its streets, nor could it be held liable for failure to enforce such an ordinance after it was enacted. Its reasoning:

> The condition of the street or walk, ..., is one thing, and the manner of its use by the public is quite a different thing. For its safe condition the City is responsible, but for its unlawful and improper use it is not .... The government does not guarantee its citizens against all the casualties incident to humanity, and cannot be called upon to compensate by way of damages its inability to protect against such accidents and misfortunes. Id. at 422.

While the nature and extent to which a municipality may be held liable in tort has been altered since Marth was decided in 1908, the fact remains that the rationale behind the Court's refusal to subject a municipality to tort liability for its failure to enforce an ordinance has steadfastly endured and has remained imminently timely: the government should not be financially responsible for the misdeeds of the private sector simply because it is trying to safeguard the general public by regulatory action. Initially, local government's protection from tort liability for the failure to enforce an ordinance was embodied in the governmental-proprietary distinction of government's activities, Rhyne, The Law of Local Government Operations, Sec. 32.10 (1980). Subsequently, the

public duty-private duty distinction precluded the municipality's liability for its failure to enforce an ordinance. Modlin v. City of Miami, 201 So.2d 70 (Fla. 1967). While these doctrines did not survive the enactment of Sec. 768.28, Fla. Stat., Amicus respectfully submits that under present law a municipality may not be held liable for its failure to enforce an ordinance. Liability under these circumstances would effectively take the administration of municipals affairs out of the hands of municipal officers and place it in the hands of the courts and juries, and thus would violate the doctrine of separation of powers.

The Legislature, in waiving the state's sovereign immunity, decreed that governments would henceforth be liable for its employees' negligent actions under circumstances in which the government, "if a private person, would be liable to the claimant in accordance with the general laws of this state ...", Sec. 768.28(1), Fla. Stat. Thus, government was liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances ...", Sec. 768.28(5), Fla. Stat. In order to bring fairness, equality, and consistency to the area of governmental tort liability, the Legislature brought municipalities within the ambit of the waiver statute, thus making tort liability of the state and its political subdivisions coextensive. Sec. 768.28(2), Fla. Stat., Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981).

In Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), the issue before the court was the scope of the waiver

of sovereign immunity resulting from the enactment of Sec. 768.28, Fla. Stat.[1] The Court, finding the negligent maintenance of a traffic light or a traffic sign, or the improper maintenance of the painted letters "stop" on the pavement of a highway, could subject the government to tort liability, held that Sec. 768.28, Fla.Stat., envinced a legislative intent to waive sovereign immunity on a broad basis. However, the Court went on to conclude that certain "discretionary" governmental functions nevertheless remained immune from tort. This concept of immunity is not necessarily predicated on the sovereign character of government (ie. the king can do no wrong); rather, it is bottomed in the concept of separation of powers which will not permit the substitution of the decision by a judge or jury for the decision of a governmental entity:

> Public policy and maintenance of the integrity of our system of government necessitate this immunity, however unwise, unpopular, mistaken or neglectful a particular decision or act might be. 371 So.2d at 1019 ... (C)ertain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance. Id. at 1022.

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1. Absent allegations that the City created a known dangerous condition which was not readily apparent to one who could be injured thereby, that the city had knowledge of the presence of people likely to be injured, and the city did not take steps to avert the danger or to warn persons who may be injured by the danger, Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982); City of St. Petersburg v. Collum, 419 So.2d 1082 (Fla. 1982); Ralph v. City of Daytona Beach, __So.2d__, (Fla. Case No. 62,094, 2/17/83), Commercial Carrier governs the case sub judice. Notwithstanding said allegations, the Neilson doctrine does not, and should not, apply under these circumstances because the doctrine is predicated upon the law of premise liability which, in turn, contemplates ownership or maintanance of the premise on which the dangerous instrumentality was located.

In order to identify "discretionary" functions, the Commercial Carrier Court adopted the analysis of Johnson v. State, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968), which distinguishes between "planning" and "operational" level decision-making by governmental entities. Additionally, the court commended utilization of the preliminary test found in Evangelical United Brethren Church v. State, 67 Wash.2d 246, 407 P.2d 440 (1965):

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
> (2) Is the questioned act, omission, or decision 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?
> (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
> (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? Id. at 445.

371 So.2d at 1022. If these preliminary questions can be answered in the affirmative, then the challenged act, omission, or decision can be classified as a discretionary governmental process and thus immune. Id. at 1019.

The enforcement of an animal control ordinance meets the Evangelical test. The enforcement of the City's animal control ordinances clearly involves a basic governmental policy; the exercise of the City's police power to protect the public from injury and damage. The scheme of the City's animal control ordinance clearly indicates a policy finding that animals may pose a danger or threat to the community and that the most

reasonable manner in which to protect the health and safety of its citizens is through the use of an animal control officer. Thus, the actions of the officer are essential to the realization of the City's policy.

The animal control officer exercises basic policy judgment in enforcing the animal control ordinance. The enforcement of the animal control ordinance is nothing more or less than the exercise of the City's police power. Thus, questioning said enforcement necessarily raises the issue of government's proper use of its police power. Neilson, 419 So.2d at 1077; Wong v. City of Miami, 237 So.2d 132 (Fla. 1970). Discretion is inherent to the concept of enforcement of laws. This is because full enforcement of the law is not a realistic expectation. Countless limitations preclude the possibility that the animal control officer will find, capture, and impound all animals roaming at large (ie. achieve full compliance). Limitations of time, personnel, equipment, workload, ingress and egress to private property, and budgets force the development of priorties, Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983). As articulated in Hernandez v. City of Miami, 305 So.2d 277 (Fla. 3rd DCA 1974):

> Inherent in the right of the City ... to exercise its police powers is its right to determine the strategy for deployment of those powers, and the sovereign authorities ought to be left free to exercise their discretion without worry over possible allegations of negligence. Id at 278.

Thus, the practical impossibility of full enforcement, in and of itself, dictates that the animal control officer will exercise discretion while

enforcing the City's animal control ordinance. The officer's decision to impound or not to impound an animal may turn on a variety of legitimate considerations: representations made by the complaining party vs. his own observations; assurances made by the owner of the dog that the dog will be, or was, properly confined; whether or not his truck or the pound is already full of stray animals; whether or not, in his opinion, a more vicious animal is located around the block and time will not permit the capture of both dogs. In sum, countless concerns may govern the decision to impound or not to impound. And, these concerns must be addressed by the animal control officer. Additionally, the fact that the animal control officer made the decision not to impound the animal did not, in and of itself, make the decision an operational function, Neilson, 419 So.2d at 1077. The decision need not be made within the four walls of city hall:

> We reject the idea that any planning level function must occur back at headquarters and that any decision made on the scene must necessarily be operational. Sometimes, only persons in the field can make effective plans. Elmer v. City of St. Petersburg, 378 So.2d 825, 827 (Fla. 2nd DCA 1979).

Lastly, the City clearly has the requisite lawful authority to pass and enforce an animal control ordinance. By statute, the City may exercise any power for a municipal purpose, Sec. 166.021(1), Fla. Stat. Municipal purpose is defined as "any activity or power that may be exercised by the state or its political subdivisions", Sec. 166.021(2), Fla. Stat. The Courts have held that the Legislature may, in its exercise of the police power of the state, constitutionally enact statutes governing the control

of animals. Gill v. Wilder, 95 Fla. 901, 116 So. 870 (1928). Alternatively, the City has the power to enact and enforce animal control ordinances by virtue of Sec. 168.09, Fla. Stat. (repealed), see Sec. 166.042, Fla. Stat.

While it is the position of Amicus that the enforcement of an animal control ordinance meets the Evangelical test, Amicus would respectfully submit that the Commercial Carrier Court intended the Evangelical test to be a preliminary inquiry:

> If, however, one or more of the questions called for, or suggest a negative answer, then further inquiry may well be necessary, depending upon the facts and circumstances involved. 371 So.2d at 1021.

The Commercial Carrier Court, in adopting the analysis of Johnson v. State, supra, opted for an analysis predicated on policy considerations by adopting a test articulated in Lipman v. Brisbane Elementary School District, 55 Cal.2d 224, 11 Cal.Rptr. 97, 359 P.2d 465 (1961):

> Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which government liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits. Id. at p. 467.

371 So.2d at 1021.

While the importance of enforcing an animal control ordinance may appear slight, the fact remains that the function addressed in the case sub judice is vitally important to the public. The enactment and

enforcement of ordinances is a pure exercise of the City's police power. The sphere of governmental functions herein addressed strikes at the very source of government's ability to govern. A government may perform a number of functions for its citizenry. However, the act of regulating private conduct to protect the health, safety, and welfare of the public is, above all, the very essence of government.

The extent to which governmental liability will impair the free exercise of this function is apparent. To allow a judge and jury to second-guess the wisdom of the City's enforcement practices will literally cripple the City's attempts to promote the health, safety, and welfare of its citizens. Each police power ordinance enacted by the City will subject the City to a greater potential liability if it fails to enforce the ordinance passed. The risk of liability will increase proportionately with the City's desire to promote the general health, safety, and welfare. This risk dictates that a city seriously consider the curtailment of exercising its police power which, in turn, will effectively chill its attempts to provide for the health, safety, and welfare of its citizens and taxpayers.

Does the injured party have alternative remedies? In the case sub judice, the City did not own the dog; it did not own and rent the house to the dog's owner; nor did it own the premises on which the injury took place. The Plaintiff could have brought actions against the dog's owner, the owner's leasor, or the owner of the premises where the injuries were incurred. The ability to secure redress was clearly available.

Notwithstanding the Lipman considerations, the most compelling consideration in the case sub judice is the fact that a municipality, by ordinance, regulates private conduct in a variety of settings and a rule of law that would subject the municipality to tort liability for its failure to enforce its animal control ordinance would apply equally to every attempt by the municipality to exercise its police power. Thus, the City's liability for failure to enforce ordinances, taken to its logical conclusion, would place before a judge or jury the question of whether the City was negligent in the enforcement of its traffic ordinances, its sign ordinances, its alcoholic beverage ordinances, its fire prevention ordinances, its garbage and trash ordinances, its tree and shrub ordinances, its drug abuse and control ordinances, or its peddler's ordinances. Additionally, Sec. 768.28, Fla. Stat., makes no distinction between the state and its political subdivisions for purposes of tort liability. Thus, a rule that would subject the municipality to tort liability for its failure to enforce its animal control ordinances would apply equally to state agencies that enforce Florida law. The potential list of state agency enforcement functions that would be subjected to such a rule of law would be limited only by the extent to which the Legislature sought to regulate private conduct in order to protect the health, safety, and welfare of the general public.

Certain appellate courts have recognized the inherent irrationality of effectively making government financially responsible for the misdeeds of private persons simply because it sought to safeguard the general

public by regulatory action. In Elliot v. City of Hollywood, 399 So.2d 507 (Fla. 4th DCA 1981), the Court held that the City's alleged failure to enforce a bush and hedge ordinance was a planning level decision for which the City was immune from tort liability. Speaking for the Court, Judge Glickstein, quoting the trial court, stated:

> ...The Plaintiff argues that the Commercial Carrier Corp v. Indian River County, 371 So.2d 1010 (Fla. 1979) decision allows such suit against a city on the basis that once an ordinance is enacted, the enforcement of such ordinance is merely ministerial.... Does the mere enactment of a municipal ordinance make the enforcement of that ordinance a ministerial function of government? For example, if a speeder caused an accident, is the City liable for failure to enforce its speed limits? An affirmative response would impose an unrealistic duty upon the city to discover all municipal violations and enforce all municipal ordinances with equal fervor. Such a task would have the effect of limiting the enactment of municipal ordinances for fear that the more ordinances enacted the greater the duty of the muncipality to enforce them.... Id. at pp 508-509.

And, in Everton v. Willard, 426 So.2d 996 (Fla. 2nd DCA 1983) the Court held that the County was immune from liability for death and injuries sustained in a vehicular collision caused by a motorist immediately following the motorist's detainment by a deputy sheriff wherein the deputy sheriff issued the motorist a citation thus allowing him to proceed rather than detaining and arresting him for intoxication. Adding that the deputy's act involved an exercise of discretion which was inherent both in the nature of enforcement and in the implementation of a basic planning level activity, Judge Cambell, speaking for the Court, opined:

> We, therefore, determine that the proper planning and implementation of a viable system of law enforcement for

> any governmental unit must necessarily include the discretion of the officer on the scene to arrest or not to arrest as his judgment at the time dictates. When that discretion is exercised, neither the officer nor the employing governmental entity should be held liable in tort for the consequences of the exercise of that discretion. Id. at pp 1003-1004.

Likewise, in Neuman v. Davis Water & Waste, Inc., 433 So.2d 559 (Fla. 2nd DCA 1983), the Court held that the Department of Environmental Regulation could not be subjected to suit predicated on its alleged negligence in policing the design, installation, and operation of a sewage treatment facility. Judge Ott, speaking for the Court, observed:

> (C)ertain essential, fundamental activities of government must remain immune from tort liability so that our government can govern.... We perceive the pure exercise of the police power to be the clearest illustration of where to allow tort liability would strike at the very foundation of the power to govern. Id at 562 (citation omitted).... The most important factor to consider is that by imposing rules and regulations and deciding when and where or what to inspect, D.E.R. is exercising the police power of the state, a purely governmental function which historically has enjoyed immunity from tort liability.... If we were to hold D.E.R. liable here we would, by analogy, be requiring a law enforcement officer to be posted on every street corner. Any time a crime or other violation of law resulted in injury to person or property, a judge or jury would have to second guess the reasonableness or adequacy of the police action. Our legislature enacts traffic and penal laws, but law enforcement agencies cannot guarantee that these laws will be obeyed. Government cannot become the insurer of those injured when its laws and regulations are broken or safety measures it imposes are ignored by others. Id. at 563 (citations omitted).

The common thread throughout each of these decisions; indeed, the common concern expressed is that an unrealistic duty will be placed upon governments to ensure the health, safety, and welfare of each individual citizen rather than to promote the health, safety, and welfare of the general public. As articulated by Judge Letts, in Wallace v. Nationwide Mutual Fire Insurance, 376 So.2d 39, 40 (Fla. 4th DCA 1979):

> (T)he possible permutations resulting in the government bearing the financial responsibility for the misdeeds of the private sector, simply because it is trying to safeguard the general public by regulatory action, is staggering.

In sum, Petitioner seeks to subject the City to tort liability for the City's alleged negligent exercise of its police power. In other words, anytime a crime or other violation of law resulted in injury to person or property, a judge or jury would have to second guess the reasonableness or adequacy of the police action. This would effectively take the administration of municipal affairs, in this case, the regulation of private conduct, out of the hands of municipal officers and place it in the hands of judge and jury. To do so would strike at the government's ability to govern; a clear violation of the doctrine of separation of powers.

CONCLUSION

Based on the policy and legal considerations enumerated herein, the Florida League of Cities, Inc., as amicus, in support of the position of the Respondents, City of Stuart, respectfully submits that the answer to the certified question should be that a City's failure to enforce a valid ordinance is a planning decision as opposed to an operational one.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U. S. mail this 5th day of September, 1983 to: Vicki J. Junod, Esquire, Attorney for Petitioners, Post Office Box 1655, Palm City, Florida 33490; Margorie Gadarian Graham, Esquire, Attorney for Respondents, Post Office Drawer E, West Palm Beach, Florida 33402; and Everett J. Van Gaasbeck, Esquire, Attorney for Respondents, Post Office Box 3406, Vero Beach, Florida 32960.

Harry Morrison, Jr.