IN THE SUPREME COURT

OF THE STATE OF FLORIDA

CASE NO. 64,001

LEILA CARTER, mother and
natural guardian of
CHARLES DURHAM, a minor,

Petitioner,

vs.

CITY OF STUART and AETNA
CASUALTY & SURETY COMPANY,

Respondents.

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

RESPONDENTS' BRIEF ON THE MERITS

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PREFACE

This is a certified question of great public interest from the District Court of Appeal, Fourth District. The Petitioner, Leslie Carter, mother and natural guardian of Charles Durham, a minor, were plaintiffs before the Nineteenth Judicial Circuit and the appellants before the District Court of Appeal, Fourth District. The respondents, City of Stuart and Aetna Casualty & Surety Company, were defendants before the trial court and appellees before the District Court of Appeal, Fourth District.

In this brief the parties will be referred to as "plaintiff" and "the City."

The symbol (R. ____) will be used to refer to the record on appeal.

STATEMENT OF THE CASE AND FACTS

The plaintiff's statement of the case and facts is not acceptable because it is incomplete and misleading. Furthermore, many "fact" statements are not supported by record references. The facts, fully stated with complete record references, are as follows:

On May 11, 1979, 8-year-old Charles Durham was bitten by a dog while the child was upon the premises of the J. D. Parker Elementary School in the City of Stuart, Florida. Bee-Hound, the animal involved in the incident, was owned by Bryan Hallstrom. Hallstrom is not a party to this action. (R. 39[17])

Hallstrom kept the mixed-breed dog at his residence located in the City of Stuart. Bee-Hound and another dog were housed on the property in a large, wire-mesh cage. The wire was embedded approximately two feet into the ground and extended approximately eight feet above the ground. (R. 38[11]) The dog was placed in that cage and the door latched on the day of the incident, but the dog escaped by chewing an opening in a board which was part of the cage door. (R. 38 [20, 23])

In August, 1978 a dog owned by Joe Pennington, Hallstrom's roommate, bit someone. (R. 61, 62) Bee-Hound was a puppy at the time. Bee-Hound was present and in the immediate area at the time of the incident. He remained on

Hallstrom's property and watched, but did not participate in the biting incident. (R. 38 [35]) (R. 61, 62)

Until the time of the attack on the plaintiff, Bee-Hound's owner had never received any report of the animal attacking any person. (R. 38[35]). Hallstrom thought the dog was not an aggressive animal. (R. 38[20]) Hallstrom considered the other animal on the premises dangerous and kept it chained inside the cage. (R. 39[19])

The City's animal control officer, Rufus Gryder, did not consider Bee-Hound a dangerous animal. (R. 37[57]) Gryder observed Bee-Hound on four occasions. The first time was in August, 1978. Then Bee-Hound simply stayed on his owner's property and only watched as another dog bit a young boy. On another occasion, Gryder accompanied an Assistant State Attorney to the Hallstrom residence to obtain information to establish a case against the dog involved in the August, 1978, incident. (R. 68[47]). During that visit, Gryder observed Bee-Hound and found him to be friendly or passive and certainly not aggressive. (R. 68[57]) The third occasion when Rufus Gryder saw the dog was in response to a complaint from a neighbor. Gryder found the dogs loose, but on Hallstrom's premises. At that time, there was no complaint of a dog bite or any other evidence of an attack on any person. (R. 68[48]) The fourth time Gryder saw the dog was after the incident involving the plaintiff. Until that time, Gryder did not have actual knowledge that Bee-Hound was a dangerous dog

because the dog had never exhibited any dangerous or vicious propensities in his presence.

Rufus Gryder was employed by the City as its animal control officer from February, 1974 through December 20, 1980. (R. 68[3]) During that time he was the only person employed by the City to perform that job. (R. 68[4]) Prior to the time Gryder was hired, complaints relating to animal control had been handled by the City's police officers. That procedure burdened police resources and led to the hiring of an animal control officer. (R. 68[25])

In performing his job Gryder patrolled the City, paying particular attention to areas where schools were located. Those areas were checked every morning and every evening as were homes in close proximity to the schools. (R. 68[23]) One animal control officer obviously could not be at each of the schools located within the City at a time when students were arriving or departing. Indeed, Gryder was not on the school premises when the attack occurred. (R. 68[13])

QUESTION PRESENTED

I.

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

ARGUMENT

The plaintiff argues that the summary judgment for the City was based upon a finding that the actions of the animal control officer were planning level, rather than operational-level functions. The trial court did not base its decision on this issue. The trial court and the Fourth District Court of Appeal determined that the failure of the City, not the employee, to enforce the ordinance was a planning or discretionary function for which it had immunity. (R. 28)

The animal control ordinance in existence prior to December, 1978, generally required citizens not to allow dogs to run at large. In December, 1978, the City Commission enacted Ordinance 792 which imposed a duty to control vicious or dangerous dogs upon the registered owners of those animals. Subsection (b) of Ordinance 792 provides:

> No vicious or dangerous dog as defined herein shall be allowed to run at large within the corporate limits of the City of Stuart or upon the premises of one other than the owner in any portion of the corporate limits of the City of Stuart. It shall be the duty of the registered owners of every vicious or dangerous dog to keep said dog under restraint at all times either by leash or by being kept in an enclosure.

The ordinance provides sanctions to be imposed upon the owner and/or the dog for violation of its terms. The ordinance did not provide for additional enforcement personnel nor did it direct the City's police department to divert or reallocate any of its police resources from other activities to the control of dogs. (R. 127)

Although ordinance 792 allows the impoundment of dogs by the "impounding officer" or by any officer of the City of Stuart Police Department, Gryder's deposition testimony shows that no police manpower resources other than Gryder himself had been allocated for that purpose. As the City's animal control officer, Gryder responded to all complaints regarding animals. (R. 68[3]) This was true even when he was off duty. (R. 68[14])

The significance of the decision not to assign regular police officers to animal control activity is underscored by the fact that Ordinance 792(g) provides criminal penalties of a fine and/or imprisonment and/or destruction of the dog upon conviction of a violation of the ordinance. Yet, Gryder was only a municipal employee and not a police officer. He had no arrest power other than that of the ordinary citizen. (R. 68[28]) Additionally, the ordinance authorizes the killing of any dangerous dog when necessary by members of the Police Department or any other person in the City. (R. 127) Gryder was not allowed to carry a gun in public. The authority to do so was withdrawn as a discretionary act of the Chief of Police. (R. 68[6]).

Furthermore, Gryder was instructed that he could not go on private property without permission of the property owner, even to pick up a stray dog. (R. 68[20])

It is a well-established legal principal that municipal authorities, in deployment of police manpower, have the right to exercise discretion and to choose tactics deemed appropriate without incurring tort liability. Wong v. City of Miami, 237 So.2d 132 (Fla. 1970). In the Wong case, certain property owners sued the City and Dade County for damages sustained during a riot which occurred during the 1968 Republican Party Presidential Nominating Convention at Miami Beach. Initially, police forces were deployed to the threatened riot area. Later the mayor ordered the officers withdrawn from the area and the riot ensued. The trial court dismissed the complaint and the District Court of Appeal affirmed. On petition for a writ of certiorari, this Court discharged the writ saying:

> While sovereign immunity is a salient issue here, we ought not lose sight of the fact that inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers.

The Wong decision retains its vitality although it predated by several years the decision in Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979), in which this Court receded from the general duty-special duty dichotomy used by the courts in determining governmental immunity. In Commercial Carrier, this court held the legislative waiver of sovereign immunity

is a limited waiver applicable to operational-level decisions while certain discretionary or planning-level decisions retain immunity from tort liability. The court reviewed its prior decision in the Wong case, and said:

> This was a clear recognition by the Court of a principle of law apart from the ancient doctrine of immunity as a simple aspect of sovereignty. It represents the distinct principle of law alluded to be Judge Fuld in Weiss v. Fote supra, which makes not actionable in tort certain judgmental decisions of governmental authorities which are inherent in the act of governing. 371 So.2d 1010, 1020.

There are strong public policy considerations for the protection extended by the courts to the exercise of governmental discretion in the employment of police resources. Under the doctrine of separation of powers there are certain functions of the several branches of government that may not be subjected to review by judge or jury in a tort action. Commercial Carrier Corp., supra. Budgetary constraints are also a factor in the governmental decision making process. Thus, the utilization and deployment of police resources involving, as it must, the competing interest of a community, is a discretionary or planning-level function, the exercise of which does not subject the governmental agency to tort liability.

The Fourth District Court of Appeal, in its opinion in Elliott v. City of Hollywood, 399 So.2d 507 (Fla. 4th DCA 1981), determined that the allocation of a municipality's limited financial resources is a

planning-level function. In Elliott, as in this case, it was alleged that the City had failed to enforce an ordinance and that failure constituted actionable negligence. The ordinance prohibited property owners from growing shrubs or bushes in a manner that would obstruct visibility of motorists on the City streets. The plaintiff alleged that the City's failure to enforce its ordinance resulted in an obstruction to visibility at an intersection and caused an accident. The trial court dismissed the amended complaint. The Fourth District Court of Appeal affirmed, applying the four-part analysis suggested by this court in Commercial Carrier.

In Jenkins v. City of Miami Beach, 389 So.2d 1195 (Fla. 3d DCA 1980), referred to in the Elliot case, a summary judgment in favor of the city was affirmed. The appellate court found the city's decision not to provide nighttime supervision in a public park was a planning or discretionary governmental decision for which the city could not be held liable in tort.

In Department of Transportation v. Nielsen, 419 So.2d 1071 (Fla. 1982) this court observed that the underlying premise for sovereign immunity is that it cannot be tortious conduct for a government to govern. There the court discussed Wong and observed that failure to send police officers to congested intersections to control traffic would not subject a governmental entity to tort liability.

The recent decision in Neumann v. Davis Water and Waste, Inc., 433 So.2d 559 (Fla. 2d DCA 1983) supports the decision of the Fourth District Court of Appeal in this case. There the plaintiff brought a wrongful death action against the installer of a sewage treatment tank and the State of Florida Department of Environmental Regulation. Plaintiffs three-year-old son was playing atop a sewage treatment tank when he fell into the tank and drowned. Plaintiff claimed that when the plant was originally constructed that DER required the area to be fenced, but that DER negligently failed to inspect the plant to ascertain that it was fenced. DER moved to dismiss on the basis of sovereign immunity. The trial court granted the motion to dismiss.

The Second District Court of Appeal affirmed. The court observed that certain essential, fundamental activities of government must remain immune from tort liability. The court concluded that to allow tort liability for the pure exercise of the police power would strike at the very foundation of the power to govern. The court stressed the fact that by imposing rules and regulations and deciding when and where or what to inspect, that DER was exercising the police power of the state, a purely governmental function historically immune from tort liability. The court observed that the legislature enacts traffic and penal laws, but law enforcement agencies cannot guarantee obedience of those laws. The court concluded that

government cannot be an insurer for those injured when laws, regulations or safety measures are broken or ignored.

The same rationale applies in this case. The City Commission enacted an ordinance. The City police department could not guarantee that the ordinance would be obeyed. The City cannot be the insurer for every person injured as a result of an infraction of the ordinance. The City, if it indeed failed to enforce the ordinance, was exercising its pure police power. That is a purely governmental function which has historically enjoyed tort liability.

Furthermore, application of the criteria ennunciated by this court in Commercial Carrier shows the governmental activity was a planning or discretionary function for which the City could not be held liable in tort. The controlling issues are as follows: (1) Does the decision not to enforce the ordinance involve a basic governmental policy? The original decision of the City of Stuart to withdraw police offers from animal control duty and to substitute an animal control officer was based upon the basic policy consideration of more effective utilization of police manpower. That determination was not changed by the enactment of Ordinance 792. (2) Is the decision essential to accomplish that policy? In balancing the competing interests and demands of the community for its limited police and financial resources, the City's decision was a necessary concession to the need to employ those resources most effectively. (3) Does the decision require

basic policy evaluation, judgment and expertise? The decision was a part of the total planning exercised by the City with respect to methods and numbers of personnel necessary to accomplish the basic governmental policy of providing essential police service to the maximum number of persons. (4) Does the City have the lawful authority to make the decision? Inherent in the right to exercise police power is the right to determine strategy and tactics for the deployment of those powers. Wong v. City of Miami, supra.

The facts in the Colorado case of Ochoa v. Sherman, 534 P.2d 834 (Colo. Ct. App. 1975), closely parallel those of this case. The plaintiff in Ochoa, claimed injury to her minor daughter as a result of a dog bite. The plaintiff alleged that the dog had attached children on a prior occasion and had been impounded for the 10-day period required by statute to determine whether or not the dog was rabid. The plaintiff claimed that release of the dog to its owner was a negligent act on the part of the city. The city had also enacted an ordinance requiring that the animal control officer seize and impound any dog who was vicious as defined by the statute. This was alleged to be a negligent act in violation of the city's own ordinance. The Colorado appellate court concluded that under the circumstances of that case the city could not be held liable for the breach of its ordinance or its failure to enforce. It appears that the case was decided on the

issue of whether or not there was immunity for a governmental act. The same principles apply here.

Assuming, arguendo, that it is the city employee's failure to act which is pivotal, there is still no tort liability on the part of the city because of the employee's failure to act. The facts in this case are analygous to those in Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983). There Azor Everton was seriously injured and Renee Trinko killed in a two car intersectional collision between vehicles driven by Everton and Willard. About ten to twenty minutes before the accident a deputy Sheriff stopped Willard and ticketed him for making an improper U-turn. The deputy observed Willard had been drinking, but did not arrest or detain him for intoxication. The plaintiffs alleged negligence on the part of the officer for actions committed within the scope of his employment as a deputy Sheriff.

The trial court dismissed the complaint. The appellate court affirmed, holding that the officer's actions were discretionary and did not subject him, the county and Sheriff's department to tort liability. The court observed that it cannot be tortious conduct for a government to govern. Certain areas inherent in the act of governing cannot be subject to suit and scrutiny by a judge or jury without violating the separation of powers doctrine. The court concluded that the deputy's actions involved basic governmental policy and the implementation thereof.

The court observed that the proper implementation of a viable system of law enforcement must necessarily include the discretion of the officer on the scene to arrest or not arrest as his judgment dictates. The court held that neither a police officer or the employing governmental authority should be held liable in tort for the consequences of the exercise of discretion. 426 So.2d at 1004.

The facts in this case and the alleged governmental activity differ substantially from the activity in Bellevance v. State, 390 So.2d 422 (Fla. 1st DCA 1980) cert. denied 399 So.2d 1145 (Fla. 1981) and Smith v. Department of Corrections of the State of Florida, ____ So.2d ____, 8 FLW 1155 (Fla. 1st DCA 4-27-83). Those cases did not involve exercise of the government's police power.

Plaintiff argues that the city ordinance "required" Rufus Gryder to act. Although not relevant to the issue of sovereign immunity, it should be noted that the ordinance does not constitute a mandate as suggested by the plaintiff. Although the word "shall" normally has a mandatory connotation, it may, in proper cases, be construed as permissive only. Lomelo v. Mayo, 204 So.2d 550 (Fla. 1st DCA 1967). When the directions of a statute are given with a view to the proper, orderly and prompt conduct of business, the statutory provision using the word "shall" may generally be regarded as directory. Reid v. Southern Development Company, 42 So. 206 (Fla. 1906).

The ordinance states the duty imposed by the act is upon the owners of dogs within the City of Stuart. An examination of the title of the ordinance reveals no intent by the commission to create the mandate alleged by plaintiff. When necessary, a court may look to the title of an act as an aid to the interpretation of the act. Cook v. Blazer Financial Services, 332 So.2d 677 (Fla. 1976). The title to Ordinance 792 states:

> An ordinance of the City of Stuart, Florida, amending Stuart Code Section 4-30 (Vicious Dogs Running at Large) by providing conditions and authority for the destruction of vicious or dangerous dogs; providing a penalty therefor and a procedure for a hearing prior to destruction, not otherwise provided for; repealing Ordinances or parts of Ordinances in conflict herewith; ratifying and confirming said section as so amended (emphasis added).

Reading of the ordinance itself shows that the intent of the legislative body of the City was to impose a duty upon the owner to properly control his or her dog and to provide the authority, but not necessarily a mandate, to seize and destroy the chattels of offending owners.

CONCLUSION

The certified question should be answered in the affirmative. The action of the city in this case was planning or discretionary in nature; that action is immune from tort liability. The decision of the Fourth District Court of Appeal which affirmed the summary judgment for the City should be approved by this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail this 26th day of August, 1983 to: VICKI J. JUNOD, ESQ., GAMBA, JUNOD & SCHOTT, P.A., 1010 Martin Downs Boulevard, Post Office Box 1655, Palm City, Florida 33490 and HARRY MORRISON, JR., Assistant League Counsel, Florida League of Cities, Inc., Post Office Box 1757, Tallahassee, Florida 32302.

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