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.

_____/

PETITIONER'S BRIEF

GAMBA, JUNOD & SCHOTT, P.A.
Attorneys for Petitioner
1010 Martin Downs Boulevard
Post Office Box 1655
Palm City, Florida 33490
(305) 287-7200

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QUESTION PRESENTED

The Court of Appeals certified the question as:

> Is a city's failure to enforce a valid ordinance a planning decision as opposed to an operational one?

The Petitioner asserts that the question is more aptly framed as:

> Is a city employee's failure to enforce a valid ordinance implemented by the city a planning decision as opposed to an operational one?

STATEMENT OF THE CASE

This is an appeal from a Summary Judgment granted to Defendants/Respondents. The Circuit Court of the Nineteenth Judicial Circuit, Martin County, Judge Charles E. Smith presiding, granted Summary Judgment to the CITY OF STUART (and its insurer, AETNA CASUALTY & SURETY COMPANY) on the basis of governmental immunity. The Court of Appeals affirmed the lower court and certified to The Supreme Court the question of whether a city's failure to enforce a valid ordinance is a planning or operational level decision. The Petitioner filed notice to invoke the discretionary jurisdiction of this Court.

STATEMENT OF THE FACTS

On May 11, 1979, CHARLES DURHAM, a boy of eight (8) years, while on his way to school was badly mauled by a pit bull terrier named Bee-Hound, belonging to Brian Hallstrom, who resided at the property of Ruth Pennington. The incident occurred between J. D. Parker Elementary School and the neighboring property of Ruth Pennington, all located in Stuart, Martin County, Florida.

The Animal Control Officer of Respondent, CITY OF STUART, Rufus Gryder, testified at deposition that he recalled approximately a dozen calls to the Pennington property in response to complaints about vicious dogs harassing neighbors. Only once in August, 1978, when another boy was bitten, did he or any employee of the CITY OF STUART impound the dogs. Bee-Hound was one of the three dogs impounded at that time, and all three were released. The City's ordinance at that time did not contain enforcement directives, and merely forbade the running at large of vicious animals.

In December, 1978, the Stuart City Council amended its ordinance with the enactment of Ordinance #792. <R 126-128>*, which stated in part:

> "(d) If any dangerous dog is found running at large or unrestrained in apparent violation of this ordinance or shall bite any person without provocation (whether running at large or restrained as prescribed here), such dog shall be taken and impounded by the impounding officer of the city of Stuart Police Department."

In April, 1979, Bee-Hound was involved in an attack on a painter at a neighboring apartment building. <R 131> It was reported to the City. Rufus Gryder went to the property, found that the dogs were back on the Pennington property, but were not restrained by fence, leash or enclosure. <R 68 (48 and 49)> He did not impound Bee-Hound. One month later, CHARLES DURHAM was viciously attacked by Bee-Hound. Rufus Gryder's failure to take and impound Bee-Hound in April was in violation of City Ordinance 792.

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*References in brackets throughout this brief referring to <R ___>, are references to the Record prepared by the lower court.

Rufus Gryder's deposition makes it clear that he knew or should have known that Bee-Hound was a "vicious dog" as defined in the ordinance because he was aware of Bee-Hound's vicious propensities from the incident in 1978 when Bee-Hound was in a pack of dogs, one of which attacked a boy, and Bee-Hound "got a little nasty" with him then <R 68 (37)>, and because he was aware that Bee-Hound was from a family of dogs which had bitten or menaced people in the past. That knowledge, together with the general knowledge that pit bulls are a vicious breed of dog, <R 68 (42 and 43)>, required Rufus Gryder to follow the mandate of Ordinance 792 and impound Bee-Hound after the April attack on the painter. Had he done so, CHARLES DURHAM would not have been attacked one month later.

Plaintiff/Petitioners alleged in their Second Amended Complaint that the CITY OF STUART, through its employee, was negligent on an operational level for, among other things, permitting a nuisance and hazardous condition, of which the City was aware, to exist in close proximity to an elementary school, in failing to warn the public and, in particular, parents of the

school children passing the property, of the hazardous condition and of failing to enforce its own ordinance on dangerous animals to eliminate the dangerous condition.

The Court below granted Summary Judgment to the City (and hence its insurer AETNA CASUALTY & SURETY COMPANY) on the basis that the actions of the City's dog catcher, Rufus Gryder, were planning level functions and not operational level functions and were therefore immune from liability. It is Petitioner's position that the Court erred in finding the actions of the dog catcher, Rufus Gryder, to be planning level functions and that such a finding virtually clothes every action of a municipal employee with immunity.

ARGUMENT

It is Petitioner's position that the Court of Appeals has too broadly framed the question in this case. It is not the CITY OF STUART's failure to act which gives rise to a claim of liability in this case. It is the City employée's failure to act, even though he had been directed to act by the City, which gives rise to the claim. The City had drafted Ordinance #792 setting forth the criteria under which the dog catcher was required to pick up dangerous dogs, and it defines dangerous dogs. Those conditions existed prior to this incident, and the dog catcher failed to pick up the dog. There is virtually no room in this ordinance for discretion to be exercised.

To find immunity in this case would be to retreat from the reasoning in Bellevance vs State, 390 So.2d 422 (Fla. DCA 1st, 1980), cert. denied 399 So.2d 1145 (Fla. 1981), where the district court held that the act of the state in releasing a mental patient did not rise to a level of basic policy decisions and that summary judgment was improper where the state did not

demonstrate that the personnel involved, after consiously balancing risks and advantages, made a considered decision in releasing the patient. Counsel for the CITY OF STUART in the instant case made numerous arguments about the planning level nature of the deployment of officers to enforce dangerous animal statutes, but such logic is irrelevant to the facts of this case where the dog catcher was on the premises, knew the dangerous dog was not restrained, and simply failed to pick him up. There is no evidence that he weighed the risks and advantages and made a considered decision.

The facts of this case distinguish it from Elliott vs City of Hollywood, 399 So.2d 507 (Fla. DCA 4th, 1981). In that case there was simply a broadly worded ordinance prohibiting citizens from allowing bushes to grow so as to create obstacles to traffic. There was no enforcement power in the ordinance and no activity had been undertaken to implement the ordinance. The city, not a ministerial employee, had made a decision not to act. In the instant case, the CITY OF STUART clearly chose to act by amending its ordinance. The Elliott case, supra, has also been

undermined by the case of Romine vs Metropolitan Dade County, 401 So.2d 882 (Fla. DCA 3d, 1981). In that case the District Court of Appeals sustained summary judgment in favor of the county on immunity grounds where the allegation had been that the county had failed to clear bushes at an intersection, leading to an automobile collision. The Supreme Court remanded the case to the District Court of Appeals, 385 So.2d 1368 (1980), in light of Commercial Carrier vs Indian River County, 371 So.2d 1010 (Fla., 1979). The District Court of Appeals again affirmed the summary judgment but drew this important distinction:

> ". . . . the County never undertook any responsibility in regard to trees and shrubbery at this intersection. If they had, a different result might have obtained."

The CITY OF STUART very definitely undertook responsibility in this case, both to citizens at large by the amendment of its ordinance, and to persons endangered by the situation existing at the Pennington property by answering over a dozen calls of complaints of dogs running loose and menacing passersby.

The Petitioner cannot ignore the factual similarities between this case and Everton vs

Willard, 426 So.2d 996 (Fla. DCA 2d, 1983). There the District Court of Appeals determined after "wrestling long and hard with the problems", that the failure of a police officer to arrest a drunk driver is a discretionary act for which neither the officer nor governmental entity can be held liable. The Court reached its decision, however, based on the special nature of law enforcement and its effects on individual freedoms. No such basic liberties are involved in the taking into custody of a pit bull terrier. While the Court in Everton answered affirmatively each of the four elements of the test set out in Evangelical United Brethren Church vs State, 67 Wash 2d 246 (1965), and adopted in Commercial Carrier, supra, at least three of those questions can be answered negatively in the instant case. Even if it is assumed that the enforcement of dangerous animal statutes involves a basic governmental program, it is clear that the decision of Rufus Gryder was not essential to that program, nor did it require the exercise of basic policy evaluation, judgment or expertise, and there was no lawful authority or duty for him to act as he did, inasmuch as the ordinance clearly directed him to do just what he

did not do, pick up the dangerous dog.

Because of the distinctions drawn above, Petitioner will not belabor the legal reasoning in Everton, supra, and will merely direct the Court's attention to the recent case of Smith vs Department of Corrections of the State of Florida, ____ So.2d _____, 8 FLW 1155, Fla. DCA 1st, April 27, 1983, where the Second District Court of Appeals ruled that there is no sovereign immunity when an inmate is negligently given preferred treatment and placed in inadequately supervised confinement, escapes and injures another. The Court stated:

> "The fact that prison officials have some discretion in assignments of inmates does not require immunity."

In a concurring opinion, Judge Ervin recognized the conflict of this decision with Everton, supra, and stated:

> "I do not think the Everton or City of Cape Coral <City of Cape Coral vs Duvall, ____ So.2d ____, 8 FLW 366, Fla. DCA 2d, January 19, 1983> opinions can be squared with the Supreme Court's decision in Collom <City of St. Petersburg vs Collom, 419 So.2d 1082 (Fla., 1982)>, due to the knowledge the officers had of the motorist's capacity for harm to the public if they were permitted to remain at liberty. Perhaps the

> opinions can be understood as recognizing a public policy exception to the waiver of immunity doctrine for police officers peforming discretionary acts in the course of their duties. If so, I think it is a very dangerous precedent, and one that could create even greater difficulties in attempting to locate the line between the discretionary-operational levels of activity, if the officer exercises his discretion in disregard of a known danger." Id at 1156

Petitioner submits that if the actions of the dog catcher in this case are favored with immunity, then Judge Ervin's fear has been realized and the line distinguishing planning and operational level activities has disappeared. If the actions of Rufus Gryder are immune, then the actions of every city employee are immune because it is difficult to envision any human activity, other than reflex action, which does not require the exercise of some discretion.

The Federal Courts have interpreted the "discretion" exception to the Federal Tort Claims Act very narrowly. In Liuzzo vs United States, 508 F Supp 923 (E.D. Mich 1981), the district court held that decisions of an FBI agent regarding the recruitment, training and supervision of an FBI informant, and the authorization by the agent for

the informant's participation in a specific mission were not decisions within the discretionary exception. Id at 932. The Court held:

> "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." Id at 931.

See also, Downs vs United States, 522 F 2d 990, where the court found that an FBI agent's handling of an airplane highjacking situation did not constitute a "discretionary function" within that exception to Federal Tort Claims Act and stated:

> ". . . . the exercise of 'discretion' by the officer in the sense of choosing among alternative courses of action does not automatically trigger official immunity." Id at 998.

And perhaps the clearest distinction was drawn by the Federal District Court in Sami vs United States, 617 F 2d 755, (D.C. Cir. 1979), where it held that the discretionary exception does not apply to "any negligent execution of admittedly discretionary policy judgments where the decisions required for the execution did not themselves involve the balancing of public policy factors."

Sami, supra, at 766. See also Blessing vs United States, 447 F Supp 1160 (E.D. Pa. 1978).

The Federal Courts would have no difficulty in finding no immunity in this case because this is an instance where a valid ordinance was negligently implemented, and it is not a case where the execution of the ordinance involved the balancing of public policy factors.

In his dissent in Department of Transportation vs Nielson 419 So.2d 1071, Justice Sundberg opined that:

> ". . . . it is apparent that a finding of immunity is the exception rather than the rule. This conclusion flows not merely from the express language of the decision <Commercial Carrier, supra> but was necessarily required because unlike the Federal Tort Claims Act there is no express exemption witin the provisions of 768.28 for discretionary acts of governmental agencies or their employees. The judicial gloss supplied by this Court should be narrowly rather than expansively invoked." Id at P. 1079

With all due respect for the importance of the dog catcher's job, his tasks fall within the lowest level of governmental activity, and it requires a strained interpretation of Florida Statute 768.28 and Commercial Carrier, supra, to classify his activities in this case as planning

level decisions. His activities were clearly of an operational level and should be denied immunity.

CONCLUSION

For the reasons set forth herein, Petitioner urges this Court to find that the governmental activity in this case was of an operational nature and remand the case to the Circuit Court for a trial by jury.

Respectfully submitted,

GAMBA, JUNOD & SCHOTT, P.A.
Attorneys for Petitioner
1010 Martin Downs Boulevard
Post Office Box 1655
Palm City, Florida 33490
(305) 287-7200

By _____
VICKI J. JUNOD, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail this 10th day of August, 1983 to: EVERETT J. VAN GAASBECK, ESQUIRE, Attorney for Respondents, Post Office Box 3406, Vero Beach, Florida, 32960, MARJORIE GADARIAN GRAHAM, ESQUIRE, Attorney for Respondents, Post Office Drawer E, West Palm Beach, Florida, 33402, and HARRY MORRISON, JR., Assistant League Counsel, Florida League of Cities, Inc., Post Office Box 1757, Tallahassee, Florida, 32302.

GAMBA, JUNOD & SCHOTT, P.A.
Attorneys for Petitioner
1010 Martin Downs Boulevard
Post Office Box 1655
Palm City, Florida 33490
(305) 287-7200

By _____
VICKI J. JUNOD, ESQUIRE