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 REPLY BRIEF

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STATEMENT OF FACTS

Petitioner inadvertently left out record references in the second paragraph of its Statement of Facts, and therefore restates that paragraph here, with the proper record references.

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 <R 68 (10)>. Only once in August, 1978, when another boy was bitten, did he or any employee of the CITY OF STUART impound the dogs <R 68 (14)>. Bee-Hound was one of the three dogs impounded at that time, and all three were released <R 68 (14-15)>. The City's ordinance at that time did not contain enforcement directives, and merely forbade the running at large of vicious animals.

Petitioner takes issue with Respondent's assertion that the Animal Control Officer did not consider Bee-Hound a dangerous animal, and directs the Court's attention to the testimony of Rufus Gryder where he states Bee-Hound had growled and

snarled at him the first time he picked him up <R 68 (37-38)>, and he knew pit bulls were generally a vicious breed of animal <R 68 (41-42)>.

ARGUMENT

Respondent takes issue with Petitioner's Statement of the Facts, but ignores the maxim that the facts must be viewed in a light most favorable to the appellant, inasmuch as this is an appeal from a summary judgment. Wills vs Sears Roebuck and Company, 351 So.2d 29 (Fla., 1977); Salgueiro vs Fiumara, 305 So.2d 5 (3d DCA, 1974). If this case were presented to a jury, the Petitioner would have the burden of proving negligence. The issue on this appeal, however, is sovereign immunity, and not negligence, and negligence must be presumed. Crepaldi vs Wagner, 132 So.2d 222 (1st DCA, 1961).

The issue of police manpower resources and deployment of those resources is equally spurious. This is not a case where the governmental agency intentionally failed to take action to enforce an ordinance. In fact, the CITY OF STUART responded on at least twelve occasions to citizen complaints regarding vicious dogs on the Pennington property. In fact, one month before this incident, the Animal Control Officer responded to a citizen complaint, found Bee-Hound

unrestrained in violation of the ordinance, and failed to pick up the dog. There is no testimony or evidence whatsoever in this case that this decision had anything to do with manpower resources.

It is ludicrous to compare the actions of this ministerial employee to the actions of the mayor who withdrew riot forces in the case of Wong vs City of Miami, 237 So.2d 132 (Fla., 1970). As the Supreme Court stated in Commercial Carrier vs Indian River County, 371 So.2d 1010 (Fla., 1979), the actions of the mayor in the Wong case were immune because they were "judgmental decisions of governmental authorities which are inherent in the act of governing." 371 So.2d 1010, 1020 To apply that description to the actions of Rufus Gryder, the Animal Control Officer, would be to label every ministerial governmental employee's actions as planning level functions.

In its legal authority, Respondent fails to recognize the distinction between planning level and operational level activities. There is a clear distinction between the planning level decision of a governmental authority to take no action to enforce an ordinance, and the

operational level function of a ministerial employee sent out to enforce an ordinance and who performs that duty negligently. Compare, for instance, the case of Weissberg vs City of Miami, 383 So.2d 1158 (3d DCA, 1980) to the case of Department of Transportation vs Nielson, 419 So.2d 1071 (Fla., 1982). In Weissberg, where a police officer negligently directed traffic, this was an operational level function and therefore no immunity; on the other hand, in Nielson, when the State simply failed to provide traffic direction, it was held to be planning level and hence, immune. Compare also Pitts vs Metropolitan Dade County, 374 So.2d 996 (3d DCA, 1979) to Jenkins vs City of Miami Beach, 389 So.2d 1195 (Fla. DCA 3d, 1980). In Pitts, when police officers negligently failed to perform their security function in patrolling a parking lot , there was no immunity for such operational activities; on the other hand, in Jenkins where the city completely failed to provide nighttime supervision in a park, this was held to be a planning level decision and immune.

The distinction between a government's knowing and planned decision not to act on the one

hand, and its decision to act and performing it negligently on the other, is clearly drawn, and the action of the dog catcher is this case falls in the latter category to which no immunity attaches.

The Colorado case of Ochoa vs Sherman, 534 P2d 834 (Colo. Ct. App. 1975), cited by Respondent, is inapposite to the law of Florida under Commercial Carrier. The Colorado Court in Ochoa relied upon a 1911 Colorado case of Addington vs Town of Littleton, 50 Colo. 623, 115 P 896 (1911). That case clearly states that Colorado law at that time (and at the time of Ochoa) relied upon the governmental function versus corporate (or proprietory) function dichotomy that was clearly rejected in Commercial Carrier. The Court in Addington stated that:

> "The duty imposed by the ordinance upon the marshall and police officers to take up or kill vicious dogs found running at large in the street was imposed under the governmental powers of the town, and not in its private corporate capacity. This being seen, it is not liable for the failure of its officers to enforce the ordinance." (emphasis added) (P. 897)

Rejecting that dichotomy, the Supreme Court of Florida in Commercial Carrier cited

language in the case of Indian Towing Co. vs United States, 350 US 61, 76 S Ct 122 (at 124-125), 100 L Ed 48 (1955), where the Supreme Court reviewed the Federal statute on immunity:

> "Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the "non-governmental"--"governmental" quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound."

and the Florida Supreme Court, also intending to avoid that chaos, went on to say:

> "For the same reasons articulated above (Indian Towing Co.), we refuse to place such a gloss on our waiver statute. To do so would be to essentially emasculate the act and the statutory purpose it was intended to serve." (P. 1017)

The legislature and courts of Colorado are clearly free to determine the breadth of sovereign immunity in the State of Colorado, but clearly no matter how similar the facts in the Ochoa case are to the instant case, the law in the Ochoa case is inapplicable to the law of sovereign

immunity in the State of Florida, because it relies upon a theory of law no longer approved in this State.

Respondent has summarily dismissed the authority found in Bellevance vs State, 390 So.2d 422 (Fla. 1st DCA, 1980) cert denied 399 So.2d 1145 (Fla., 1981) and Smith vs Department of Corrections of the State of Florida, _____ So.2d _____, 8 FLW 1155 (Fla. 1st DCA, April 27, 1983), because it is claimed the activity in those cases did not involve the exercise of police powers. Petitioner must respectfully disagree, and asserts that the supervision of mental patients in a state-run hospital and prisoners in a state-controlled prison does indeed involve the exercise of police powers, as it is broadly understood to protect the safety and welfare of the citizenry.

Perhaps Respondent is arguing that the exercise of police powers enjoys some special immunity not granted to all governmental operational activities. No authority is found for such an argument. The result in Everton vs Willard, 426 So.2d 996 (Fla. DCA 2d, 1983), is far more narrowly drawn. In that case the Court found

the actions of a police officer in failing to arrest a drunk driver to be immune, not because of the special nature of police powers generally, but because of the effect the power to arrest has on the freedom and liberty of citizens. That basic individual freedom is not present in this case.

If the arguments of Respondent and Amicus that the exercise of police power enjoys a special immunity is carried to its logical conclusion, then the actions of police officers would be absolutely immune. If an officer injures an innocent bystander when he negligently draws a weapon or conducts a high-speed chase of a felon, the municipality would be immune. The city, through its police officers, could violate their own regulations as Rufus Gryder violated the ordinance here, without suffering the liablity any private entity would suffer in the same circumstances.

The Animal Control Officer's activities in this case were of a purely ministerial nature. His duties and obligations were clearly outlined by the ordinance, and he violated them. To elevate such activity to a "planning" level activity which enjoys immunity is to emasculate F.S. 768.28.

CONCLUSION

Petitioner respectfully urges this Court to reverse the lower courts and to remand this case for trial on the merits.

Respectfully submitted,

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By _____
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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 14th day of September, 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.

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