IN THE SUPREME COURT OF FLORIDA

CITY OF DAYTONA BEACH, a municipal corporation,

Petitioner,

vs.

HELEN B. PALMER, as Personal Representative of the Estate of William Gregory Palmer, Jr., deceased,

Respondent.

CASE NO. 64-773

D.C.A. CASE NO. 83-416

BRIEF OF PETITIONER CITY OF DAYTONA BEACH

ON THE MERITS

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I N D E X

C A S E S C I T E D

A U T H O R I T I E S C I T E D

BRIEF OF PETITIONER CITY OF DAYTONA BEACH ON THE MERITS

In this Brief petitioner City of Daytona Beach will be referred to as "City". Respondent Helen B. Palmer, as Personal Representative of the Estate of William Gregory Palmer, Jr., deceased, will be referred to as "Palmer".

The following symbols will be used:

"A" - Appendix to Brief of Petitioner City of Daytona Beach.

STATEMENT OF THE CASE

In her Amended Complaint, Palmer seeks to recover for damages to office space rented by William Gregory Palmer, Jr., her late husband, in a building which was destroyed by fire on September 12, 1981 in Daytona Beach, Volusia County, Florida.

To said Complaint the City filed a Motion to Dismiss on the ground that under the doctrine of sovereign immunity it was not liable to Palmer as a matter of law.

On March 1, 1983 an Order was entered granting the City's Motion to Dismiss, with prejudice. From said Order Palmer appealed to the Fifth District Court of Appeal which, in an opinion[1] filed December 29, 1983, reversed and remanded the Order of the trial court.

In its opinion said Fifth District Court of Appeal recognized that the issue in this case is one of great public importance and, therefore, certified to this Court the following question:

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1. A-1

"CAN A CITY BE HELD LIABLE IN TORT TO A PROPERTY OWNER FOR DAMAGES CAUSED BY THE NEGLIGENT ACTS OF THE CITY'S FIREFIGHTERS IN COMBATING A FIRE?"

STATEMENT OF FACTS

For the purposes of this Brief the applicable facts must be taken from the allegations of the Amended Complaint. The District Court of Appeal decided that a cause of action was stated where it was alleged "that the city's firemen breached standard fire fighting practices in combating a fire in a building on South Beach Street in Daytona Beach, and that their negligence caused the fire to spread to William Palmer's office where it destroyed virtually all of his office equipment, library, and professional records."

ARGUMENT

QUESTION

CAN A CITY BE HELD LIABLE IN TORT TO A PROPERTY OWNER FOR DAMAGES CAUSED BY THE NEGLIGENT ACTS OF THE CITY'S FIREFIGHTERS IN COMBATING A FIRE?

The question certified to this Court for its decision was answered in the affirmative by the District Court of Appeal.

In arriving at its decision, said Court chose to disregard the only appellate decision in Florida wherein an effort was made by a property owner to recover damages which were alleged to be the result of negligence on the part of a municipality and its firefighters in fighting a fire. This case is Steinhardt v. North Bay Village[2] wherein liability was denied in a similar situation.

In Steinhardt, a property owner sued the defendant city for

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2. Steinhardt v. North Bay Village, 132 So. 2d 764 (Fla. 3d D.C.A. 1961), Cert. discharged, 141 So. 2d 737 (Fla. 1962)

damages caused by destruction of said owner's buildings through fire. The trial court entered a judgment dismissing the Complaint and the property owner appealed.

In its opinion affirming the judgment of the trial court, the District Court of Appeal of Florida, Third District, held that a city was not liable for alleged negligence in failure to establish efficient fire department based on claims that firefighters were improperly allowed to use water from water tank for other than fire fighting purposes, and that they were not trained properly.

In its opinion affirming the judgment of the lower court, said District Court of Appeal stated:

> "The gravamen of this Complaint is the failure of the city to properly carry out a function it has undertaken and for the performance of which it has presumably collected taxes from the plaintiff. It is not alleged that the city has failed to provide a fire department; rather, it is urged that it provided an ineffective one insofar as the needs of the plaintiff were to be met."

The gravamen of the Complaint in our case is exactly the same.

As to the reasons for its decision, said District Court of Appeal said:

> "If we look for reasons rather than reasoning in the cases denying municipal liability for loss occasioned by the failure to extinguish fires, we will find reasons enough. The most influential of these is the thought that a conflagration might cause losses, the payment of which would bankrupt the community. Closely allied with this fear is the realization that the crushing burden of extensive losses can better be distributed through the medium of private insurance."

In our case, the District Court of Appeal chose not to follow Steinhardt after first making the erroneous assumption that Steinhardt

relies on the rule "that cities are immune from torts committed while carrying on governmental functions." Actually, the term "governmental function" is not even used in the Steinhardt opinion nor are any of the other "dichotomies" which have been used as standards for evaluating the liability of municipal corporations in the past. These standards, which are set out in detail in Commercial Carrier Corp. v. Indian River Cty.[3], include the following:

1. Governmental--proprietary.

2. General duty--special duty.

It is our position that the reason the District Court of Appeal did not apply any of these standards in Steinhardt is that such application is unnecessary until it is first established that under the facts of the case under consideration there existed between plaintiff and defendant a duty for the defendant to exercise reasonable care.

It is unnecessary, we submit, to consider the planning--operational standard established in Commercial Carrier in our case unless it appears from the facts that such a duty exists. In the absence of such duty, application of the planning--operational dichotomy by the District Court of Appeal to the facts of our case was premature.

As is the case in most factual situations wherein a municipal corporation is alleged to be liable to a citizen for damage, we should return to the decision of this Court in Wong v. City of Miami[4].

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3. Commercial Carrier Corp. v. Indian River Cty., Fla., 371 So. 2d 1010

4. Wong v. City of Miami, Fla., 237 So. 2d 132

This case supports our contention that before the planning--operational dichotomy adopted in Commercial Carrier can be applied to the facts of our case, it must first appear that there is a duty on the part of the defendant to exercise reasonable care.

In Wong this Court reviewed a decision of the District Court of Appeal, Third District, wherein the opinion of said District Court was certified as being one that passes on a question of great public interest.

From the opinion of the District Court of Appeal[4a], it appears that plaintiffs sought to recover damages sustained by their property during a riot which occurred in 1968. It was contended by plaintiffs that were it not for the negligence of the City of Miami in withdrawing its police officers from the riot scene this damage would not have occurred.

In affirming an Order by the trial judge dismissing the Complaint based on this theory, the District Court of Appeal held:

> "At common law, governmental unit has no responsibility for damage inflicted upon its citizens or property as a result of riot or unlawful assembly.
>
> Common law in Florida has not been abrogated by any statute.
>
> City and County were not liable for damage to plaintiffs' businesses and property resulting during period of civil disobediance, riot and disregard for peace and dignity in area surrounding plaintiffs' businesses even if plaintiffs' businesses were not afforded adequate police protection."

In its opinion the District Court of Appeal specifically held that there was no liability under the common law for damage caused as a result of failure to provide adequate police protection.

4a. Wong v. City of Miami, Fla., 229 So. 2d 659

In so doing, it did not even refer to the standards for judging liability of a governmental entity referred to in this Court's opinion in Commercial Carrier.

In Wong, the District Court of Appeal held as a matter of law that there was no duty on the part of a municipality to exercise reasonable care in providing police protection under the circumstances alleged in the Complaint. By analogy, this reasoning is applicable to the facts of our case because there is no duty on the part of a municipality under Florida law, or the common law generally, to exercise reasonable care in providing fire protection either.

The decision of said District Court of Appeal in Wong was reviewed by this Court on Petition for Writ of Certiorari. In its opinion discharging said Writ this Court held:

> "City and County were not liable for riot damage to plaintiffs' businesses.
>
> Inherent in right to exercise police powers is right to determine strategy and tactics for deployment of those powers; sovereign authorities ought to be left free to exercise their discretion and choose tactics deemed appropriate without worry over possible allegations of negligence."

Once again, as did the District Court of Appeal, the Supreme Court arrived at this conclusion without applying the old standards of governmental--proprietary or general duty--special duty which were rejected in the Commercial Carrier decision in favor of the planning--operational dichotomy which is now the law of Florida.

It is our position that the Supreme Court of Florida also found that there was no duty to the plaintiff under the facts alleged in the Complaint and, therefore, it was unnecessary to apply any test to determine the nature of function of the city which was alleged

to have been performed in a negligent manner.

The impropriety of "leap frogging" the issue as to whether a duty existed and going directly to consideration of the nature of function which is alleged to have been negligent, is discussed in a dissent by Chief Justice Anstead to an opinion filed by the majority of the District Court of Appeal, Fourth District, in Manors of Inverrary XII v. Atreco-Fla.[5],

In Manors plaintiff sought to recover damages which were allegedly sustained by reason of the defendant city in failing to examine plans and specifications and properly inspect the premises before issuing a building permit and certificate of occupancy. As a result, it is alleged, the improvements failed to meet the requirements of the South Florida Building Code in numerous respects.

The city's Motion to Dismiss on the ground that it was entitled to sovereign immunity because the enforcement of the building code is a discretionary function was granted. From a final judgment dismissing the city, plaintiff appealed and said District Court of Appeal stated that the sole question argued on appeal is whether the activities of a city building inspector in approving plans, specifications and construction is discretionary planning activity or operational activity.

The majority of the Court in Manors decided that the negligence of the city in failing to properly examine plans and specifications and properly inspect premises before issuing a building permit

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5. Manors of Inverrary XII v. Atreco-Fla., Fla., 438 So. 2d 490 (Fla. App. 4 Dist. 1983)

constituted operational activity of the city and, therefore, reversed the judgment of the lower court. Perceiving the question involved in Manors to be one of great public importance, the following question was certified to this Court:

> "Should the negligent conduct of a building inspector in approving plans, specifications, and construction that do not meet the requirements of the applicable building code be considered 'operational' conduct for which the municipality may be held liable in damages or 'discretionary' conduct to which sovereign immunity would apply?"

The majority of the Court in Manors apparently thought that the only question which they had to decide is whether the negligent conduct complained of could be considered "operational" or "discretionary" conduct. In his dissent, however, Judge Anstead took the position--which we do here--that a consideration of the nature of the function which is alleged to be negligent is premature until it is first determined that a duty to exercise reasonable care existed as between plaintiff and defendant, the breach of which was actionable.

In this regard Judge Anstead said:

> "Section 768.28, Florida Statutes (1975), simply waived the defense of sovereign immunity for the State, its agencies and subdivisions. There must still be a duty owed, a duty violated, and damages resulting therefrom, in order for there to be tort liability on the part of the government." (Underlining ours.)

Judge Anstead said further:

> "The state of the law in Florida at the time the Legislature abolished the defense of sovereign immunity was, pursuant to the Modlin[6] decision,

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6. Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967)

> that there was no responsibility, in the case of public officials such as building inspectors, that would give rise to liability. This absence of responsibility did not rest on the defense of sovereign immunity. If that is correct then it should be apparent that the Legislature, by abolishing the defense, did not intend to create a legal duty that did not then exist. The Legislature simply left the case law on this issue intact." (Underlining ours.)

Judge Anstead further noted that the decision of this Court in Commercial Carrier, rather than clarifying the law, has produced the same sort of confusion that the Commercial Carrier opinion concludes existed prior to the legislative abrogation of sovereign tort immunity.

We agree with Judge Anstead when he says:

> "After Commercial Carrier, and its rejection of Modlin, courts have appeared to lose sight of the requirement of the existence of a duty in considering liability, and have, instead, directed most of their attention to the difficult task of determining whether the action involved was 'discretionary' or 'operational' in accord with the nebulous standard set out in the case of Evangelical United Brethern Church v. State, 67 Wash. 2d 246, 407 P. 2d 440 (1965), and adopted in Commercial Carrier."

The solution to this problem is, we respectfully submit, that before attempting to apply the difficult planning--operational dichotomy adopted in Commercial Carrier, the Court should first consider whether a duty to exercise reasonable care existed in the first instance.

For a decision which specifically involves a claim for damages resulting from negligence of a city in fighting a fire, we refer the Court to Biloon's Elec. Serv. v. City of Wilmington,[7] wherein the

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7. Biloon's Elec. Serv. v. City of Wilmington, Del. Super., 401 Atl. 2d 636

Superior Court of Delaware granted a summary judgment for the defendant City of Wilmington.

In Wilmington, a repair shop was destroyed by fire during a civil disturbance. The owners of the damaged property filed suit against the City of Wilmington alleging that the destruction of their place of business was the result of the City's failure to provide adequate police and fire protection.

The Superior Court of Delaware in its Order granting the Motion of the City for summary judgment discusses many of the problems which also exist under Florida law as to the liability of a municipality for negligence of its employees:

In this regard said Court states:

> "All this points up the futility in attempting to define a formula a equation which can be applied to each and every situation to determine liability or non-liability. The futility itself, however, demonstrates that there can be no mathematical formula just as there has been no magic in the arbitrary categorization of acts being 'governmental/proprietary,' 'public duty, private duty' or 'administrative, discretionary/ministerial.' Each case must be scrutinized on the facts as presented. Based on that record, the question of whether the trial should continue becomes a question of law which should be resolved by the trial judge."

Said Court further states:

> "The fundamental principal, implicit or explicit, in all the cases is that a municipality can not be held to a standard of strict liability for police and fire protection. To impose a duty of an insuror on these men and women would be to utterly ignore the difficulty and danger inherent in the tasks they are required to perform."
> * * *

But the distinction now is well documented. The rule is 'liability' not 'immunity' but the exceptions to liability are necessary when public policy considerations far outweigh the value of an individual property." (Underlining ours.)

In paragraph 7 of its opinion said Court said:

"A motorist, for instance, has the duty to use due care in the operation of his automobile and the standard to measure that duty is whether his conduct was 'reasonable under the circumstances.' If such a requirement were to be applied to police and fire protection, the results would be absurd. The case of a robbery victim who would hold the city liable for lack of police protection is an example. Would the case go to the jury on the basis that the protection afforded the victim was not reasonable under the circumstances? Does a judge and jury then look at all the facts to determine whether less than that could be considered unreasonable? But even more, would not that call into play an inquiry into basic public policy decisions on budgets, taxation and the allocation of the deployment of the municipal resources? Also, how does one measure the vagaries of criminal conduct?

This points up the argument of non-liability in cases where fundamental tort liability was never heretofore recognized. The concept has been foreseeability but what is suggested is that basically we are discussing 'duty'. Does the decision of a city to institute police and fire protection create a duty on the city running to each and every citizen to protect them from all hazards? Certainly not." (Underlining ours.)

When giving its reason for granting the City's Motion for Summary Judgment, said Court said:

"Guided by underlying policy considerations and ignoring arbitrary planning/operational, discretionary/ministerial or governmental/proprietary distinctions and apart from the question of municipal immunity, the Court concludes that the issuance of the Battalion Chief's directive was an on-the-scene tactical decision peculiarly the province of the executive branch, which ought to be free from judicial second guessing."

From the Summary Judgment in favor of the defendant City of Wilmington, plaintiff appealed to the Supreme Court of Delaware.[8] Said Supreme Court stated that the appeal presented one issue, namely:

> "Is a municipality immune from liability as a matter of law for the (alleged) negligence of city firemen during a civil disturbance?"

In affirming the Summary Judgment in favor of the defendant City, said Supreme Court held:

> "Owners of business which was burned during a civil disturbance do not have the right to recover damages from municipality for the alleged negligence of city firemen during the disturbance."

The Biloon decisions as well as the existing Florida law, as epitomized by Steinhardt and Wong, state the law generally on the issue before this Court which is that there is no liability on the part of a municipality for negligence of its firefighters in fighting a fire. The basic fallacy in the decision of the District Court of Appeal in the instant case is that it has used the planning--operational dichotomy adopted by this Court in Commercial Carrier as a pretext for imposing a duty which does not exist under the common law of this State.

Therefore, it is unreasonable and improper for the District Court of Appeal here to reverse the judgment of the lower court on the basis that negligence in fighting a fire constitutes an "operational" function of city government without first making a legal determination that a duty existed to exercise reasonable care.

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8. Biloon's Elec. Serv. v. City of Wilmington, Del. Supr., 417 A. 2d 371

The Fifth District Court of Appeal also should have taken into consideration the following language in F.S. 768.28:

> "(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act." (Underlining ours.)

Under the so-called "parallel function" doctrine which we will now discuss, it was necessary for said District Court of Appeal to find that a private person would be liable to plaintiff here in accordance with the general laws of this State before taking into consideration the issue as to whether the acts or omissions of City firefighters were "planning" or "operational".

The State of Idaho has adopted a statute[9] which is similar to the law in Florida with regard to sovereign immunity. The Idaho statute provides that:

1. The doctrine of sovereign immunity is abolished subject to certain exceptions.

2. Every governmental entity is subject to liability for negligence where the governmental entity if a private person or entity would be liable for any damages under the laws of the State of Idaho.

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9. I.C. §6-903(a), Laws of Idaho

This language also appears in Florida Statute 768.28.

The Supreme Court of Idaho in Chandler Supply Co. v. City of Boise,[10] had occasion to interpret this statute in an action brought against the City of Boise alleging negligence on the part of the City's fire department.

The facts involved in Boise were that firefighters employed by the City fought and extinguished a fire which resulted in substantial damage to property owned by plaintiff Chandler. Said plaintiff sued the City of Boise alleging negligence on the part of the City's fire department. A verdict was returned in favor of plaintiff and Boise appealed.

The judgment for plaintiff was reversed by the Supreme Court of Idaho for reasons we will discuss later in this Brief.

In its opinion, however, said Court states that the so-called "parallel function" test is the first step to be applied in determining whether there has been a waiver of governmental immunity where the applicable statute provides that a governmental entity is liable only if a private person would be liable under the laws of the state in question.

Since our statute contains the identical language to the effect that a state agency or subdivision can not be held liable unless a private person would be liable to claimant under the general laws of the state, it is our contention that fire protection provided by a municipality has no parallel in the private sector and, therefore, it was unnecessary for the District Court of appeal in our

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10. Chandler Supply Co. v. City of Boise, 666 P.2d 1323 (Idaho 1983)

case to interpret or apply the planning--operational exception to sovereign immunity created under Commercial Carrier.

We have been unable to find any cases wherein it is held as a matter of law that fire protection by a municipality has no parallel in the private sector. It can be said without fear of contradiction, however, that traditionally in Florida fire protection has been provided by tax supported subdivisions of the State. Furthermore, we know of no business enterprises that provide fire protection on a profit basis. Therefore, it seems that the only logical conclusion that can be drawn insofar as fire protection is concerned is that there is no "parallel function" in the private sector.

As stated in Boise, a statute must be construed, if possible, so that effect is given to all its provisions. Under this rule, unless some good reason can be shown to the contrary, it is necessary to give effect to the language in Florida Statute 768.28 which provides that an action at law may be maintained against the state for tort only in those instances in which a private person would be liable to the claimant under the general laws of this state.

The Legislature in enacting this language certainly must have contemplated that there would be some functions of government which would not be provided by the private sector. Otherwise, why include this language in the statute? If this Court holds that there are no functions of government which are not provided by the private sector, this language in the statute becomes meaningless. The most obvious example we can think of of a governmental function which is

not provided by the private sector would be police and fire protection.

We urge this Court to accept the concept that there exists no "parallel function" in the private sector insofar as police and fire protection is concerned and, therefore, it is unnecessary to consider whether such services are provided in the "planning" or "operational" function of government.

Even if this Court dispenses with the need for a determination of a duty as between plaintiff and defendant, and finds that the factual situation involved here passes the "parallel function" test, there is authority for the proposition that decisions made by city firefighters in connection with fighting a fire are "planning" or "discretionary" functions for which the city is immune from liability. Before citing authority for this proposition we point out to the Court that the terms "planning" and "discretionary" are used interchangeably in Commercial Carrier as well as other decisions involving this proposition of law.

In Boise, the Supreme Court of Idaho reversed the judgment in favor of plaintiff on the ground that the discretionary function exception in the applicable statute shielded governmental units from tort liability where the plaintiff's action is based upon a claim of negligence with regard to the operational decisions of city firemen in fighting a fire, a traditional governmental function.

The applicable Idaho statute contains a section entitled "Exceptions to Governmental Liability" which provides that a governmental entity shall not be liable for any claim which:

> "1. Arises out of any act or omission of an employee of the governmental entity exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused. (Emphasis added.)"

The provision of this statute is essentially the same as the law as adopted by this Court in Commercial Carrier.

In its opinion in Boise, the Supreme Court of Idaho said:

> "Public officers engaged in preserving the peace and safety of a community are called upon to exercise their judgment in a manner which often means life or death to themselves and others. Decisions in such areas as law enforcement and firefighting must often be made in an instant. Surely, by enacting the discretionary function exception, the legislature recognized that discretion in making such judgments is entitled to deference at least equal to that given to legislators and judges who have the luxury of time, debate and a comparatively safe and comfortable place to ponder and decide the ways in which governmental business should be conducted."

This language is peculiarly applicable to judgment of conduct of municipal firefighters. Obviously it will be impossible in the instant case to recreate the circumstances with which City firefighters were faced when they arrived at the scene of this fire. Even if they could be recreated, it is neither fair nor proper for firefighters to be second guessed by a judge and jury with regard to decisions made in fighting a fire which could involve life or death.

In its opinion reversing the Order dismissing the Complaint in the instant case, the Fifth District Court of Appeal recites allegations in the Complaint to the effect that the City's firemen

breached standard fire fighting practices in combating a fire in a building owned by plaintiff as a result of which plaintiff sustained damage. Said Court further concludes that a breach of standard fire fighting practices is "operational"--not "planning"--within the meaning of Commercial Carrier. In so doing, said Court apparently decided that once the decision was made to fight the fire, all further actions were "operational".

In City of Hammond v. Cataldi,[11] the Court of Appeals of Indiana, Third District, specifically rejects the proposition that once a decision is made by a municipality to fight a fire everything done thereafter is "operational" in nature for which the city may be held liable.

In Cataldi, plaintiffs' restaurant caught fire. The fire department was summoned and fought the fire; however, the restaurant was destroyed.

Plaintiffs sued the City of Hammond and alleged:

> "10. That when the fire initially erupted the City of Hammond fire department was summoned and that upon arrival at the plaintiffs' restaurant the said fire department commenced to fight the fire; however, because of the negligent training, supervision and administration of the department by the officials in charge, the fire was not controlled and extinguished resulting in the total destruction of the premises.
>
> 11. That the City of Hammond was negligent and careless in one or more of the following particulars:
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> (a) in failing to supervise the department so that there would be sufficient number of men for the equipment intended to be used;

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11. City of Hammond v. Cataldi, 449 N.E.2d 1184 (Ind.App.3 Dist 1983)

(b) in failing to supervise and train its firemen in the controlling and extinguishing of fires under the conditions existing at the time of the Cataldi fire;

(c) in failing to have adequate equipment and manpower;

(d) in causing the spread of the fire by erroneous and negligent fire fighting methods . . ."

The city moved for summary judgment on the grounds that the actions taken by the fire department were discretionary and, therefore, the city was immune under the Indiana Tort Claims Act. The applicable Indiana statute adopts the discretionary function exception which is the law in Florida by reason of the Commercial Carrier decision.

Plaintiffs argued, on the other hand, that although the initial decision to fight the fire was discretionary, subsequent actions were ministerial.

In reversing an order denying the city's motion for summary judgment, the Indiana court held:

"City fire department's action in fighting fire at restaurant required exercise of judgment by fire department and fire fighters, and, decisions of how to fight particular fire required judgment to be made regarding appropriate methods and techniques for unique situation presented by fire; thus, city was immune from liability for damages sustained by owners of restaurant who alleged that city was negligent in failing to supervise fire department, in training its personnel in controlling and extinguishing fires, in failing to have adequate equipment and manpower, and in causing spread of fire by erroneous and negligent fire-fighting methods."

As to plaintiffs' contention that once the initial decision to fight the fire had been made all subsequent actions were ministerial,

the Indiana court said:

> "We disagree with the Cataldis' analysis that once the decision was made to fight the fire, all further actions were ministerial. First, the definitions of a discretionary duty includes the determination of how an act should be done. Adams v. Schneider, supra. Second, the actions alleged to be negligent required the exercise of judgment by the fire department and by the fire fighters."

The Indiana court rejected a similar argument with respect to police investigation of a crime because such an analysis belittles the judgments that must be made by police officers concerning methods of investigation, quantum of evidence necessary for arrest, timing of arrest and the like.

The Indiana court said further, that like judgments made by police officers, decisions as to how to fight a particular fire require that judgment be made regarding appropriate methods and techniques for the unique situation presented by that fire.

Said court then concluded that the acts or omissions alleged in the Complaint to have been negligence were discretionary in nature and, therefore, the city was immune from liability as a matter of law.

As was the situation in Cataldi, the acts or omissions of City firefighters in our case which are alleged by plaintiff to be actionable involved exercise of discretion or judgment as to the methods by which the fire should be extinguished. Therefore, said acts or omissions are "discretionary" and the City is immune from liability therefor.

CONCLUSION

For the reasons stated, the question certified to this Court for its decision as being of great public importance should be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U. S. Mail, to Fred S. Disselkoen, Jr., Esquire, Post Office Box 2633, Ormond Beach, Florida 32075-2633, this 13th day of February, 1984.

ALFRED A. GREEN, JR., ESQUIRE