IN THE SUPREME COURT

STATE OF FLORIDA

BARBARA URSIN, Plaintiff/Petitioner, -vs- LAW ENFORCEMENT INSURANCE COMPANY, LTD., a foreign corporation, FLORIDA SHERIFFS' SELF-INSURANCE FUND, AUBREY ROGERS, individually and as Sheriff of Collier County, Florida, AL BEATTY, individually and as Deputy Sheriff of Collier County, Florida, and, GEORGE SNIDER, individually and as Deputy of Collier County, Florida, Defendants/Respondents.	Case No: 65, 523

BRIEF OF PETITIONER

APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA

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STATEMENT OF THE FACTS AND CASE

Petitioner, BARBARA URSIN, seeks reversal of the decision of the District Court of Appeal, Second District rendered June 20, 1984 entitled Ursin v. Law Enforcement Insurance Company, Ltd., etc., et. al., 450 So.2d 1282 (Fla. 2d DCA 1984) (A.8-9). The Petitioner was the original Plaintiff below and Appellant before the District Court of Appeal. The Respondents, LAW ENFORCEMENT INSURANCE COMPANY LTD., a foreign corporation, FLORIDA SHERIFF'S SELF-INSURANCE FUND, AUBREY ROGERS, individually and as Sheriff of Collier County, Florida, AL BEATTY, individually and as Deputy Sheriff of Collier County, Florida, and GEORGE SNIDER, individually and as Deputy of Collier County, Florida, were the original Defendants in the trial forum and the Appellees before the District Court of Appeal. This was an appeal by the Petitioner from an Order dismissing her Complaint with prejudice entered by the Circuit Court in and for Collier County. The District Court of Appeal, Second District, affirmed the lower court's ruling.

In this brief, the parties will be referred to by the positions they occupy before this court. References to the record are as follows:

(R.) for original record on Appeal.

(A.) for appendix to Brief of Petitioner.

Since this is an appeal from an Order granting a Motion to Dismiss Petitioner's Complaint, all facts alleged in the Complaint must be accepted as true. Orlovski v. Solid Surf, Inc., 405 So.2d 1363 (Fla. 4th DCA 1981); Fletcher v. Williams, 153 So.2d 759 (Fla. 1st DCA 1963).

The basic facts underlying both Counts I and II of the Petitioner's Complaint concern the activities of the Defendants and one, EARL BAUMGARDT (hereafter BAUMBARDT). In January of 1978, BAUMGARDT was sentenced to a total of twenty (20) years in prison as a result of his convictions for rape, kidnapping, and robbery. BAUMGARDT was convicted by the Circuit Court of Collier County, Florida. BAUMGARDT was then committed to the Mentally Disordered Sex Offenders (MDSO) program. (A.2), (R.6).

In the latter part of 1980, after having served only two (2) years of his sentence and with approximately eighteen (18) years of his prison sentence remaining to be served, BAUMGARDT was returned to Collier County for a hearing on the clarification of his status as a mentally disordered sex offender. BAUMGARDT was thus returned to the custody of the Respondents herein. While awaiting his hearing on MDSO status, BAUMBARDT was made a trustee at the Collier County Jail. As a trustee, he was not closely supervised or controlled. On January 13, 1981, BAUMGARDT walked away from a trustee kitchen detail, and within moments of his escape, kidnapped the Petitioner. BAUMGARDT seized the Petitioner at the Collier County Court House where she was an employee and

then forced her to drive to Lee County where he sexually molested her. BAUMGARDT later released the Petitioner in Punta Gorda, Florida. Petitioner has alleged that BAUMBARDT'S actions caused her grievous physical and emotional injuries. (A.2,3), (R.6,7).

Count I of the Petitioner's Complaint focuses on the fact that BAUMGARDT was negligently assigned to a trustee kitchen detail by Respondents BEATTY and SNIDER while BAUMBARDT was in the custody, care and control of Respondents BEATTY, SNIDER and ROGERS. Petitioner alleges that the negligence of the Respondents flows from the fact that they knew that trustees were not closely supervised or controlled, that they were aware of BAUMGARDT'S previous history of rape, robbery and kidnapping, and that the Respondents knew that trustees could, without any difficulty, walk away from the Collier County Jail. (A.1-4), (R.5-8).

Count II of the Complaint alleges that Respondent, ROGERS, as Sheriff of Collier County, negligently failed to instruct, supervise and control his deputies, Respondents BEATTY and SNIDER, in that Respondent, ROGERS should have known that dangerous persons, such as BAUMGARDT were being given trustee status; Respondent, ROGERS had the power to prevent such negligent of granting of trustee status, but failed to exercise that power to protect the public. The Petitioner goes on to allege in Count II that, as a result of the foregoing, Respondent, ROGERS actually approved or ratified the reckless and wanton actions of Respondents, BEATTY and SNIDER in making BAUMGARDT a trustee,

notwithstanding the fact that all three Respondents were aware of the "known dangerous propensities" of BAUMGARDT. (A.4-5), (R.8-9).

As previously mentioned, all Respondents filed a Motion to Dismiss, which was granted by the Trial Court (A.7), (R.1). Appeal was taken by Petitioner to the Second District Court of Appeal. The Second District Court of Appeal affirmed the Trial Court on the basis that sovereign immunity bars recovery by the Petitioner in this suit. (A.8-9). The District Court of Appeal acknowledged that it's decision expressly and directly conflicts with the decision of the First District Court of Appeal in Smith v. Department of Corrections, 432 So.2d 1338 (Fla. 1st DCA 1983), (A.9), and this Court accepted jurisdiction by it's Order of January 25, 1985 (A.10).

SUMMARY OF ARGUMENT

ARGUMENT I

The Complaint states the cause of action for which sovereign immunity has been waived as Section 768.28 Florida Statutes is now construed. The decision to place BAUMGARDT in the trustee program on kitchen duty is an operational decision involving the implementation of an already established policy rather than a basic policy decision affecting the course of the whole trustee program which is not challenged.

The conflicting decision Smith v. Department of Corrections, 432 So.2d 1338 (Fla. 1st DCA 1983), correctly applies the prior decisions of the Supreme Court to the factual situation presented. Case law involving the same questions in Washington State, where many of the sovereign immunity principles adopted by the Supreme Court originated, supports the decision of the First District Court of Appeal, as does Federal case law.

The Second District Court of Appeal has abandoned the planning/operational distinction and incorrectly applied the principles of Evangelical United Brethren Church v. State, 67 Wash.2d 246, 407 P.2d 440 (1965) and Commercial Carrier Corporation v. Indian River City, 371 So.2d 1010 (Fla. 1979), with the result that it now immunizes any discretionary government function.

The Fifth District Court of Appeal has correctly analyzed and refuted this line of Second District Cases in Huhn v. Dixie

Insurance Company, 453 So.2d 70 (Fla. 5th DCA 1984). The concurring opinion in Smith, supra, also analyzed the earlier Second District decisions and correctly anticipated that they would lead to confusion in the area of sovereign immunity doctrine. The actions of the Respondents in this case also created a known hazardous condition from which an operational duty arises to protect the public pursuant to City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982).

The types of decisions immunized by the Second District are no different than those to which liabilty already attaches under the tort of False Imprisonment. The fact that officials have some discretion in making these decisions does not require immunity.

ARGUMENT II

The Supreme Court should abolish or severely restrict the judicially created exemption from the Legislature's waiver of sovereign immunity. The common law prior to the waiver contained inherently unsound doctrines regarding municipal tort liability. The Legislature exercised its constitutional authority to waive sovereign immunity on behalf of all political subdivisions including municipalities by enacting Section 768.28 Florida Statutes. The Statute broadly waives immunity subject to specified limitations and the Legislature consciously omitted any exemption for "discretionary functions". One purpose was to eliminate the confusion in the law caused by varied and contradictory semantic tests.

The Court's purpose in Commercial Carrier was to preserve the constitutional pattern of distribution of basic policy making decisions in government. However, by carving out a judicially created exemption from the Statute, the Court violated the Legislature's constitutional authority to make the basic policy decisions in this area. Encouragement of making these basic policy decisions by Courts on a "case-by-case" basis has undermined the Legislature's effort and resulted once again in unsound law.

Subsequent Supreme Court decisions have failed to clarify the law. Some lower courts have entirely given up trying to interpret the law. Others, notably the Second District, have returned to the inherently unsound principles which existed prior to the enactment of the waiver of sovereign immunity.

The Court should abandon the judicially created exemption from the Sovereign immunity statute. In the alternative, the Court should adopt the course of the Supreme Court of Washington and severely restrict the exemption to those actions which actually involve basic policy decisions, and only where it can be shown that such a policy decision was actually made, consciously balancing risks and advantages. This will serve to limit the exemption to the purpose for which it was intended and prevent it from engulfing the rule that sovereign immunity is waived.

ARGUMENT I

THE COMPLAINT STATES A CAUSE OF ACTION FOR WHICH SOVEREIGN IMMUNITY HAS BEEN WAIVED IN SECTION 768.28 FLORIDA STATUTES UNDER THE CRITERIA SET FORTH BY THIS COURT.

The Legislature by enacting Section 768.28 Florida Statutes waived sovereign immunity for liability for torts on behalf of the state and it's agencies and subdivisions for the negligent or wrongful acts or omissions of any employee of the agencies on subdivision acting within the scope of his office or employment, subject to the limitations set forth in the act, Section 762.28 Florida Statutes. This Court, in the landmark case of Commercial Carrier Corporation v. Indian River City, 371 So.2d 1010 (Fla. 1979), recognized that the legislature had omitted from the Statute the express exception for "discretionary acts" which is found in the Federal Tort Claims Act. It did hold that some discretionary functions of government were exempted from judicial review, but only those which involved the "planning" level of governmental decision making. In adopting the analysis of the California Supreme Court in Johnson v. State, 69 Cal.2d 72, 73 Cal. Rptr. 240, 447 P.2d 352 (1968), the Court held that "operational" levels of decision making by governmental agencies were not immune. Id., at 1022. This distinction is set forth as follows:

> Planning level functions are generally interpreted to be those requiring basic policy decisions, while operational level functions are those that implement policy. Id., at 1021.

It is evident that the actions by the Respondents as set forth in the Complaint do not involve basic policy decisions, but only the implementation of policy. No challenge has been made to the existence or validity of the trustee program at the Collier County Jail. Petitioner only challenges (1) the decision to place BAUMGARDT, a prisoner temporarily entrusted to the County Jail by the Department of Corrections for purposes of attending a hearing; and a person whose propensity to commit acts such as those suffered by the Plaintiff was well known to the Respondents, on this trustee program and assign him to kitchen detail where there was no close supervision and from whence he could easily escape to commit these acts and (2) the negligent training and supervision related to this program which led to this occurrence. See Willis v. Dade County School Board, 411 So.2d 245 (Fla. 3rd DCA) rev. denied, 418 So.2d 1278 (Fla. 1982) (creation of a teaching position is a planning function; filling of the position is operational).

The Court in Commercial Carrier, supra, further approved the four pronged test taken from the Washington State case of Evangelical United Brethren Church v. State 67 Wash.2d 246, 407 P.2d 440 (1965). The test quoted in Commercial Carrier, supra, at page 1019 sets forth four questions, each of which must be answered in the affirmative in order to bring the challenged act within the exemption from the waiver of sovereign immunity.

As applied to the facts in the instant case, the questions must be answered as follows:

> 1. Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
>
> The answer is no; giving BAUMGARDT, a dangerous state prisoner being temporarily held at the Collier County Jail for a hearing, trustee status as a kitchen worker was in no way an intregal part of the trustee program at the Collier County Jail.
>
> 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 of program or objective?
>
> Again, the question virtually answers itself in the negative under these facts. Had BAUMGARDT been placed on kitchen detail, the "course" of the Collier County trustee program would not have been affected in any way.
>
> 3. Does the act, omission, or decision require the exercise of basis policy evaluation, judgment, and expertise on the part of the governmental agency involved?
>
> The answer here must be no unless it was "basic policy" to place known dangerous criminals in trustee positions.
>
> 4. Does governmental agencies involved possess a requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission or decision?
>
> The answer here must be yes; again Petitioner is not challenging the existence or validity of the trustee program at the Collier County Jail.

Certainly, it is not the case that all four of the above questions can be answered "clearly and unequivocally" in the affirmative, and therefore the Complaint should not have been dismissed.

In a decision on the facts so markedly similar that the Second DCA acknowledged direct conflict, the First District Court of Appeal held in Smith v. Department of Corrections, 432 So.2d 1338 (Fla. 1st DCA 1983), that the reclassification of a dangerous prisoner to minimum custody status failed to meet this test and that the trial court had erred in dismissing the Complaint of Smith who was abducted and shot by the prisoner three months after he escaped. The Court found that while inmate classification is necessary to the maintenance of a prison system, this particular inmate's reclassification appeared to be made for reasons unrelated to the functioning of the prison system without use of agency expertise.

First District Court of Appeal using the four pronged test ruled similarly in Bellavance v. State, 390 So.2d 422 (Fla. 1st DCA 1980), when it found no immunity for a state mental hospital which negligently released a violent patient who injured a third party. In discussing questions two and three, the First DCA stated as follows:

> "We are unable, however, to answer to questions two and three in the affirmative. Paraphrased to the instant situation, we must ask: is the act of releasing Riccardelli essential to the realization or accomplishment of the Baker Act policy of insuring the least restrictive means of intervention and treatment for mentally ill patients, or is it one which would not change the course or direction of that policy? We think that is the latter, for we are hard pressed to see how the act of releasing, or for that matter, not releasing, Riccardelli would materially affect the ends and purposes of the Baker Act. Further, it is a specific individual act which simply does not rise to the character of a 'basic policy evaluation' as suggested by question three."

It is significant that the Supreme Court of Washington state, from which the Evangelical Brethren test originates, appears to be in line with the First District Court of Appeal's analysis of these types of cases. See for example; Eldredge v. Kamp Kachesse Youth Services, Inc., 90 Wash.2d 402, 583 P.2d 626 (1978) (Decision to reassign escaped juvenile to same facility without increased supervision did not meet the tests set forth in Evangelical United Brethern, supra.), and Peterson v. State, 100 Wash.2d 421 671 P.2d 230 (1983) (Decision of psychiatrist at state hospital against seeking an additional ninety (90) days involuntary commitment of mental patient was not a "decision necessarily involving a basic governmental policy, program, or objective.").

United States Court of Appeals for the Fifth Circuit has held that the Federal Tort Claims Act, which contains an express exemption from the sovereign immunity waiver for discretionary functions, does not allow immunity nor shield the government from responsibility for negligently releasing a homicidal prisoner on parole. Payton v. United States, 636 Fed.2d 132 (5th Circuit 1981).

The analysis for Count II of the Complaint is almost identical and will not be repeated.

The Second District Court of Appeals held that the activities described in the Complaint where protected under sovereign immunity. It did not however, hold that they were planning level

activities which are exempted from the broad waiver of governmental immunity under Commercial Carrier. Rather, it followed its own line of cases which holds that discretionary governmental activities are immune even when they are clearly operational.

The genesis of this line of cases is Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983) (Review by Supreme Court pending). In that case, one person was killed and two others seriously injured by an intoxicated motorist. The motorists had been stopped approximately 10 to 20 minutes before the accident for improper driving by a Deputy Sheriff who observed that the motorists had been drinking and was also informed of this fact by the motorist himself. He nevertheless allowed the motorist to drive away, neither arresting him for driving while under the influence nor detaining him to further ascertain the extent of his intoxication. The Second District Court of Appeal recognized that "clearly whether discretionary or not, Deputy Parker's acts were in the operational field of law enforcement for Pinellas County". Id., at 999. The Court nevertheless held that the Deputy Parker's acts were immune, specifically rejecting the requirement of Commercial Carrier that to fall within the exemption of the legislature's waiver, the acts must be of a basic policy making nature.

Although the Second DCA nominally applied the Evangelical four pronged test, it is clear from the reading of the entire

opinion that the crux of the matter for the District Court of Appeal is that this particular operational activity involves the exercise of discretion. Thus, for example, in answering question number (2) of that test, the Court reasoned as follows:

> Is the act or decision essential to the accomplishment of that program as opposed to one which would change the course of the program? Yes, because we believe that to remove discretion from the operational level of law enforcement would make a radical change in the ability to maintain a reasonable workable system of law enforcement. Id., at 1003.

The obvious flaw in this reasoning is that it literally equates discretion with immunity, and conversely the lack of immunity with the complete removal of discretion. Thus, the Second DCA reinstated the discretionary v. ministerial test for sovereign immunity despite the leglislative waiver of sovereign immunity and the clear decision of the Supreme Court in Commercial Carrier that the line of cases which spawned this test had no application after the enactment of the waiver. Commercial Carrier supra, at 1016. The Second DCA therefore held in effect that because police officers duty to arrest involve the exercise of discretion, a police officer may totally ignore that duty without incurring responsibility to the persons endangered, no matter how negligent the non-feasance nor how dangerous the condition created by it.

This of course opened a Pandora's Box from which have flown numerous new situations in which the government's non-feasance or

misfeasance was immune, including the instant case. Cape Coral v. Duvall, 436 So.2d 136, Rodriguez v. City of Cape Coral, 451 So.2d 513 (Peace officer's non-feasance of statutory duty to take intoxicated persons to a treatment facility when they appear to be in immediate need of emergency treatment or unable to make rational decisions, HELD: Immune because officer must exercise discretion in determining whether person "appears" to require treatment.) Newmann v. Davis Water and Waste, Inc., 433 So.2d 559 (Fla. 2d DCA 1983) (agency which permitted treatment plant to be built subject to proviso that it be fenced immune from non-feasance of duty to inspect and determine whether fence had actually been placed as required).

The instant case involves the culmination of this line. It holds in essence that since choosing which inmates are to be placed in non-secure, unsupervised trustee positions involves some discretion, a government employee may place any inmate in such a position, no matter how dangerous he is known to be nor how likely to escape if given the opportunity, and this decision will be absolutely immune from redress by persons harmed.

As stated in Commercial Carrier, all governmental functions, no matter how seemingly ministerial, can be characterized as embracing the exercise of some discretion in the manner of their performance. It is clear that the Supreme Court in articulating an exception to the broad waiver of sovereign immunity, did not mean to imply that the government would be responsible for only

those acts for which municipalities were responsible prior to the waiver of immunity. Rather, the exemption requires the Courts to "find and isolate those areas of quasi legislative policy making which are sufficiently sensitive to justify a blanket rule that Courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision" (emphasis added) Commercial Carrier, supra, at 1021 quoting Johnson v. State, supra. It is only those discretionary decisions which are exempted.

In the recent, well reasoned opinion Huhn v. Dixie Insurance Company, 453 So.2d 70 (Fla. 5th DCA 1984), the Fifth District Court of Appeal has eloquently explained why the Second District's line of cases discussed above should be rejected and reaches a contrary result on facts which are analogous to those in Everton, supra, and City of Cape Coral, supra. In so doing, Fifth DCA cited with approval the decision of the First DCA in Smith, supra, in holding that operational activities are not immune even though some discretion is involved in their exercise.

In his concurring opinion in Smith v. Department of Corrections, Judge Ervin foresaw that the Second DCA reasoning in Everton and City of Cape Coral would lead it into this quagmire. He noted that by placing a prisoner with known dangerous propensitites in a situation of minimum or no supervision, the government created a dangerous condition from which it had the duty to warn or protect the public as set forth by the Supreme

Court in City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982). Indeed, it was this type of known danger which the California Supreme Court held to require such a duty in Johnson v. State, supra, upon which this Court relied in Commercial Carrier and City of St. Petersburg v. Collom. Noting that Section 768.28(1) Florida Statutes generally permits actions against the State or its agencies to the same extent that a private person would be liable to a plaintiff under the laws of the State, Judge Ervin noted Section 319 of the Restatement Second of Torts which states: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled, is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm".

After noting that the Everton and City of Cape Coral opinions could not be squared with the Supreme Court's Decision in Collom, Judge Ervin went on to state prophetically:

> "Perhaps the opinions can be understood as recognizing a public policy exception to the waiver of immunity doctrine for police officers performing discretionary acts in the course of their duties. If so, I think this 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." (Emphasis original) Smith v. Department of Corrections, supra, at page 1341.

Subjecting the operational decisions of law enforcement personnel to tort liability would not work any radical change in the system of law enforcement. Florida law already subjects the

"discretionary" decision to arrest to liability under the tort of False Imprisonment. See for example, the recent case of City of Hialeah, etc., v. Rehm, 455 So.2d 458 (3rd DCA 1984).

In summary it is submitted that the First and Fifth DCA have correctly applied the standards for sovereign immunity and, as expressed in the majority opinion Smith:

> After consideration of these cases, we conclude that there is no sovereign immunity when an inmate is negligently given preferential treatment and placed in inadequately supervised confinement. The fact that prison officials have some discretion in assignment of inmates does not require immunity. Id., Smith v. Department of Corrections, supra, at 1340.

ARGUMENT II

THE SUPREME COURT SHOULD ABOLISH OR SEVERELY RESTRICT THE JUDICALLY CREATED EXEMPTION FROM THE LEGISLATURE'S WAIVER OF SOVEREIGN IMMUNITY.

The Petitioner submits that, as shown in the previous argument, the facts of this case do not fall within the exemption from the waiver of sovereign immunity as that exemption is now interpreted. Nevertheless, a review of history and the current state of sovereign immunity problems reveals a need for a broadly stated ruling and clarification by the Supreme Court of this issue.

Prior to the enactment of Section 768.28 Florida Statutes, the common law regarding sovereign immunity and particularly municipal tort liability was complex and unsound. It involved multiple layered semantic tests such as ministerial vs. discretionary duties, First National Bank v. Filer, 107 Fla. 526, 145 So. 204 (1933), proprietary vs. governmental functions, Calfman v. City of Tallahassee, 84 Fla. 634, 94 So. 697 (1922), general duty vs. the special duty, Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967), etc.

The legislature, presumably being aware of this chaos, enacted 768.28 Florida Statutes, broadly waiving immunity for the state and it's subdivisions, including municipalities, and

specifically omitting the exemption for "discretionary" functions found in the Federal Tort Claims Act on which Section 768.28 is modeled.

> In accordance with Section 13, Article X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liabilty 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. Section 768.28(1) Florida Statute. (emphasis added)

In interpreting the Statute in Commercial Carrier, supra, the Court recognized it's purpose and the dangers of returning to the old semantic tests. Commercial Carrier quotes at length the United States Supreme Court case of Indian Towing Company v. United States, 350 US 61, 76 S.Ct. 122, 100 Led 48 (1955), which construes the Federal Tort Claims Act:

> In rejecting the governments assertion that it was immune from suit, the Court also disallowed the notion that the Federal Tort Claims Act incorporated the concept of municipal tort liability:
>
> > 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 48 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. The fact of the matter is that the theory whereby muncipalities are made amenable to liability is an endeavor, however akward and contradictory, to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claim Act cuts the ground from under that doctrine; it is not self defeating by covertly embedding the casuistries of municipal liability for torts.
>
> 350 US at 65, 76 S.Ct. at 124, 125 (footnote omitted). For the same reasons articulated above, we refuse to place such a gloss on our waiver statute. To do so would be to essentially emasculate the act and the salutary purpose it was intended to serve. Commercial Carrier, supra, at 1017.

Nevertheless, the Court went on to carve out an exemption in addition to those specifically enacted by the legislature, for certain discretionary functions which could properly be characterized as planning activities requiring a basic policy decision. Id., at 1021. The Courts understandable concern was to shield such basic governmental policy making from judicial scrutiny and thereby preserve the pattern of distribution of governmental functions prescribed by constitution and statute. Commercial Carrier, supra, at 1018.

However, Florida's Constitution gives the Legislature the power to waive sovereign immunity, that is to determine the extent to which injured and aggrieved persons may employ the judicial process to review and judge the acts of government. Article X, Section 13, Fla. Const. By carving out from the Legislature's waiver of sovereign immunity, an exemption or limitation not included in those specified by the Legislature, the Court not only violated the sound rule of statutory interpretation "inclusio

unius est exclusio alterus", but the Court also violated the very policy it sought to further - invading and second-guessing a basic policy decision entrusted by our Constitution to the Legislature.

The Commercial Carrier decision set forth a very restricted exemption. Nevertheless, it set loose the demon of determining, on a "case by case" basis, whether the Courts should make the policy decision of applying or waiving sovereign immunity which the Constitution placed in the hands of the Legislature.

The problem of determining the borders of this exemption became worse as the Court tried to clarify it in the so-called "Neilson Trilogy." Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982), Ingham v. State, Department of Transportation, 419 So.2d 1081 (Fla. 1982), City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982). In those cases dealing with issues of road and bridge construction and maintenance, the Court tried to clarify the matter but held that the exempt planning level of government extended downward at least to the omission of screens bars or other protective devices from the sewers of a drainage project which was inherently dangerous without them. City of St. Petersburg vs. Collom, supra, (holding that the creation of known dangerous conditions such as this gives rise to an operational level duty to warn the public or protect the public from the danger, but at the same time, allowing the Plaintiff to proceed only on the theory that the lack of warning gave rise to liability.) At the same time, the Court stated that

the operational level extends upwards at least as far as the design of bridge supports once the planning level decision to build the bridge is made. Department of Transportation v. Neilson, supra, at 1077-1078. Justice Sunberg, author of the Commercial Carrier decision dissented. As he noted, "the enigma is now shrouded in mystery". Department of Transportation v. Neilson, supra, at 1079.

The result, as this Court must be aware, has been an avalanche of cases in the Appellate Courts and utter confusion among the litigants and the judiciary. The burden on limited appellate resources is only one part of the public costs of this confusion which must also include the cost to the claimants, government agencies, and the court system of litigation of matters in which there is no factual dispute and which could otherwise be settled, and the inability of all parties to determine what the potential liability for a particular activity might be.

The Fourth District Court of Appeal expresses the problem and its proposed solution as follows:

> As to the overall question of what constitutes "planning" and what is "operational," it is our view that the Florida case law is in disarray. Indeed the only way out of the impasse at the District Court level is to certify each and every case to the Supreme Court, on its particular facts, and let our superiors show us the way until the law is clarified or Commercial Carrier is receded from. Carter v. City of Stewart, 433 So.2d 669 (Fla. 4th DCA 1983).

Furthermore in some districts, notably the Second District Court of Appeal, the exemption has been allowed to swallow the

rule, thereby giving rise to the very emasculation of the legislature's waiver, which the Court sought to avoid in Commercial Carrier. Indeed, the Second District Court of Appeal has taken the position that the law in this area is now exactly as it was before.

> We were faced with the task of applying labels - governmental and proprietary, general duty and special duty, or a combination - to the activities of government. With these labels came confusion and pleas from the judiciary for a waiver of this "archaic and outmoded concept".
>
> The legislature responded by enacting Section 768.28 Florida Statutes (1974 supp.), which we originally perceived as a broad and complete waiver of sovereign immunity in Florida, except as limited by the legislature. However, the Courts quickly began fashioning exemptions to the waiver, asserting that "certain areas of governmental conduct (still) remain immune from scrutiny by Judge or jury," thus perpetuating immunity and perpieting litigants. Commercial Carrier, 371 So.2d at 1017-1018. We were handed a new set of labels to apply to the governmental activity - discretionary and non-discretionary, or operational and planning level.
>
> The rule (immunity) is now the exception, and the exception (liability) is the rule; "everything has changed, yet nothing has changed", whether controlled by sovereign immunity or its waiver, and regardless of the labels we use, the result is the same... (citations ommitted) (emphasis added) Newmann v. Davis Water and Waste, Inc., 433 So.2d 559 at 562 (Fla. 2d DCA 1983).

Petitioner respectfully submits that the Legislative attempt to solve the problem has never been given the chance to operate. The legislature specifically imposed restrictions on its waiver, including a monetary limit of $100,000.00 per claimant and $200,000.00 per incident no matter how many state agencies or subdivisions are involved (which is no more than the standard

homeowners liability policy limits), and absolute personal immunity for officers employees and agents of the state and its subdivisions, absent malice, bad faith or willful and wanton disregard. Section 768.28(5) and (9) Florida Statute. These and other restrictions are well designed to prevent catastrophic results in any particular case, and if this broad waiver of immunity proves unwise by allowing judicial determinations of liability in areas which should be exempt, the legislature can amend to add any necessary restrictions pursuant to its Constitutional Authority. Article X, Section 13, Florida Constitution.

In a recent decision, this Court denied relief to a claimant because he had failed to give the statutorily required notice to the Department of Insurance, although the Department of Insurance had no financial interest in the matter and the notice had been given to the appropriate agency (a school board). The Court was evidently of the opinion that the legislature inadvertently failed to exempt county school districts from the statutory notice requirement. Nevertheless, the claim as disallowed on the basis that "our views about the wisdom or propriety of the notice requirement are irrelevant because the requirement is so clearly set forth in the statute. Consideration of the efficacy of or need for the notice requirement is a matter wholly within the legislative domain". (Citations omitted). Levine v. Dade County School Board, 442 So.2d 210 at 212-213 (Fla. 1983). It is

respectfully submitted that this reasoning applies with equal force to the rest of the Legislature's considered and planned waiver of sovereign immunity, especially where, as here, the omission of an exemption for "discretionary functions" was certainly not inadvertent. Commercial Carrier, supra. See also Huhn v. Winn Dixie, supra, at 73.

At the very least, the Court should clarify the "planning level" exemption by carefully restricting its range so that the exemption does not swallow the rule. This is the approach urged by Justice Sunberg in his prophetic dissent in Neilson, supra. Justice Sunberg noted that every other jurisdiction which has adopted the rationale of Johnson v. State, supra, had construed planning level functions more narrowly than the majority in the Neilson trilogy. Department of Transportation v. Neilson, supra, at 1080.

The Supreme Court of Washington, which was the source of the Evangelical rule adopted in Commercial Carrier, has repeatedly held that discretionary governmental immunity is an extremely limited exception. Mason v. Abbitton, 85 Wash.2d 321, 328, 534 P.2d 1360 (1975), Hassilon v. City of Seattle, 86 Wash.2d 607, 547 P.2d 1221 (1976), Miatky v. City of Spokane, 101 Wash.2d 307, 678 P.2d 803 (1984). In the recent case of Chambers-Castanes v. King County, 100 Wash.2d 275, 669 P.2d 451 (1983), the Supreme Court of Washington was faced, as this Court is here, with recent lower court of appeal decisions granting immunity on the basis of

discretionary police activity without determining whether the challenged conduct involved a basic policy decision. In expressly disapproving those decisions, the Court quoted it's previous language in Mason v. Abbitton as follows:

> "To now hold that this type of discretion, exercised by police officers in the field, cannot result in a liability under RCW 46.61.035, due to an exception provided for basic policy discretion, would require this Court to close it's eyes to the clear intent and purpose of the legislature when it abolished sovereign immunity under RCW 4.96.010. If this type of conduct were immune from liability, the exception would surely engulf the rule if not totally destroy it. (citations ommitted) Id., at 669 P.2d 456 quoting Mason, supra,at 328-29 534 P.2d 1360.

Indeed, in order to assure that the exemption is limited to the purpose for which it was created; to assure that courts refused to pass judgment on policy decisions in the province of coordinate branches of government, the Supreme Court of Washington requires the following:

> Accordingly, to be entitled to immunity, the State must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in "discretionary activity" is irrelevant if, in a given case, the employee did not render a considered decision. King v. City of Seattle, 84 Wash.2d 239, 525 P.2d 228, 233 (1974).

If the Court decides to adhere to the judicially created exemption for discretionary planning level activities, it is respectfully submitted that the narrowness of this exemption should be clearly set forth and the Court should additionally require the showing set forth in King v. City of Seattle, supra, to avoid allowing this exemption to overrun the purpose for which it was created and engulf the legislature's broad waiver of immunity.

CONCLUSION

Petitioner respectfully submits that the decision to make Baumgardt a trustee and assign him to kitchen detail with his known propensity for violence was an operational level activity of the Respondents for which sovereign immunity has been waived. In addition, the Respondents breached a duty to protect the Petitioner from any known dangerous condition which they had created and this duty arises at the operational level.

Furthermore, the law governing the Legislature's waiver of sovereign immunity should be clarified and the judicially created exemption for "planning level" activities be abolished in order to give effect to the legislature's intentions and eliminate the chaos and uncertainty which abounds in this area. In the alternative, the Court should at least restrict the exemption to the purposes for which it was intended in order to avoid emasculating the act and the purpose it was intended to serve.

For all of the above reasons, the District Court's affirmance of the Trial Court's order dismissing Petitioner's Complaint should be reversed and this cause remanded to the Trial Court for further proceedings in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the above and foregoing Brief have been furnished by United States Mail to the Honorable SYD J. WHITE, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and a true and correct copy has been furnished by United States Mail to GAIL SMITH-SWEDMARK, Attorney for Respondents, Post Office Box 669, Tallahassee, Florida 32302-0669, this 13 day of February, 1985.

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