W00A 017

IN THE SUPREME COURT

OF THE STATE OF FLORIDA

OLIVA RODRIGUEZ, as Personal Representative of the Estate of EDDIE RODRIGUEZ,

Petitioner,

v.

CASE NO. 65,623

CITY OF CAPE CORAL, RENNY WIERSMA and THE AETNA CASUALTY & SURETY COMPANY,

Respondents.

BRIEF OF RESPONDENTS ON THE MERITS

ON PETITION FOR REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

Gerald W. Pierce
HENDERSON, FRANKLIN, STARNES & HOLT
Attorneys for Respondents
Post Office Box 280
Fort Myers, Florida 33902-0280
(813) 334-4121

TOPICAL INDEX

TOPICAL INDEX, cont'd

TABLE OF AUTHORITIES

STATEMENT OF THE FACTS AND OF THE CASE

The Respondents, the City of Cape Coral, Renny Wiersma and the Aetna Casualty and Surety Company, disagree with the Statement of the Case and Facts in the Petitioner's brief. The brief inaccurately represents both the facts and issues which were before the Circuit Court and the District Court. In order to correct the substantial inaccuracies in the Petitioner's brief, it is necessary for the Respondents to restate completely both the facts and the case. This brief will refer to the Petitioner as "Plaintiff," to the Respondents by name, and to the deceased as "Mr. Rodriguez." Although the Plaintiff appealed from the entry of a summary judgment against her, she has relied only upon the allegations of the Complaint in making her representations as to the facts before the trial court. The allegations in the Complaint were quite dramatic, but discovery quickly disclosed that they were also untrue.

According to the evidence which was presented to the trial court, on the night of his death, Mr. Rodriguez, a former police officer, was attending a party at the Italian American Club in Cape Coral, Florida. (R 566, 274-75, 564). Prior to arriving at the Club, he may have had a few drinks. (R 320, 584). He and the Plaintiff, his wife, arrived at the Club in their car at approximately 8 p.m. (R 568). The party was a BYOB affair, and Mr. Rodriguez brought a quart of

rum. (R 569). During the course of the evening, the bottle of rum was emptied, presumably by Mr. Rodriguez alone. (R 570). He ate, drank and danced during the course of the evening. (R 568). He ate two full meals at the Club that evening. (R 572, 280). He was in good spirits at the party. (R 574, 293). The friend who invited Mr. Rodriguez to the Club, also a former police officer, was with him for the entire evening. (R 569, 564). He testified that Mr. Rodriguez seemed alright throughout the evening. (R 578). He was not staggering or falling down. (R 574). He testified that he did not observe any signs of intoxication. (R 579).

The Plaintiff, who had only one drink during the evening, did not notice a change in the way Mr. Rodriguez acted. (R 280, 285). She testified that his actions were normal. (R 286). She could not remember whether his speech was slurred. (R 285). She did not remember him stumbling or tripping. (R 294). She did not remember any difference in the way he talked. (R 301). She testified that he had no trouble dancing and that he did not get sick. (R 293). He did not fall off his chair or spill a drink on anyone. (R 294). She testified that he was not asked to leave, and that he did not make a fool of himself. (R 294). She did not remember that he had any trouble walking. (R 299).

Mr. Rodriguez and the Plaintiff left the party at approximately 12:30 a.m. (R 586, 281). The friend who had

invited Mr. Rodriguez and the Plaintiff to the party left at the same time, and testified that he felt that Mr. Rodriguez was able to handle himself. (R 573-74). He asked Mr. Rodriguez if he wanted him to drive the car. (R 573, 577). Mr. Rodriguez said, "No, I'm alright." (R 577). The friend said, "Don't forget, you are coming over tomorrow." (R 577). Mr. Rodriguez responded, "I know. I will see you in the morning." (R 577).

The Plaintiff told her husband that she wanted to drive the car. (R 282). She did not know whether he was capable of driving because she knew he had been drinking. (R 321-22). They argued about who would drive. (R 320). Mr. Rodriguez drove the car for about two blocks before he stopped. (R 282-84). He told the Plaintiff to go on home, and that he would meet her there. (R 286-87). He then began to walk. (R 287). The Plaintiff circled the block twice, and he again told her to go on home. (R 287). The Plaintiff testified that Mr. Rodriguez understood what she was saying to him. (R 301). She drove home and waited for him. (R 289). She said that she figured that he was going to make it home. (R 289). She did not go back out and look for him because she thought that he would walk home. (R 290).

Mr. Rodriguez was next seen by three Cape Coral policemen, including Sergeant Wiersma. These officers met in separate police vehicles in a park at the foot of the Cape Coral Bridge at approximately 1:30 a.m. or 2:00 a.m. (R 41,

427, 468). The purpose of the meeting was for the other officers to turn paperwork over to Sergeant Wiersma. (R 468). The park was located on the south side of the road, and the officers saw Mr. Rodriguez walking toward the bridge on the north side of the road. (R 46-52, 427, 470, 472). He was carrying his coat over his shoulder. (R 48, 437, 473). The officers briefly discussed the fact that Mr. Rodriguez was approaching. (R 46-47). None of them noticed anything abnormal about the manner in which he was walking. (R 48, 58, 429, 474). He was not stumbling or falling or anything of that nature. (R 48-49). The officers intended to find out where Mr. Rodriguez was going, but they were going to wait until he was closer before they asked him. (R 47). Before Mr. Rodriguez arrived, the other two officers were dispatched to the scene of a disturbance, leaving only Sergeant Wiersma at the park. (R 47, 429, 475-76).

Sergeant Wiersma testified that he saw nothing unusual about the walk or gait of Mr. Rodriguez. (R 474). He pulled his car out from the park, and crossed the road to pull up next to Mr. Rodriguez. (R 477). He intended to find out where Mr. Rodriguez was going. (R 478). Mr. Rodriguez walked up to the window of the car. (R 479). He told Sergeant Wiersma his name. (R 478). Sergeant Wiersma asked where he was going. (R 479). Mr. Rodriguez said he was going over the bridge to his home. (R 479-80). Sergeant Wiersma told him that it was illegal to walk on the bridge.

(R 480). Sergeant Wiersma could smell alcohol on Mr. Rodriguez' breath, but he saw nothing in his behavior to indicate that he was intoxicated. (R 480). Mr. Rodriguez told Sergeant Wiersma that he had been at a dinner dance at the Italian American Club, and that he had had a fight with his wife. (R 481). At about that time, a small, two-seat sports car pulled up behind the police vehicle. (R 483-84, 730). Sergeant Wiersma left his vehicle to find out what the problem was. (R 483-84). The driver said that he was out of gas. (R 484, 731). Mr. Rodriguez stood between the two cars while Sergeant Wiersma was talking with the driver of the sports car. (R 486). Sergeant Wiersma had the police dispatcher call a friend of the driver of the sports car to bring him some gas. (R 485, 731). He asked the driver of the sports car if he would give Mr. Rodriguez a ride over the bridge. (R 487, 731, 748). The driver said that he did not have room for another passenger, but that his friend would give Mr. Rodriguez a ride when he arrived with the gas. (R 487, 748-49). Sergeant Wiersma asked Mr. Rodriguez if he would accept the ride, and he said that he would. (R 487). Sergeant Wiersma then left to go to the scene of the disturbance to which the other two officers had been dispatched. (R 488). Sergeant Wiersma testified that there was nothing from the behavior, speech, actions or demeanor of Mr. Rodriguez that would indicate that he was intoxicated. (R 468, 489).

In his deposition, the driver of the sports car testified that Sergeant Wiersma asked him to take Mr. Rodriguez over the bridge. (R 731). The driver told Sergeant Wiersma that he did not have room, but that his friend would give Mr. Rodriguez a ride when he arrived with the gas. (R 748-49). It was the driver's opinion that Mr. Rodriguez was intoxicated. (R 737). After Sergeant Wiersma left, Mr. Rodriguez was rocking back and forth. (R 750). The driver testified that he never saw Mr. Rodriguez fall. (R 763). After a few minutes, Mr. Rodriguez came back to the sports car and told the driver that if Sergeant Wiersma returned, to tell him that he had decided to take his chances and walk over the bridge. (R 751-52). The driver assumed that he meant that he would take his chances as to being struck by a car. (R 769). He also testified that Mr. Rodriguez knew what he was saying and that Mr. Rodriguez knew that he was supposed to wait. (R 754). Mr. Rodriguez was told that help was on the way, but he said he was going to go ahead and take his chances. (R 768).

Shortly thereafter, before he actually reached the Cape Coral Bridge, Mr. Rodriguez was struck and killed by a car. (R 80). An autopsy revealed a blood alcohol level of .216 percent. (R 787). This level should produce an abnormal gait and abnormal thought processes, and could even cause some slurring of speech, depending upon the particular individual. (R 790). Habitual use of alcohol would cause an

increased tolerance, and the autopsy findings were consistent with chronic use of alcohol. (R 809, 822-24). There was no indication that Mr. Rodriguez would have needed immediate hospitalization for alcohol poisoning or any other alcohol related problem. (R 810).

In her brief, the Plaintiff represents that the trial court's denial of the original motion for summary judgment meant that the trial court found sufficient evidence to support a jury finding that Mr. Rodriguez was incapacitated within the language of Section 396.072(1). To the contrary, there is nothing in the record to indicate the basis of the denial of the motion. The Respondents suggest that the basis for the denial of the first motion was the one-page affidavit which was filed by the Plaintiff shortly after the first motion was filed. (R 641-42, 723-24). The affidavit completely contradicted her deposition testimony. (R 258-328, 723-24). The affidavit gave no explanation for the blatant inconsistencies between her live testimony and the contents of the affidavit. (R 723-24). It is the position of the Respondents that the trial court improperly considered the contradicting affidavit in denying the first motion for summary judgment.

In the Fourth Amended Complaint, the Plaintiff alleged that Defendants City of Cape Coral and Sergeant Wiersma were negligent in failing to take Mr. Rodriguez into protective custody under Section 396.072, Florida Statutes (1977), and

that this failure to take Mr. Rodriguez into custody was a proximate cause of his death. (R 602-606). The Complaint also alleged that the City of Cape Coral was negligent in failing to train police officers in the manner and ways in which to comply with the statute. (R 605). Defendants City of Cape Coral and Wiersma filed a second motion for summary judgment. (R 1089-90). The motion asserted that there was no duty on the part of Sergeant Wiersma to take Mr. Rodriguez into protective custody under the facts, that the decision not to take him into custody was a discretionary decision exercised by Sergeant Wiersma in performance of his duties, and that the City of Cape Coral and Sergeant Wiersma would be protected by the doctrine of sovereign immunity in connection with the decision not to take Mr. Rodriguez into custody. (R 1089-90). The motion was granted, and the Plaintiff appealed from the order which granted the motion. (R 1147, 1150).

In her brief, the Plaintiff misleadingly represents that the "City advanced and the District Court considered only the sovereign immunity point." (Brief at 4). While it is true that the City discussed the sovereign immunity point, the primary argument by the Respondents was that the voluminous evidence established that Mr. Rodriguez did not appear to be incapacitated within the meaning of Section 396.072 at the time he was questioned by Sergeant Wiersma. (Brief of Appellees at 9-15). While it is true that the District Court

discussed only the sovereign immunity issue in its opinion, the Court also noted that the sovereign immunity issue was only one of the issues raised in the appeal. (Opinion at 4). In their response to the Plaintiff's motion for rehearing, the Respondents requested that the District Court render the sovereign immunity question moot by entering a decision based upon the Respondents' primary point on appeal relating to the absence of any genuine issue of material fact as to whether Mr. Rodriguez appeared to be incapacitated. (Response to Motion for Rehearing at 1, 2). The fact that there was no evidence to support the claim that Mr. Rodriguez appeared to be incapacitated within the meaning of the statute is implicit in the opinion by the District Court. The Court noted that in fact, Sergeant Wiersma observed and conversed with the decedent, and that in fact he determined that the decedent was not incapacitated. (Opinion at 7).

SUMMARY OF ARGUMENT

The sovereign immunity issue is rendered moot by the fact that the evidence at trial established that Mr. Rodriguez did not appear to be incapacitated within the meaning of the statute at the time he was seen by Sergeant Wiersma. In fact, the evidence established that he did not even appear to be particularly intoxicated. The only evidence which would tend to indicate that Mr. Rodriguez was seriously intoxicated is found in an affidavit filed by the Plaintiff subsequent to her deposition, in which she substantially contradicted her deposition testimony. The affidavit is not competent evidence, and the evidence which was before the trial court established as fact that Mr. Rodriguez did not appear to be incapacitated.

If Everton and Duvall are upheld by this Court on review, those decisions are entirely consistent with the decision in the instant case. In all three cases, the purportedly tortious act involved a direct, fundamental exercise of police power discretion. Everton and Duvall recognized that questions of the applicability of the sovereign immunity doctrine are not based upon semantic games. It cannot be tortious for the government to govern, and the common element in Everton, Duvall, and the instant case is the fact that each involves the exercise of a basic fundamental governmental power. A police officer in the street is

one of the few lower-echelon government employees who can exercise a basic governmental power in exercising his discretion. An infringement upon this discretion would be violative of the separation of powers concept and would have a crippling impact upon the effectiveness of law enforcement in this state.

ARGUMENT

I. THE SUMMARY JUDGMENT ENTERED IN FAVOR OF THE RESPONDENTS WAS PROPER BECAUSE THE VOLUMINOUS EVIDENCE AT THE TRIAL COURT LEVEL ESTABLISHED THAT MR. RODRIGUEZ DID NOT APPEAR TO BE INCAPACITATED WITHIN THE MEANING OF SECTION 396.072 AT THE TIME HE WAS SEEN BY SERGEANT WIERSMA.

Respondents will respond to the Plaintiff's arguments in the next portion of this brief. Unfortunately, this case has reached this Court on an issue that is completely moot. Respondents suggest that these proceedings are a complete waste of time for both the parties and this Court. As noted by the District Court in its opinion, the sovereign immunity issue was only one of the issues which was raised on appeal. The primary issue urged by the Respondents was the fact that the evidence established that Mr. Rodriguez did not appear to be incapacitated within the meaning of Section 396.072 when he was seen by Sergeant Wiersma. The Plaintiff has attempted both in the District Court and in this Court to redefine the issues to avoid having to address this dispositive fact.

The Plaintiff's attempt to avoid addressing the factual issue has reached the point of blatant, clear and unequivocal misrepresentation on page four of her brief, where she stated, "On appeal, the City advanced and the District Court considered only the sovereign immunity point." In fact, the only issue advanced by the City and the District Court was the evidentiary issue. The remainder of its argument was a

response to the sovereign immunity points advanced by the Plaintiff. The City's primary argument, and the argument to which the Plaintiff would not prefer to respond, is based upon the evidence. Further, the Respondents are confident that the District Court considered all of the arguments raised in the lower proceedings, and not just the sovereign immunity issue advanced by the Plaintiff. Respondents suggest that the only reason that the Court did not discuss the evidentiary issue in its opinion is that the evidentiary issue lacked value as precedent. The fact that the evidentiary question was considered by the Court is seen on page four of the opinion, where the Court stated:

> The Defendants' motion for summary judgment also alleged that there was no duty on the part of Renny Wiersma to take Rodriguez into protective custody or to take him to the hospital under the facts of the case.

In order to avoid the delay and expense of the proceedings before this Court, Respondents requested in their response to the motion for rehearing that the Court clarify matters by addressing the evidentiary issue. Unfortunately, the Court did not clarify the situation.

Section 396.072, upon which the Plaintiff relies, is found in the Chapter of the Florida Statutes entitled "alcoholism." Section 396.022 specifies the legislative purpose in enacting the Chapter. This Section details the problems that society faces because of alcoholism. More specifically, the statute states in part:

> The criminal law is not an appropriate device for preventing or controlling health problems. Dealing with public inebriates as criminals has proved expensive, unproductive, burdensome, and futile. The recognition of this fact and the concurrent establishment of modern public health programs for the medical management of alcohol abuse and alcoholism will facilitate early detection and prevention of alcoholism and effective treatment and rehabilitation of alcoholics and early diagnosis and treatment of other concurrent diseases.
>
> Handling alcohol abusers and alcoholism primarily through health and other rehabilitative programs relieves the police, courts, correctional institutions, and other law enforcement agencies of a burden that interferes with their ability to protect citizens, apprehend law violators, and maintain safe and orderly streets.
>
> Section 396.022(4) & (5), Florida Statutes (1981).

The purpose of the statute is to relieve law enforcement agencies of a burden that interferes with their ability to protect citizens. There is no indication that the statute was intended to impose a tremendous new burden upon peace officers to take all intoxicated persons into protective custody. There is not even the remotest indication that the legislature intended to create a private cause of action by enacting this legislation. The purpose of the legislation is to provide law enforcement officers a new tool for dealing with a serious problem of modern society.

In support of her claim that Sergeant Wiersma had a duty to take Mr. Rodriguez into protective custody, the Plaintiff relies upon the following language in Section 396.072:

> Any person who is intoxicated in a public place and who appears in need of help, if he consents to the proffered help, may be assisted to his home or to an appropriate treatment resource, whether public or private, by a peace officer. Any person who is intoxicated in a public place and appears to be incapacitated shall be taken by the peace officer to a hospital or other appropriate treatment resource. A person shall be deemed incapacitated when he appears to be in immediate need of emergency medical attention, or when he appears to be unable to make a rational decision about his need for care.
>
> Section 396.072(1), Florida Statutes (1981).

The statute specifically affects only two types of intoxicated persons. It is intended to apply only to two levels of severely intoxicated persons. The first type is a person who is intoxicated in a public place and who appears to be in need of help. If such a person consents to proffered help, a peace officer may assist him to his home or to an appropriate treatment resource. The second type of intoxicated person covered by the statute is a more severely intoxicated person who has gone beyond the appearance of a mere need for help. This type of person is one who is actually incapacitated. Under the statute, a person is incapacitated when he appears to be in immediate need of emergency medical care or when he appears to be unable to make a rational decision about his need for such care. When a peace officer finds a person who is intoxicated to the point of this type of incapacity, the statute gives him authority to take the person to a hospital or to an appropriate treatment resource even if the person

does not give his consent. The provision dispenses with the need for consent with this most severe level of intoxication, since an incapacitated person could not give or refuse his consent.

The Plaintiff's entire claim against the City of Cape Coral and Sergeant Wiersma is based upon her assertion that Mr. Rodriguez appeared to be incapacitated at the time that Sergeant Wiersma spoke with him. However, the record does not contain even the remotest indication that Mr. Rodriguez was intoxicated to the point of incapacity. In fact, there was no evidence that he was even intoxicated to the point that he appeared to be in need of help. The autopsy revealed a blood alcohol level of .216 percent. According to the evidence, this level of intoxication would probably produce an abnormal gait and abnormal thought processes. It could even cause some slurring of speech, depending upon the tolerance of the particular individual. The evidence also indicated that a habitual user of alcohol would have an increased tolerance for alcohol in his system. There is not the slightest indication in the record that this level of intoxication would give the appearance of incapacitation. It is also undisputed in the record that there was no indication that Mr. Rodriguez needed emergency medical attention.

The statute does not require that a peace officer give every person who might be intoxicated a test to determine his blood alcohol level. Instead, it applies only when it

"appears" that the person is incapacitated. Incapacitation and intoxication are certainly not the same thing. The wording of the statute indicates that a person who is incapacitated is intoxicated beyond the point where he merely needs help. The statute gives some assistance in defining what it means by "incapacitated" where it provides that a person is deemed incapacitated when he appears to be in immediate need of medical attention or when he appears to be unable to make a rational decision about his need for care. The record contains no evidence or inference that Mr. Rodriguez appeared to be incapacitated.

The friend of Mr. Rodriguez who was with him for the entire evening at the Italian American Club testified that he did not observe any sign of intoxication. Mr. Rodriguez was not staggering or falling down. His friend was a former police officer, and he testified that he felt that Mr. Rodriguez could handle himself when he was getting into his car to leave the Club. The Plaintiff herself testified that the actions of Mr. Rodriguez appeared normal. She did not remember any difference in the way he talked. She testified that he had no trouble dancing, and that he did not get sick. She did not remember that he had any trouble walking. She testified that he understood what was being said. He was able to drive the car. When the Plaintiff left him, she fully expected him to be able to walk all the way home in his condition.

Shortly after the first motion for summary judgment was filed, the Plaintiff filed a one-page affidavit which substantially and directly contradicted her deposition testimony. (R 723). This affidavit gave no explanation for the blatant inconsistencies between her live testimony and the contents of the affidavit. When a party is faced with a motion for summary judgment, he cannot use an affidavit to repudiate his previous deposition in order to create a jury issue. Ellison v. Anderson, 74 So.2d 680, 681 (Fla. 1954). This rule is particularly enforced where there is no attempt to excuse or explain the discrepancies. Id.; see also Home Loan Company, Incorporated of Boston v. Sloane Company of Sarasota, 240 So.2d 526 (Fla. 2d DCA 1970). The Plaintiff could not rely upon this affidavit to defeat a motion for summary judgment.

The three police officers testified that Mr. Rodriguez did not appear to be intoxicated. He walked normally and spoke rationally. Mr. Rodriguez understood that Sergeant Wiersma had arranged for transportation across the bridge for him. He consciously rejected the transportation and "took his chances." The only evidence of the appearance of any intoxication whatsoever was the testimony of the driver of the sports car that ran out of fuel at the base of the bridge. The driver testified that it was his opinion that Mr. Rodriguez was intoxicated. He said that he saw Mr. Rodriguez rocking back and forth as he stood. However, there

is no evidence that he ever had any trouble walking or talking. At most, this evidence could show that Mr. Rodriguez appeared to be slightly intoxicated. There is no evidence that he was incapacitated in any way. There is no evidence that he appeared to need emergency medical treatment or that he appeared to be unable to make a rational decision about his need for care. In fact, except for the improper affidvait signed by the Plaintiff, the evidence established that Mr. Rodriguez was not incapacitated.

The Plaintiff's position is that the statute requires all peace officers to take all persons who appear to be intoxicated to a hospital or an appropriate treatment resource. According to the Plaintiff, a police officer who fails to take an intoxicated person into protective custody becomes the insurer of that person's safety. The monumental impact of this interpretation of the statute is quite obvious. Neither the language nor the purpose of the statute supports the Plaintiff's position.

The evidence conclusively established that Mr. Rodriguez did not appear to be incapacitated within the meaning of the statute. Accordingly, Sergeant Wiersma had no duty under the facts of the case to take him into protective custody, even if it is assumed that sovereign immunity is unavailable, and even if it is assumed that the legislature intended to create a private cause of action by enacting the statute. The entry

of the summary judgment was proper, and the sovereign immunity question is rendered moot.

II. THE DECISION OF THE DISTRICT COURT MUST BE UPHELD IF THIS COURT UPHOLDS THE DECISIONS IN EVERTON V. WILLARD, 426 SO.2D 996 (FLA. 2D DCA 1983), AND CITY OF CAPE CORAL V. DUVALL, 436 SO.2D 136 (FLA. 2D DCA 1983).

A. The decisions in Everton and Duvall were consistent with the decision in the instant case, since all three cases involve the exercise of police-power discretion in determining whether to take a person into custody.

The Plaintiff's entire argument on this issue is based upon the fact that the word "shall" happens to be used in the statute. According to her argument, since that particular word is used, the statute does not involve the use of discretion. According to her argument, Everton and Duvall are thus rendered irrelevant in this case.

Questions of the availability of sovereign immunity are not determined by looking at a single word. The word in the statute which requires the exercise of discretion is the word "appears." Under the terms of the statute, it is only when a person "appears" to be incapacitated that any duty of any police officer may arise. The word "shall" is irrelevant unless it "appears" to the peace officer that the person is incapacitated. The determination of whether a person appears to be incapacitated is a judgmental decision. The peace officer must rely upon his training and his powers of observation. His judgment is limited by time, lighting conditions

and many other considerations. The difficulty of making such decisions is illustrated in the instant case, where the Plaintiff argues that Sergeant Wiersma should have been able to tell that Mr. Rodriguez was incapacitated within the terms of the statute even though there was no evidence that he had any problem walking, talking or making decisions.

The determination as to whether a person appears to be incapacitated requires a basic, fundamental, police-power decision. Making such a decision is a direct exercise of the police power. Sergeant Wiersma was faced with making a judgment as to whether to invoke the police powers of the state. In discussing the discretion of a peace officer in determining whether to arrest an intoxicated person, the Court in Everton stated:

> We believe that though Deputy Parker's activities were clearly operational, they also involved basic governmental policy and the implementation thereof as emphasized by the Court in Neilson. Certainly, law enforcement is basic to government. Failure to adequately maintain or even to install adequate traffic control devices might eventually result in a certain amount of chaos as regards our transportation system. However, failure to maintain good, adequate and reasonable law enforcement would not just be chaotic, it would be disastrous. Absolutely essential to a good, adequate, and reasonable system of law enforcement as we know it is its own operation level activities, and essential to those operational level activities is the discretion of a law enforcement officer under the circumstances of a particular case to decide whether or not to detain or arrest someone.
> 426 So.2d at 1001-02.

A decision which would place the burden of taking all intoxicated persons into protective custody would also be disastrous. There is no indication in the statute that it was intended as a life, health and accident insurance policy for intoxicated persons in the State of Florida. The purpose of the statute is to treat alcoholism as a disease and not as a crime. It gives peace officers a method of dealing with a societal problem without invoking the operation of the criminal justice system. There is no indication in the statute that the legislature intended to create a private cause of action in favor of intoxicated people, or that it intended to impose additional liabilities upon law enforcement officers.

Everton cited to Berry v. State, 400 So.2d 80 (Fla. 4th DCA 1981), regarding judicial and prosecutorial immunity. It noted that it would be unfair to refuse immunity as a result of the actions of an officer in the street under the pressures of the moment when immunity in the same case would be afforded to the judge and prosecutor in their deliberate actions in the cool light of day. 426 So.2d at 1003. Certainly the Plaintiff is not advocating that a judge should be subject to civil liability for factual determinations made from the bench. In making judicial decisions, the judge functions as an integral part of our system of government. Subjecting him to liability to suit would be crippling upon the judicial system. In making decisions as to whether a

particular individual should be taken into custody, the police officer similarly functions as an integral part of our governmental system. It is easy to say that any particular factual determination by a judge, a prosecutor, a county commissioner or a policy officer in the exercise if their official duties is not a "planning-level, policy-making" decision, and thus would subject the government official to suit. However, the crippling impact of allowing a suit for one such decision is not felt in that particular lawsuit. The impact would come from the thousands of other decisions that could potentially subject the official to suit.

There is no uniform manual for making a judgment as to whether a particular individual is incapacitated. The judgment does not involve measuring the angle of a curve or a distance from an intersection. It does not involve measuring the height of shrubbery or determining whether a building is in compliance with a building code. It involves an internal decision, made quickly and under less than ideal conditions.

The substance of Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), is found where this Court stated:

> Hence, we are persuaded by these authorities that even absent an express exception in section 768.28 for discretionary functions, certain policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability. Like the Washington court, we recognize that the identification of these functions will in many instances be difficult. The temptation is strong to fall back on

> semantic labels for ease of application and seeming certainty. However, we eschew this temptation, as it surely will result in a return to the overly structured and often misleading analysis which persists in the law of municipal sovereign immunity.
>
> 371 So.2d at 1020.

Later in the opinion, this Court stated:

> So we, too, hold that although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain "discretionary" governmental functions remain immune from tort liability. This is so because certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance.
>
> 371 So.2d at 1022.

This Court discussed the liability for the exercise of the police power in more detail in Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982). In Neilson, the issues involved the installation and placement of traffic control devices. In discussing the sovereign immunity problems, this Court stated:

> With regard to the installation and placement of traffic control devices, we find the argument that such placement is exclusively the decision of traffic engineers and, as such, an operational-level function, to be without merit. Many municipalities and counties make these decisions, including even the installation of single traffic lights, within the ambit of their legislative function. Moreover, traffic control is strictly within the police power of the governmental entity. Questioning this function necessarily raises the issue of the government's proper use of its police power. In Wong v. City of Miami, 237 So.2d 132 (Fla. 1970), it was determined that the city could not be held accountable for how

> the police force was deployed. By analogy to Wong, the failure to deploy by patrolmen to congested intersections to control traffic would not subject a governmental entity to negligence liability. In our view, decisions relating to the installation of appropriate traffic control methods and devices or the establishment of speed limits are discretionary decisions which implement the entity's police power and are judgmental, planning-level functions. 419 So.2d at 1077.

The determination as to whether a particular individual should be taken into custody also raises the issue of the government's proper use of its police power. In Wong, the decision made by the city was a factual decision as to how it was felt that the police officers could best be deployed at the time. If it is held that a jury may sit back in the cool light of day and second guess the wisdom of decisions made by police officers in the exercise of their official duties, it would be a blatant encroachment of the judicial branch of government into the sphere of the executive branch. Under Everton and Duvall, the judgment made by Sergeant Wiersma in the early morning hours of October 15, 1978, was a decision which was an integral part of basic governmental policy. The judgment exercised by Sergeant Wiersma cannot subject him or his employer to civil liability.

Respondents admit that counsel for the Plaintiff at oral argument put a question directly to counsel for the Respondents and directly to the three-judge panel with no response. Respondents suggest that the District Court has no duty to respond to interrogation by counsel. They further suggest

that their attorney has no duty to respond to inane questions at oral argument. One can easily characterize any decision by a government official as a "factual" decision. The decision to design a curve in a road in a particular manner is a factual decision. A decision as to the safest manner in which to control an intersection is also factual. The question that should be asked is not one of whether a decision is a factual decision. The question is one of whether the decision is a policy-making, planning or judgmental, governmental function. Commercial Carrier at 1020. As noted in Commercial Carrier at 1018, and in various other decisions, it is not a tort for the government to govern. Even though a decision by an officer on the street as to whether to take a person into custody may not be a high-level, policy-making decision for broad application, it is a direct and fundamental function of governing. To answer the Plaintiff's question, it would not be a judgmental, governmental function for a building inspector to compare a building under construction with county requirements. Similarly, the inspection of a school bus to determine whether it meets published criteria is not a basic, judgmental, governmental function. The difference between these kinds of actions and the actions of Sergeant Wiersma is that he was exercising the governmental function of the police power at its most fundamental level. It cannot be questioned that such a judgment made by an officer on the street is a fundamental police

power function, and that this particular function can be exercised only on the street level. The Plaintiff wants to play semantic games by finding a category into which fundamental governmental functions and non-governmental functions may fit, and then arguing that they should be treated in the same manner. This argument ignores the substance of Commercial Carrier and the Neilson trilogy by attempting to impose semantic labels where they are neither helpful nor relevant.

B. Once a peace officer makes a determination that an individual is not incapacitated within the meaning of the statute, the statute imposes no further duties to provide care or transportation for the individual.

The Plaintiff's next point is based upon the premise that a peace officer must protect a person from himself after the officer determines that the person is not incapacitated. There is no basis for this claim in the statute. The statute does not obligate the officer to do anything under such circumstances. There is also no basis for the claim in the pleadings.

Sergeant Wiersma had every right simply to drive away, leaving Mr. Rodriguez as he found him. Instead, he arranged for a ride across the bridge for Mr. Rodriguez. Mr. Rodriguez knew that the ride had been arranged. He knew that he was supposed to wait. He made a conscious choice to attempt to walk across the bridge after he had represented to Sergeant Wiersma that he would wait for the ride. As Mr. Rodriguez

said himself, he decided to take his chances. Sergeant Wiersma had no legal right or obligation whatsoever to force Mr. Rodriguez to wait for the ride. The death of Mr. Rodriguez was not caused by any force set in motion by Sergeant Wiersma.

C. The Plaintiff did not seek damages in the trial court based upon any purported creation of a known dangerous trap; if the Plaintiff had requested relief based upon such factual allegations, the relief would have been unavailable because the evidence established without question that Sergeant Wiersma did not knowingly create a dangerous trap.

This Court recently stated the requirements for stating a cause of action under Neilson and Collom for the creation of a known dangerous condition. In Harrison v. Escambia County School Board, 434 So.2d 316 (Fla. 1983), the Court stated:

> Under Collom, therefore, a plaintiff would have to allege specifically the existence of an operational level duty to warn the public of a known dangerous condition which, created by it and being not readily apparent, constitutes a trap for the unwary. Neilson also requires the pleading of a known trap or known dangerous condition. Collom and Neilson require specific allegations of fact instead of generalities. Id. at 321.

An examination of the Fourth Amended Complaint reveals that the Plaintiff made no attempt to plead a cause of action under Collom and Neilson. In fact, not only was the issue not raised at the trial court level, it was also never raised before the District Court. In any event, the evidence in the

instant case reveals that Sergeant Wiersma did nothing to create a known dangerous condition not readily apparent, constituting a trap for the unwary.

III. THE DECISIONS IN EVERTON AND DUVALL SHOULD BE UPHELD.

Both Everton and Duvall have been pending in this Court for a long time. The issues have been briefed and argued in great detail. In fact, the Petitioners in both Duvall and in the instant case are represented by the same attorneys. In light of these factors, in light of the length of this brief, and in light of the fact that the Everton and Duvall issues are moot in this case in any event, the Respondents will not attempt to respond to the Plaintiff's argument in great detail. However, they will review the substance of the law of sovereign immunity and its applicability to this case.

Commercial Carrier and the Neilson trilogy are the cases which defined the substance of sovereign immunity in Florida. They do not provide true or false questions or multiple choice answers to sovereign immunity questions. In fact, the cases recognize the impossibility of devising a test which would apply in every situation. Contrary to the Plaintiff's understanding, Commercial Carrier does not provide that sovereign immunity questions are answered by determining whether the action in question was "planning level" or "operational level." In fact, Commercial Carrier recognizes that the concept of sovereign immunity in this state is not a

question of immunity at all. It is based upon the concept of separation of powers and the fact that it is not a tort for the government to govern. Commercial Carrier at 1018. In reviewing questions of alleged liability, it is necessary to determine where tort liability ends and the act of governing begins. Id. The legislative, judicial and executive processes of government cannot be characterized as tortious. Id. at 1018-19. There must be room for basic governmental policy decisions and their implementation, unhampered by the threat or fear of sovereign tort liability. Id. at 1019. This Court noted that "certain policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability." Id. at 1020. It refused to fall back on semantic labels for ease of application and seeming certainty because of the overly structured and often misleading analysis that would result. Id.

In summarizing the holding of Commercial Carrier in Neilson, this Court stated:

> In the latter, absolute immunity attaches to "policy-making, planning, or judgmental governmental functions." 371 So.2d at 1020. The underlying premise for this immunity is that it cannot be tortious conduct for a government to govern. Our decision recognized that there are areas inherent in the act of governing which cannot be subject to suit and scrutiny by judge or jury without violating the separation of powers doctrine.
>
> 419 So.2d at 1075.

If one avoids the temptation of attempting to press a square peg into a round hole by applying the planning

level/operational analysis to the decisions of the policemen on the street, and if one instead applies the holding and reasoning of Commercial Carrier to the situation, it is very clear that the actions of the police officer are not grounds for liability. The police officer's actions are not ministerial. The police officer is one of the few lower-echelon public employees who perform pure governing functions. The decision of the policeman on the street necessarily involves a high level of discretion. The exercise of that discretion is a pure exercise of a basic governing function.

Based upon the Plaintiff's analysis, a governmental entity will be subject to liability for the wrongful arrest of any person that is arrested by mistake. The officer's investigation will be open for review to determine whether he acted negligently in arresting the suspect under the circumstances. Such an invasion into the functioning of the executive arm of the government in exercising its police power authority would be intolerable.

The Everton and Duvall cases represent the insight of the Second District Court of Appeal into the concept of sovereign immunity under Florida law. Instead of attempting to impose a planning level/operational level analysis over a situation where it cannot be imposed, the Second District looked to the substance of the holdings in Commercial Carrier and in the Neilson trilogy. The Court could have taken the easy way out by ignoring the substance of Commercial Carrier

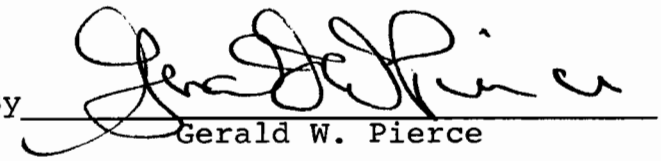
in favor of semantic games. Instead, it chose to rule consistent with the reasoning and substance of this Court's decisions.

CONCLUSION

Respondents request that the decision of the District Court be approved and that review be dismissed or denied.

Respectfully submitted,

HENDERSON, FRANKLIN, STARNES & HOLT
Attorneys for Respondents
Post Office Box 280
Fort Myers, Florida 33902-0280
(813) 334-4121

By 
Gerald W. Pierce

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Respondents has been furnished to JOEL S. PERWIN, ESQUIRE, 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida, 33130, SHELDON J. SCHLESINGER, P.A., 1212 S.E. Third Avenue, Fort Lauderdale, Florida, 33335, JOHN M. HARTMAN, ESQUIRE, Post Office Box 2696, Fort Myers, Florida, 33902, XAVIER J. FERNANDEZ, ESQUIRE, Post Office Box 729, Fort Myers, Florida, 33902, and to GEORGE O. KLUTTZ, ESQUIRE, Post Office Box 2446, Fort Myers, Florida, 33902, by regular United States Mail this 7th day of January, 1985.

Gerald W. Pierce