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IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,623

OLIVIA RODRIGUEZ, as Personal Representative of the Estate of Eddie Rodriguez,

Petitioner,

vs.

CITY OF CAPE CORAL, RENEE WIERSMA, and THE AETNA CASUALTY INSURETY COMPANY,

Respondents.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

LAW OFFICES, PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

PAGE

LAW OFFICES, PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

PAGE

LAW OFFICES, PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

PAGE

TABLE OF CASES

PAGE

TABLE OF CASES

PAGE

TABLE OF CASES

PAGE

LAW OFFICES, PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

PAGE

TABLE OF CASES

PAGE

TABLE OF CASES

PAGE

AUTHORITIES

AUTHORITIES

PAGE

I
STATEMENT OF THE CASE AND FACTS

The pertinent facts of this case are well-stated in the district court's opinion, *Rodriguez v. City of Cape Coral*, 451 So.2d 513 (Fla. 2nd DCA 1984), *review granted*, Case No. 65,623 (Fla. October 24, 1984). The plaintiff's complaint, as amended, alleged that in the early morning hours of October 15, 1978, the plaintiff's decedent, Eddie Rodriguez, was walking east on the Cape Coral Parkway toward the Cape Coral Bridge, when he was observed by several officers of the Cape Coral Police Department. At that time, the amended complaint alleged, Mr. Rodriguez had a blood alcohol level of approximately .216%, and was staggering in his motions, rocking back and forth, with a strong smell of alcohol on his person, and slurred speech, having consumed a quart of rum earlier that evening. *Id.* at 514; *see* R. 602-03.[1/] As the district court acknowledged, 451 So.2d at 514, the amended complaint further alleged that Mr. Rodriguez was "incapacitated" "because of his intoxication," and thus that the officers had a statutory obligation to take him "to a hospital or other appropriate treatment resource" under §396.072(1), Fla. Stat. (1977), which provides:

> 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 (our emphasis).

In light of Mr. Rodriguez' obvious incapacitation and of this statutory requirement, the plaintiff's complaint alleged that the police officers were under a duty to take Mr. Rodriguez into some form of protective custody (R. 604), and were negligent "in aban-

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[1/] "R." refers to the Record on Appeal in the district court.

doning the said Eddie Rodriguez alone at 2:00 A.M., on a lonely stretch of highway to fend and care for himself while obviously intoxicated and unable to fend and care for himself and while totally and completely incapacitated and in need of medical and custodial care and assistance . . ." (R. 605). Instead, the amended complaint alleged, the city and its officers were negligent in leaving Mr. Rodriguez in the company of an individual who had stopped on the bridge, and who was waiting for a friend to bring some gas (R. 603-04).[2/] That negligence, the complaint alleged, was a proximate cause of Mr. Rodriguez' death a few moments later, when he was struck by a careless driver on the bridge (R. 605).

This complaint was brought against the driver, a number of physicians and insurers, the City of Cape Coral, and the police officers who encountered Mr. Rodriguez on the bridge (R. 598). As the district court's opinion notes, 451 So.2d at 514, the municipal defendants filed a motion for summary judgment on three grounds: 1) that there was no evidence showing that Mr. Rodriguez was obviously intoxicated, and thus incapacitated, within the terms of §396.072; 2) that the city's conduct was not a proximate cause of Mr. Rodriguez' death; and 3) that the plaintiff had produced no evidence to support its alternative allegation that the city was negligent in the training of its officers (R. 641-42). The trial court denied this motion regarding both the City of Cape Coral and the one officer (Renny Wiersma) who had made the decision not to take Mr. Rodriguez into protective custody, granting it as to two other officers (R. 1011). It thus found sufficient evidence to support a jury finding that Mr. Rodriguez was obviously intoxicated and

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[2/] After the officers had stopped Mr. Rodriguez, and smelled alcohol on his breath (R. 439 at 42), a sports car stopped on the bridge and the driver told them that he was out of gas (R. 439 at 46). Officer Renny Wiersma used his police dispatcher to call a friend of the driver to bring some gas (R. 439 at 47), and then asked the driver if he would take Mr. Rodriguez across the bridge (R. 439 at 49). The driver answered that his car was not large enough, but that he would ask his friend to give Mr. Rodriguez a ride after the friend arrived with the gas (*id.*). Officer Wiersma then drove away (R. 439 at 49, 51).

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incapacitated within the language of §396.072(1).[3/]

After the trial court had denied summary judgment to the city and the one officer, the District Court of Appeal, Second District, decided *Everton v. Willard*, 426 So.2d 996 (Fla. 2nd DCA), *review granted*, No. 63,440 (Fla. September 9, 1983), and *City of Cape Coral v. Duvall*, 436 So.2d 136 (Fla. 2nd DCA), *review granted*, No. 63,441 (Fla. September 9, 1983)--both holding that the decision of a police officer not to arrest or otherwise apprehend a drunk driver is protected by the sovereign immunity doctrine. In light of these decisions, the remaining municipal defendants filed another motion for summary judgment asserting that the decision not to take Mr. Rodriguez into protective custody was a discretionary decision protected by the sovereign immunity doctrine as articulated in *Everton* and *Duvall*--and in addition that the officer had no duty to take

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[3/] The trial court was correct in this finding. Mr. Rodriguez had been at a party earlier that evening, and had consumed an entire quart of rum, drinking "right through the night" (R. 561 at 10). At some point he and his wife "had words" (R. 561 at 12), and he was in no condition to drive (R. 561 at 13, 17). Nevertheless, he staggered up to his car, opened up the hood for no apparent reason, and when his wife suggested that he not drive, Mr. Rodriguez threw a glass containing liquid into the car (R. 561 at 17). He was obviously drunk (R. 561 at 8-18). Indeed, his wife later submitted an affidavit in which she stated that he was "obviously intoxicated," "staggering," slurring his speech, unable to drive, "not fully understandable, and was not making rational decisions or comments" (R. 723). At the same time that the police officers encountered Mr. Rodriguez on the bridge, the driver of the disabled sportscar which had stopped on the bridge saw him rocking back and forth, slurring his words, stooped over, obviously intoxicated (R. 25 at 9-14, 26, 28). That witness knew that Mr. Rodriguez was drunk "before I actually saw him rocking" (R. 725 at 13). And the driver who hit Mr. Rodriguez testified that he simply "came out of the dark" (R. 95 at 30) and "caused the impact" (R. 95 at 72). From the way Mr. Rodriguez hit the car, the driver concluded that he was probably "running over from that side of the road toward my car" (R. 95 at 80). The driver was not speeding, and was watching the road under good lighting conditions (R. 95 at 27, 28, 30, 31, 43, 62, 65, 72, 78, 80, 83-84). The autopsy revealed that Mr. Rodriguez had a blood alcohol level of .216% at the time of his death (R. 787). That level of intoxication typically produces slurred speech, a staggering gait, decreased mental judgment, and impairment of reflexes (R. 95 at 58-59; R. 790). All of this evidence easily supports the trial court's conclusion that summary judgment was inappropriate on the question of whether Mr. Rodriguez was obviously intoxicated and incapacitated at the time the police officers encountered him. As we note, however, that question is not before this Court, because both the trial court and the district court assumed *arguendo* that Mr. Rodriguez was obviously incapaciated at the time.

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25 WEST FLAGLER STREET, MIAMI, FLORIDA 33130-1780

Mr. Rodriguez into protective custody or for treatment (R. 1089-90; *see* 451 So.2d at 514-15). Without explanation, the trial court granted the motion (R. 1147).

On appeal, the city advanced and the district court considered only the sovereign immunity point. As we have noted, the district court assumed *arguendo* that the evidence was sufficient to permit a jury's conclusion that Mr. Rodriguez was obviously intoxicated and incapacitated within the meaning of §396.072(1) at the time he was encountered by the officers near the Cape Coral Bridge. And the district court also acknowledged Mrs. Rodriguez' contention that unlike *Everton* and *Duvall*, "this case involves the city's negligence in failing to perform a nondiscretionary, ministerial function required by section 396.072(1), Florida Statutes (1977)." 451 So.2d at 515. Nevertheless, the district court observed that §396.072(1) creates this nondiscretionary duty only when a person "appears to be incapacitated," and held that this *factual* determination of incapacitation "was within Officer Weirsma's discretion." *Id.* at 516. The exercise of that discretion, the district court noted, is circumscribed by a number of *factual* criteria--"by time, lighting conditions, communications and other circumstances." *Id.* Because the officer must thus make certain *factual* judgments before obeying a mandatory statutory directive, the district court held "that neither a city nor a city police officer may be held liable for the exercise of his discretion in not taking an intoxicated person into protective custody under section 396.072(1), Florida Statutes (1977)," *id.* The plaintiff's petition for discretionary review followed.

II
ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT'S OPINION MUST BE REVERSED INDEPENDENT OF THIS COURT'S DISPOSITION OF *EVERTON* AND *DUVALL*.

B. WHETHER THE DISTRICT COURT'S OPINION MUST BE REVERSED BECAUSE THE *EVERTON* AND *DUVALL* DECISIONS ARE WRONG.

III
ARGUMENT

A. THE DISTRICT COURT'S OPINION MUST BE REVERSED INDEPENDENT OF THIS COURT'S DISPOSITION OF *EVERTON* AND *DUVALL*.

Even if this Court should affirm the district court's decisions in *Everton* and *Duvall*, the decision in this case nonetheless must be reversed. We say this for three reasons, any one of which requires reversal.

1. *The* Everton *and* Duvall *Decisions Apply the Sovereign Immunity Doctrine Only to Certain Discretionary Operational-Level Conduct, While the Officer Here had no Discretion, and in Fact Acted Unlawfully, in Failing to take Mr. Rodriguez into Custody.* Right or wrong, the key to the *Everton* decision is "discretion." The question stated is whether an officer should be protected "in exercising his discretion of whether or not to take an individual into custody." 426 So.2d at 997. Acknowledging that such discretion is exercised at the "operational" level, *id.* at 98-99, the district court nonetheless found such discretion essential to effective police work, *id.* at 1002-03, and held that "a viable system of law enforcement . . . must necessarily include the discretion of the officer on the scene to arrest or not arrest as his judgment at the time dictates." *Id.* at 1003-04.

Whether or not this Court upholds the district court's historic decision in *Everton* and *Duvall* to carve out for protection against the legislature's broad waiver of sovereign immunity a sphere of operational-level decisionmaking, there can be no question that the central characteristic of that sphere is the inherently-discretionary nature of such decisions, even exercised at the operational level. In this sense, even *Everton* and *Duvall* are consistent with this Court's repeated admonition that the sovereign immunity doctrine will not protect non-discretionary governmental acts--acts which are mandated by statute or some other authority.

Thus in *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979) (hereinafter "*Commercial Carrier*"), this Court adopted the four-question test of

Evangelical United Brethren Church of Adna v. State, 67 Wash.2d 246, 407 P.2d 440 (1966)--of which the fourth question is whether or not the governmental agency at issue possessed "the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?" *Commercial Carrier*, 371 So.2d at 1019. Thus, before an act or omission is entitled to immunity, it must be found that the actor had the lawful authority to act. A decision to violate a statutory or regulatory duty can never be immune from suit. Any contrary holding would permit a governmental agency or officer to immunize itself simply by deciding to break the law. Thus, by adopting the *Evangelical* test, *Commercial Carrier* itself excluded from protection governmental actions which are required by statute or regulation.

The cases which followed *Commercial Carrier* make that point explicit. In *State Department of Transportation v. Cooper*, 408 So.2d 781 (Fla. 2nd DCA), *review dismissed*, 413 So.2d 875 (Fla. 1982), the court held that the State DOT could be liable for its negligent failure to erect a stop-ahead sign because such a sign is required by the Manual on Uniform Traffic Control Devices adopted by the DOT. In *A. L. Lewis Elementary School v. Metropolitan Dade County*, 376 So.2d 32, 34 (Fla. 3rd DCA 1979), the court held that the decision of whether or not to install a traffic signal cannot be protected "in face of a statutory imposition of a duty on such governmental agencies to establish and maintain such traffic regulation facilities." Because the relevant statute "directs the Department of Transportation to adopt [and implement] a system of traffic control devices ... [t]hat express statutory direction ... makes such governmental actions mandatory, and the question of whether or not such shall be installed is thereby removed from the realm of governmental discretion."

Likewise in *Jones v. City of Longwood*, 404 So.2d 1083, 1085 (Fla. 5th DCA 1981), *review denied*, 412 So.2d 467 (Fla. 1982), the court found no protection for operational-level governmental inspections, because the ordinance in question "leaves no discretion in

the building inspector or fire chief, but requires them to periodically inspect all buildings and structures within the City of Longwood." In *Hollis v. School Board of Leon County*, 384 So.2d 661, 665 n.9 (Fla. 1st DCA 1980), the school board's failure adequately to maintain a school bus was not protected, in part by analogy to federal cases holding "that no discretionary function exception is involved when government officials are operating under mandatory statutes or regulations which they have a legal duty to observe and implement."[4/] And the same court recently held in *Newsome v. Department of Corrections*, 435 So.2d 887 (Fla. 1st DCA 1983), *review denied*, ___ So.2d ___ (Fla. 1984) (9 FLW 478), that the state Department of Corrections was not immune from liability for the conduct of an inmate assigned to the Department of Transportation, because "[s]ection 945.11 is a clear legislative mandate that DOC is responsible for the supervision of inmates assigned to DOT work details such as this." Thus, DOT was not immune "in carrying out its statutory operational duty of supervising such inmates . . . ."

At the least, therefore, even as they make new law in protecting certain operational-level decisions, *Everton* and *Duvall* maintain the long-settled principle that non-discretionary acts are never protected. In *Everton* and *Duvall*, no statute or regulation *required* the officers to arrest the drunk driver; that decision necessarily was committed to their discretion. In this case, in contrast, the plaintiff's complaint was not grounded in the officers' failure to arrest Mr. Rodriguez, but in their failure to follow the statutory *requirement* that they take him into protective custody because of his incapacitated condition. As we have noted, §396.072(1) gives a police officer enormous discretion in deciding what to do with a person who appears intoxicated but not incapacitated, providing that the officer "may" assist the person to his home or to a treatment facility.

[4/] *See, e.g., Griffin v. United States*, 500 F.2d 1059, 1068-69 (3rd Cir. 1974) ("We hold only that the Government may be liable where its employees in carrying out their duties, failed to conform to pre-existing statutory and regulatory requirements").

But in the very next sentence, the statute provides that if a person is intoxicated and also "appears to be incapacitated," he "shall" be taken for treatment. It is well-settled that a statute must be enforced according to its plain and unambiguous language.[5/] Under ordinary circumstances, the word "shall" is mandatory.[6/] In this case the language of the statute leaves no question that the word "shall" has a mandatory connotation, because the same statute also contains the permissive word "may" in the previous sentence. The use of both permissive and mandatory language in the same statute leaves no question that the legislature understood the difference. *See Brooks v. Anastasia Mosquito Control District*, 148 So.2d 64, 66 (Fla. 1st DCA 1963). Thus, when this statute says that the officer "shall" take an intoxicated person who appears to be incapacitated for treatment, it means exactly what it says--and it leaves the officer *no* discretion to abandon that person on a bridge in the middle of the night.

The district court acknowledged all of this, and also acknowledged *arguendo* the ample evidence permitting a jury's conclusion that Mr. Rodriguez did appear incapacitated within the meaning of this statute. Anybody who walks off a bridge into a car is not in control of his capacities. Nevertheless, the district court held that no jury will ever be permitted to review the factual judgment of an officer about the apparent incapacitation of an intoxicated person, because that *factual* judgment is protected by the sovereign immunity doctrine. But what in the world does such a factual judgment, in a single, individual case, have to do with the exercise of sovereign governmental

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5/ *Heredia v. Allstate Ins. Co.*, 358 So.2d 1353 (Fla. 1978); *Reino v. State*, 352 So.2d 853 (Fla. 1977); *State v. Egan*, 287 So.2d 1 (Fla. 1973); *Florida Real Estate Commission v. McGregor*, 268 So.2d 529 (Fla. 1972); *Van Pelt v. Hillard*, 75 Fla. 792, 78 So. 693 (1918).

6/ *Neal v. Bryant*, 149 So.2d 529, 532 (Fla. 1962); *Florida State Racing Commission v. Bourquardez*, 42 So.2d 87 (Fla. 1949); *White v. Means*, 280 So.2d 20 (Fla. 1st DCA 1973); *Florida Tallow Corp. v. Bryan*, 237 So.2d 308, 309 (Fla. 4th DCA 1970). *See McDonald v. Roland*, 65 So.2d 12, 14 (Fla. 1953); *Fixel v. Clevenger*, 285 So.2d 687, 688 (Fla. 3rd DCA 1973) (per curiam); *Brooks v. Anastasia Mosquito Control District*, 148 So.2d 64, 66 (Fla. 1st DCA 1963).

powers?

At the very least, this Court's decisions protect the exercise of discretion only "in the policy-making sense . . . ." *Rupp v. Bryant*, 417 So.2d 658, 665 (Fla. 1982). Perhaps by some mental gymnastics the *Everton and Duvall* decisions can be explained in those terms. Perhaps it can be said that when the ultimate decision--the decision of whether or not to arrest--is committed to the officer's discretion, then the exercise of that discretion is in some sense--even at the operational level, and even though only one particular case is involved--the making of policy. We disagree with that conclusion for reasons outlined below, but at least it has a (hollow) ring of truth. In this case, however, the ultimate decision--the decision of whether or not to take a person into custody--is *not* committed to the officer's discretion; to the contrary, the officer is *required* to take an incapacitated person for treatment. The ultimate decision is non-discretionary. Only the preliminary factual judgment is necessarily a product of time, place and circumstance. By what conceivable theory can such a factual judgment be held to partake of the *essence* of government--of that central core of policymaking without which government cannot exist? To state that question is to answer it. When an officer looks at an intoxicated individual and decides whether he appears incapacitated or not, he is not making policy. He is making a factual judgment--the kind of factual judgments which juries are asked to assess every day.

Perhaps the best way to underscore this point is to ask a question to which we can think of no answer--a question which we put directly to the respondent in the district court, with no response--and directly to the panel of the district court at oral argument, with no response: if the district court's decision in this case is upheld, can anyone think of a single example of an operational-level decision or action by a governmental official which is *not* protected by the sovereign immunity doctrine? If the factual judgment of an officer about incapacitation is protected, why not the factual determination of a

building inspector that a building is safe? Why not the factual determination of a school-bus inspector that a bus is safe? Why not the factual decision of a firetruck-driver that he can make it through an intersection without hitting someone? Why not the factual judgment of a government architect that a beam should be placed here and not there? Even if *Everton* is right that there are some operational-level decisions entitled to protection, these are certainly not such decisions. They do not involve policy. They do not involve discretion in any policy-making sense. They involve the application of settled governmental guidelines--in this case a *mandatory* guideline--to specific factual circumstances. They have nothing to do with the purposes of the sovereign immunity doctrine.

We are dealing here with a statute which *waived* the sovereign immunity doctrine, creating *no* exceptions--not even an exception for discretionary functions, like the Federal Tort Claims Act, 28 U.S.C. §2680(a). This Court has repeatedly observed that the statute constitutes a "broad" waiver of sovereign immunity, and thus that any judicially-created exceptions must be narrowly drawn.[7/] In the light of that requirement, affirmance of the district court in this case is inconceivable. It would emasculate the statute. It would turn a broad waiver of sovereign immunity into no waiver at all. It would literally abolish the statute. Even if this Court affirms *Everton* and *Duvall*, it must reverse in this case.

2. *Even if the Decision Not to Take Mr. Rodriguez into Protective Custody was Protected by the Sovereign Immunity Doctrine, the Negligent Implementation of That Decision Was Not.* As we have noted, the plaintiff's complaint alleged that instead of

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[7/] *Beard v. Hambrick*, 396 So.2d 708, 711 (Fla. 1981); *District School Board of Lake County v. Talmadge*, 381 So.2d 698, 703 (Fla. 1980); *Commercial Carrier*, 371 So.2d at 1022. *Accord, Foley v. State Department of Transportation*, 422 So.2d 978, 979 (Fla. 1st DCA 1982). As the U.S. Supreme Court said regarding the F.T.C.A., where a statute constitutes a broad waiver of immunity, it is "inconsistent to whittle it down by refinements." *United States v. Yellow Cab Co.*, 340 U.S. 543, 550, 71 S. Ct. 399, 95 L. Ed. 523 (1951).

taking Mr. Rodriguez to a hospital as the statute required, the officers requested a third party who was at the scene to ask a friend of that third party, whom the third party expected to arrive at the bridge, to transport Mr. Rodriguez "over the Cape Coral Bridge, if and when a friend came to pick up the third person who was there at that time" (R. 604). We have explained the surrounding circumstances in footnote 2, *supra*. The plaintiff's complaint alleged that the police officers were negligent in abandoning Mr. Rodriguez in this particular way (R. 604-05), and thus that the City was negligent not simply in failing to comply with the statutory requirement of seeking treatment for Mr. Rodriguez, but also in the manner in which the officers abandoned him near the bridge.

Of course a reasonable factfinder might conclude that the officers were not negligent because they reasonably relied upon a citizen's promise to get Mr. Rodriguez a ride. But a factfinder might also conclude that the officers were negligent in failing to confirm that the ride was coming; in failing to wait for it to arrive; in failing to call a cab by radio to pick up Mr. Rodriguez; in failing to secure his phone number and call his wife; or in somehow otherwise making sure that he was not left in the middle of the road in the middle of the night.

In *City of Miami v. Horne*, 198 So.2d 10 (Fla. 1967), this Court held that whether or not the decision of a police officer to pursue a vehicle is protected, the manner in which the officer implements that decision and gives chase is not protected. *Accord*, *Sintros v. LaValle*, 406 So.2d 483, 484 (Fla. 5th DCA 1981); *Reed v. City of Winter Park*, 253 So.2d 475 (Fla. 4th DCA 1971). *See also Johnson v. State*, 69 Cal.2d 782, 73 Cal. Rptr. 240, 250, 447 P.2d 352, 362 (1968) ("subsequent ministerial actions in the implementation of that basic decision must still face case-by-case adjudication on the question of negligence"), *cited in Bellavance v. State*, 390 So.2d 422 (Fla. 1st DCA 1980), *review*

denied, 399 So.2d 1145 (Fla. 1981).[8/]

Likewise in this case, independent of any judicial protection accorded the initial decision about whether or not to take Mr. Rodriguez for treatment, a reasonable factfinder could conclude that the officers were negligent in leaving him near the bridge in the hope that someone would arrive to pick him up, rather than implementing their decision in a more reasonable manner. Nothing in the *Everton* or *Duvall* decisions suggest otherwise. They do protect the decision of an officer about whether or not to arrest a drunk driver, but they say nothing to insulate the officer for any negligence in the manner in which he implements that decision. Nor is it conceivable that the operational implementation of such a decision can have anything to do with the important governmental policies implicated by the sovereign immunity doctrine. The decision itself may be protected, but its careless or negligent implementation is purely ministerial, having nothing to do with policy or governing. Thus, at the very least, the trial court's order of summary judgment should be reversed, with instructions to permit a jury's consideration of the manner of implementing the officer's decision.[9/]

[8/] The overwhelming majority of cases in other jurisdictions support this contention. *See, e.g., Fochman v. Honolulu Police and Fire Departments*, 649 P.2d 114, 116 (Hawaii 1982); *Adams v. State*, 555 P.2d 235, 241 (Alaska 1976); *McCorkle v. City of Los Angeles*, 74 Cal. Rptr. 389, 449 P.2d 453, 460 (Cal. 1969) (en banc); *Green v. City of Livermore*, 117 Cal. App.3rd 82, 172 Cal. Rptr. 461 (1981); *Duarte v. City of San Jose*, 100 Cal. App.3rd 648, 161 Cal. Rptr. 140, 144 (1980); *Mann v. State of California*, 70 Cal. App.3rd 773, 139 Cal. Rptr. 82 (1977); *Suarez v. Dosky*, 171 N.J. Super. 1, 407 A.2d 1237, 1241 (Sup. Ct., App. Div. N.J. 1979), *cert. denied*, 412 A.2d 806 (N.J. 1980). Every one of these cases involves operational negligence in the implementation of decisions which might or might not themselves have been protected. To the same effect, see the following cases under the F.T.C.A.: *United Airlines, Inc. v. United States*, 379 U.S. 951, 85 S. Ct. 452, 13 L. Ed.2d 549 (1964); *Payton v. United States*, 679 F.2d 475 (5th Cir. 1982) (en banc); *Reminga v. United States*, 631 F.2d 449 (6th Cir. 1980); *Sami v. United States*, 617 F.2d 755 (D.C. Cir. 1979); *United States v. White*, 211 F.2d 79, 82 (9th Cir. 1954); *Costley v. United States*, 181 F.2d 723, 724-25 (5th Cir. 1950); *Hernandez v. United States*, 112 F. Supp. 369, 371 (D. Hawaii 1953); *Worley v. United States*, 119 F. Supp. 719, 721 (D. Ore. 1952).

[9/] We should emphasize in closing on this point that the litigation of this question will involve not simply acts of omission by the officers, but also the consequences of their

3. *Even if the Decision Not to Take Mr. Rodriguez for Treatment were Considered to be Protected by the Sovereign Immunity Doctrine, that Protection is Lost Because the Officers Knowingly Created a Dangerous Trap.* This Court has held that even a governmental decision which might otherwise be entitled to protection will lose such protection if the decision is made with conscious knowledge that it creates a danger to individuals. In *Department of Transportation* v. *Neilson*, 419 So.2d 1071, 1078 (Fla. 1982), this Court declared that if an "alleged defect is one that results from the overall [governmental] plan itself, it is not actionable unless a known dangerous condition is established." *Accord, City of St. Petersburg* v. *Collom*, 419 So.2d 1082, 1083, 1086 (Fla. 1982). As this Court noted in *Collum*, when the government creates such a danger it must warn "or protect the public from, the known danger." 419 So.2d at 1083.

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affirmative decisions. In proper cases, when police officers have a duty to act affirmatively, a good argument can be made that they should be held liable for pure acts of omission. *See Irwin* v. *Town of Ware*, 467 N.E.2d 1292, 1302-03 (1984); Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 Harv. L. Rev. 821, 832-35 (1981). The *Irwin* case cites 4 Massachusetts cases, and 25 cases in other jurisdictions, including Florida (*Huhn* v. *Dixie Ins. Co., supra*), holding governmental officials liable for operational-level acts of omission.

But this is not such a case. In this case, the officers affirmatively intervened into the chain of events which ended in tragedy. They stopped Mr. Rodriguez. They questioned him. They altered his course of conduct. They made an affirmative decision to put him in the custody of a private citizen. They did not simply fail to act; they acted affirmatively. And in that recognition, any asserted distinction between misfeasance and nonfeasance is "tenuous" at best. Note, *supra*, 94 Harv. L. Rev. at 825-26 n.23, *citing* 2 F. Harper & F. James, *The Law of Torts* §18.6, at 1051, *and* W. Prosser, *Handbook of the Law of Torts* §56, at 339-40 (4th ed. 1971). *See Padgett* v. *School Board of Escambia County*, 395 So.2d 584, 585 (Fla. 1st DCA 1981) (per curiam); *Shealor* v. *Ruud*, 221 So.2d 765, 769 (Fla. 4th DCA 1969). *See also Schuster* v. *City of New York*, 5 N.Y.2d 75, 87, 154 N.E.2d 534, 541, 180 N.Y.S.2d 265, 275 (1958). Thus, at least three of the cases from other jurisdictions cited in footnote 8, *supra--Suarez, Mann*, and *Green*--all involved acts of negligent *omission* which followed some *affirmative* intervention by the police into a situation. They involved, respectively, the failure to escort children across the street after stopping at an accident; the failure to take the occupants of a car away from the scene of an accident; and the failure to secure a car after arresting its drunk driver, instead of leaving it with two drunk passengers. Regardless of the metaphysics by which one distinguishes between acts of omission and acts of commission, it is clear that none of these cases, nor this case, involved a pure act of omission. To the contrary, they involved affirmative decisions which affected the chain of causation leading to the injury.

Even assuming in the abstract that an officer's decision not to take an intoxicated individual into protective custody might be a protected decision, the extent of such protection is defined by time, place and circumstance. If the individual is in a public park or a quiet residential neighborhood, in circumstances creating no conceivable danger to his safety, then the officer's decision to abandon him may have no foreseeable consequences. But if, as here, the individual is intoxicated and incapacitated in the middle of a well-traveled roadway in the middle of the night, then the failure to secure his safety obviously creates a known dangerous condition, or so a reasonable jury could find. Again, perhaps the jury will find that that condition was relieved by the citizen's promise to take Mr. Rodriguez to safety--but that will be a question for the jury. The facts in this case at least permit a reasonable conclusion that the officers knowingly created a dangerous condition by their conduct.

B. THE DISTRICT COURT'S OPINION MUST BE REVERSED BECAUSE THE *EVERTON* AND *DUVALL* DECISIONS ARE WRONG.

1. *The* Everton *and* Duvall *Decisions are Inconsistent with this Court's Repeated Distinction Between Operational-Level and Planning-Level Decisions.* The *Everton* opinion expressly acknowledges that an officer's street-level decision is operational rather than planning-level, but nonetheless finds it to be protected because of its discretionary nature. 426 So.2d at 998-99. That departure from the distinction between planning-level and operational-level decisions is inconsistent with every opinion by this Court on the subject, and with every opinion in every other district. In *Commercial Carrier*, 371 So.2d at 1020, this Court recognized that "all governmental functions, no matter how seemingly ministerial, can be characterized as embracing the exercise of some discretion," but held that only "certain 'discretionary' governmental functions remain immune from tort liability," functions identified by distinguishing "between the 'planning' and

'operational' levels of decision-making by governmental agencies." *Id.* at 1022.[10/]

Since *Commercial Carrier*, this Court has returned to the sovereign immunity question nine times--and every one of those opinions has drawn the identical distinction between planning-level and operational-level decisions.[11/] In its latest pronouncement, for example, *Department of Transporation v. Webb*, *supra* note 11, 438 So.2d at 780-81, this Court emphasized that the failure to place warning signs at a railroad crossing which is known to be dangerous, and the failure to maintain that crossing, are "operational-level functions" not protected by the sovereign immunity doctrine; and Justice Shaw's concurrence quoted with approval the district court's declaration that operational-level activities are not protected even if they involve some planning: "[DOT's] analysis is unhelpful because every operational activity taken by DOT must at some point entail planning, which would cloak the department in absolute immunity." *Id.* at 781 (Shaw, J., concurring), *citing Department of Transportation v. Webb*, 409 So.2d 1061, 1064 (Fla. 1st DCA 1982) (per curiam). In *Department of Transportation v. Neilson*, *supra* note 11, 419 So.2d at 1075, this Court flatly attributed to *Commercial Carrier* the holding "that discretionary, judgmental, planning-level decisions were immune from suit, but that operational decisions were not so immune." And in *Rupp v. Bryant*, *supra* note 11, 417 So.2d at 665, this Court found actionable the decision of a principal and school teacher

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[10/] Even before *Commercial Carrier*, this Court's historic decision holding that in proper cases municipalities may be liable for personal injuries, *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957) (en banc), involved a police officer's negligence at the operational level.

[11/] *Department of Transportation v. Webb*, 438 So.2d 780 (Fla. 1983); *Harrison v. Escambia County School Board*, 434 So.2d 316, 320-21 (Fla. 1983); *Ralph v. City of Daytona Beach*, ___ So.2d ___ (Fla. 1983) (8 FLW 79); *City of St. Petersburg v. Collom*, 419 So.2d 1082, 1083 (Fla. 1982); *Ingham v. State Department of Transportation*, 419 So.2d 1081, 1082 (Fla. 1982); *Department of Transportation v. Neilson*, 419 So.2d 1071, 1075 (Fla. 1982); *Rupp v. Bryant*, 417 So.2d 658, 663 n.11 (Fla. 1982); *City of Lauderdale Lakes v. Corn*, 415 So.2d 1270, 1272 (Fla. 1982); *District School Board of Lake County v. Talmadge*, 381 So.2d 698 (Fla. 1980).

not to supervise a club's activity--a decision obviously involving enormous discretion--because that decision did not involve "discretion in the policymaking sense . . . ."

Except for the second district,[12/] every other Florida district has maintained an unwaivering distinction between planning-level and operational-level decisions.[13/] The *Huhn* decision, *supra* note 13, involves the failure of a police officer to apprehend a drunk driver--and is directly antithetical to *Everton* and *Duvall*. The *Palmer* decision, *supra* note 13, involves the allegation of negligence by firefighters--and cannot be reconciled with *Everton* or *Duvall*. Both cases involve enormous discretion exercised at the operational level, as do many of the others cited--discretion in hiring or retaining a teacher, *Willis*, *supra* note 13 ("Though the creation of a teaching position is a planning function, the actual filling of that position is operational"); discretion in patrolling a parking lot, *Pitts*, *supra* note 13; discretion in assuring the safety of school buses, *Hollis*,

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[12/] In addition to *Everton*, *Duvall*, and the instant case, the second district has also protected operational-level decisionmaking in *Ursin v. Law Enforcement Ins. Co.*, 450 So.2d 1282 (Fla. 2nd DCA 1984)--a case involving alleged operational-level negligence in supervising a prisoner. The case acknowledges conflict with *Smith v. Department of Corrections*, 432 So.2d 1338 (Fla. 1st DCA 1983), and is now before this Court.

[13/] *See, e.g., Huhn v. Dixie Ins. Co.*, 453 So.2d 70 (Fla. 5th DCA 1984); *Palmer v. City of Daytona Beach*, 443 So.2d 371 (Fla. 5th DCA 1983); *Bryan v. State Department of Business Regulation*, 438 So.2d 415 (Fla. 1st DCA 1983); *Broward County v. Payne*, 437 So.2d 719 (Fla. 4th DCA 1983); *Newsome v. Department of Corrections*, 435 So.2d 887 (Fla. 1st DCA 1983); *Smith v. Department of Corrections*, 432 So.2d 1338 (Fla. 1st DCA 1983); *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 423 So.2d 911, 192 (Fla. 3rd DCA 1983); *Foley v. State Department of Transportation*, 422 So.2d 978 (Fla. 1st DCA 1982); *Reinhart v. Seaboard Coast Line R. Co.*, 422 So.2d 41, 44 (Fla. 2nd DCA 1982), *review denied*, 431 So.2d 988 (Fla. 1983); *Willis v. Dade County School Board*, 411 So.2d 245, 246 (Fla. 3rd DCA), *review denied*, 418 So.2d 1278 (Fla. 1982); *Griffin v. City of Quincy*, 410 So.2d 170, 172 (Fla. 1st DCA 1982), *review denied*, 434 So.2d 887 (Fla. 1983); *McClung v. City of Boynton Beach*, 399 So.2d 453, 454 (Fla. 4th DCA) (per curiam), *review denied*, 411 So.2d 380 (Fla. 1981); *Paul v. Osceola County*, 388 So.2d 40 (Fla. 5th DCA 1980); *Hollis v. School Board of Leon County*, 384 So.2d 661 (Fla. 1st DCA 1980); *Weissberg v. City of Miami Beach*, 383 So.2d 1158 (Fla. 3rd DCA 1980); *Wojtan v. Hernando County*, 379 So.2d 198, 199 (Fla. 5th DCA 1980); *Wallace v. Nationwide Mutual Fire Ins. Co.*, 376 So.2d 39, 40 (Fla. 4th DCA 1979); *Pitts v. Metropolitan Dade County*, 374 So.2d 996 (Fla. 3rd DCA 1979); *Ferla v. Metropolitan Dade County*, 374 So.2d 64, 66 (Fla. 3rd DCA 1979), *cert. denied*, 385 So.2d 759 (Fla. 1980).

supra note 13; discretion of a building inspector in insuring the safety of a condominium, *Trianon*, *supra* note 13. As the court noted in *Hollis*, *supra* note 13, 384 So.2d at 665, a defendant cannot be "absolved from any liability because he acted within the appropriate limits of his discretion." To the contrary, the "discretionary function exception . . . is limited to functions occurring only at the planning level, not at the operational level, defined as the level at which policy is implemented."

Such operational-level decisions may be no less discretionary than planning decisions. They may be no less important to society. Certainly the safety of a school bus (*Hollis*, *supra* note 13); or of a hospital parking lot (*Pitts*, *supra* note 13); or the qualifications of a teacher (*Willis*, *supra* note 13) are no less important to society than the safety of our streets and highways. But this Court's distinction between planning-level and operational-level decisions does not depend upon the importance of the governmental decision at issue. To the contrary, as we note below, it depends upon the *quality* of that decision--on the extent to which it somehow partakes of the essence of governing.

The point of this sub-section is that *Everton* and *Duvall* and the instant case *cannot* be affirmed without making new law--without departing expressly from the invariant line of cases, in this Court and in every other district court, which draw the line between planning and operational decisions. As one commentator has written, any jurisdiction which draws that line must hold that the sovereign immunity doctrine does not protect decisions made by police officers on the streets. Note, *Police Liability for Negligent Failure to Protect Crime*, 94 Harv. L. Rev. 821, 836-37 (1981). The next question is whether this Court should make new law.

2. *The Rationale of* Commercial Carrier. The planning/operational distinction is not, and has never been, an arbitrary line drawn for no reason except that this Court had to draw the line somewhere. To the contrary, it reflects a careful attempt by this

Court--when confronted with a statute which contains no exceptions, and in fact declares that government should be just as accountable for its conduct as private persons--to maintain the broadest scope of liability for governmental negligence, while insulating from accountability only those governmental functions whose inhibition by the threat of civil liability would constitute a threat to government itself--because it would undermine the quality of those broad public policies from which derive the myriad day-to-day decisions which are the concrete fabric of government. When any of those day-to-day decisions--decisions which have no *prescriptive* quality because they have no immediate impact beyond the resolution of a single dispute--are themselves careless, the system can survive their prosecution. But such individual decisions are made within the rubric of broad guiding principles, and when the process of formulating those principles itself is inhibited by the threat of civil prosecution, then government itself is threatened, and the threat to government must outweigh the right of individuals to compensation for injuries negligently caused. As one court noted regarding the F.T.C.A., "courts should not subject the sovereign to liability where doing so would inhibit vigorous decisionmaking by government policymakers."[14/]

In attempting to draw this vital distinction between prescriptive and non-prescriptive judgments, it is no surprise that *Commercial Carrier* relied upon the test articulated in *Evangelical United Brethren Church of Adna v. State*, 67 Wash.2d 246, 407 P.2d 440, 445 (1966) (en banc). One part of the *Evangelical* test is that, even if the conduct in question does implicate some important governmental policy (and after all, what

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14/ *Gray v. Bell*, 712 F.2d 490, 511 (D.C. Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 1593, ___ L. Ed.2d ___ (1984). Under this rationale, the judicial task is "to preserve an immunity broad enough 'to [prevent] tort actions from becoming a vehicle for judicial interference' with the conduct of government." *Id.* at 513, *citing Sami v. United States*, 617 F.2d 755, 766 (D.C. Cir. 1979). *Sami* in turn cites *Blessing v. United States*, 447 F. Supp. 1160, 1170 (E.D. Pa. 1978). Thus, governmental decisions are protected only if they are "[f]raught with foreign relations or other public policy consideration." *Sami v. United States, supra*, 617 F.2d at 767.

operational-level decision does *not* implicate some important governmental policy), that conduct must itself be considered "essential to the realization or accomplishment of that policy."[15/] It is simply inconceivable that the individual act of an individual police officer in an individual case can be considered "essential" to the realization or accomplishment of a general policy. As the court noted in *Bellavance v. State*, 390 So.2d 422, 424 (Fla. 1st DCA 1980), *review denied*, 399 So.2d 1145 (Fla. 1981)--even though "the act of releasing a mental patient involves a basic governmental policy," "we are hard pressed to see how [that act] would materially affect the ends and purposes of [the law]."[16/]

The *Everton* decision must be reversed because it fundamentally fails to resolve that essential point. It reasons that the individual decision of a police officer is essential to the accomplishment of a law-enforcement program "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." 426 So.2d 1003. But any decision to remove discretion from the operational level of law enforcement would be made at the *planning* level--and thus would *itself* be a policy

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[15/] In addition to *Evangelical*, *Commercial Carrier* quotes with approval a statement from *Weiss v. Fote*, 7 N.Y.2d 579, 586, 200 N.Y.S.2d 409, 413, 167 N.E.2d 63, 66 (1960), that to allow a jury to assess "the reasonableness and safety of a *plan* of governmental services ... would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts" (our emphasis). It is the *plan* which must be protected, not its implementation. Likewise, *Commercial Carrier* cites an article which reasons that immunity is appropriate "when condemnation of the acts or omissions relied upon necessarily brings into question the propriety of governmental objectives or programs ...." 371 So.2d at 1019, *citing* Peck, *The Federal Tort Claims Act*, 31 Wash. L. Rev. 207 (1956).

[16/] *Accord*, *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 423 So.2d 911, 913 (Fla. 3rd DCA 1983) ("Inspections, plan reviews and certifications for this particular condominium did not change the overall direction or policy of the general program of building inspection in the city"). The *Trianon* holding was endorsed in *Bryan v. State Department of Business Regulation*, 438 So.2d 415 (Fla. 1st DCA 1983). The holding of *Bellavance* was endorsed in *Smith v. Department of Corrections*, 432 So.2d 1338 (Fla. 1st DCA 1983). *Cf. Kirkland v. State*, 424 So.2d 925 (Fla. 1st DCA 1983).

decision immune from suit.[17/] The recognition that the removal of *all* discretion from *all* officers would hurt the law enforcement system does not address the question of whether the *individual exercise* of that discretion in-and-of-itself is essential to the accomplishment of the objectives of the law-enforcement system. Like the court in *Bellavance*, we are "hard pressed to see" how a single, individual exercise of discretion "would materially affect the ends and purposes" of the law-enforcement system. If that were true--if every discretionary operational-level decision to some marginal extent were seen to further the overall policy objectives which it implicates--then of course *every* discretionary operational-level decision would be protected. And of course, almost every governmental decision does involve some discretion. As one court has said: "Unless government officials (at no mattor of eschelon) make their choices by flipping coins, their acts involve discretion in making decisions." *Smith v. United States*, 375 F.2d 243, 246 (5th Cir.), *cert. denied*, 389 U.S. 841, 88 S. Ct. 76, 19 L. Ed.2d 106 (1967).

This observation is not to denegrate the importance of street-level decisions made by police officers. They involve enormous discretion; they are obviously important. Though made at the operational level, they are governmental functions. But our legislature *waived* sovereign immunity. It concluded that the mere "sovereign" character of

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17/ Thus, if the legislature or some high ranking governmental official made a policy decision to prescribe specific mandatory guidelines governing the decision of whether or not to make an arrest, and in the process denied all discretion to individual police officers in making that decision, such a policy judgment would satisfy the *Evangelical* test and would be entitled to immunity even if an officer's strict and non-negligent compliance with such guidelines resulted in injury. *See Wong v. City of Miami*, 237 So.2d 132 (Fla. 1970) (mayor's decision to withdraw police from riot area protected), *cited in Commercial Carrier*, 371 So.2d at 1019-20. *Accord, Silver v. City of Minneapolis*, 284 Minn. 266, 170 N.Y.2d 206 (1969), *cited in* Commercial Carrier, 371 So.2d at 1022. In the words of *Everton*, that kind of decision "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." Such a decision, made at the planning level, would be entitled to protection. But no such decision was made in this case, or in *Everton*. They each involved an isolated street-level decision by an individual officer, which cannot possibly "materially affect the ends and purposes" of the law enforcement system.

an activity is not enough to deny redress, except by a private bill, to people who are injured by governmental decisions.[18/] And in *Commercial Carrier*, this Court expressly rejected any interpretation of the statute which would insulate from liability those functions which are inherently or uniquely governmental because they are not performed by private persons. 371 So.2d at 1016-17, *citing Indian Towing Co. v. United States*, 350 U.S. 61, 64-65, 76 S. Ct. 122, 124-25, 100 L. Ed. 48 (1955). That holding derived from the language of the statute itself, which expressly provides that governmental officials should be no better off than private individuals--that is, that they should be subject to the same standards in the performance of uniquely-governmental functions that private individuals are subject to in the performance of private functions. The appropriate exception, therefore, is not an exception for functions which are uniquely governmental in nature, but an exception for functions whose inhibition would interfere with the existence of government--and thus with the very system in which the sovereign immunity doctrine operates. This is more than just a distinction between planning-level and operational-level decisions. It is a distinction between two forms of governing--the protected form of making policy, and the unprotected form of implementing policy, even in the necessary exercise of discretion.

If both kinds of decisions are entitled to protection, then our legislature's broad waiver of sovereign immunity will have no meaning at all. For if a policeman's judgments are entitled to protection, then why not a fireman's judgments, or a teacher's judgments, or a building inspector's judgments, or any discretionary judgments made by public officials at the operational level, which by definition reflect a choice or a decision

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[18/] As Justice Traynor wrote for the California Supreme Court in *Muskopf v. Corning Hospital District*, 55 So.2d 211, 214-15, 359 P.2d 457, 458-59, 11 Cal. Rptr. 89, 90-91 (1961), *citing* Borchard, *Government Liability in Tort*, 34 Yale L. J. 1, 4 (1924): "How [the sovereign immunity doctrine] became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.'"

by the official? This Court has enough sovereign immunity cases pending right now to recognize the floodgates which *Everton* and *Duvall* have opened. The governmental choices at issue in those cases involve no less discretion than that exercised by the police officer in *Everton*, and far more than the discretion exercised by the officer under a mandatory statutory directive in this case. And if your house is burning down, or your children take a school bus, or your building is unsafe, such decisions are no less important to our society. If the single judgment of a police officer under *Everton* is essential to the accomplishment of the law-enforcement system, and thus protected, then the individual decisions of these officials are no less essential to the governmental systems in which they operate.

So if *Everton* is the right decision, then all of the decisions of this Court and the other district courts cited already--decisions about teachers and firemen and building inspectors--are wrong, and when our legislature purported to waive sovereign immunity, and said in this context that government officials are no better than private people, it must have been selling the public a bill of goods. For if the *Everton* rationale is upheld by this Court, the victims of governmental negligence at the operational level will find themselves exiting the courtroom from the same revolving door through which they entered. They will enter that door with confidence, brandishing a statute which says that sovereign immunity is waived--and that public officials are put in the same position as private individuals--and they will exit in disbelief, finding that their statutory weapon has turned to ashes at the first mention by any defendant of the word "discretion." Since this Court is charged to interpret the statute, not to rewrite it, we are confident that affirmance of the *Everton* decision is inconceivable.

3. *Decisions in Other Jurisdictions.* Perhaps for this reason, our challenge to the *Everton* rationale is supported by the overwhelming majority of other jurisdictions. The most recent decision is *Irwin v. Town of Ware*, 467 N.E.2d 1292 (Mass. 1984), which is

identical to *Everton* and *Duvall* in that the plaintiffs charged the town with liability for the negligence of its police officers in failing to take into protective custody a driver who was obviously intoxicated, and who subsequenty caused an accident injuring the plaintiffs. Like the Florida statute, the Massachusetts statute provides that public employers shall be liable for the consequences of negligent acts or omissions "in the same manner and to the same extent as a private individual under like circumstances." *Id.* at 1298. But unlike the Florida statute, the Massachusetts statute also contains an explicit exception from liability for claims based upon "the exercise or performance or the failure to exercise or perform a discretionary function . . . ." *Id.*

Acknowledging what we have insisted throughout this brief, and what the F.T.C.A. cases consistently hold--that every governmental function "'involves the exercise of discretion and judgment to some degree'"--the *Irwin* court emphasized that for the purposes of the statute, discretionary acts must be defined as those "'involved in weighing alternatives and making choices with respect to public policy and planning,'" as opposed to acts "which involve 'the carrying out of previously established policies or plans.'" *Id.* at 1298-99, *quoting Whitney v. Worcester*, 373 Mass. 208, 218-19, 366 N.E.2d 1210 (1977). In light of that unasailable formulation, the outcome of the case was inevitable, 467 N.E.2d at 1299:

> No reasonable basis exists for arguing that a police officer is making a policy or planning judgment in deciding whether to remove from the roadway a driver who he knows is intoxicated. Rather, the policy and planning decision to remove such drivers has already been made by the Legislature. . . . This is not to say every harm resulting from the conscious failure of a police officer to remove an intoxicated driver from the roadway will give rise to liability for the public employer. . . . Where liability does not result, however, it will be because some element of the tort alleged will not have been established. It will not be because the act of the officer is discretionary within the meaning of [the statute]. To hold otherwise would violate the Legislature's intent that the Act be "construed liberally for the accomplishment of [its] purposes." . . . The primary purpose of the Act is "to provide an effective remedy for persons injured

as a result of the negligence of governmental entities in the Commonwealth."[19]

The *Irwin* decision is consistent with the overwhelming majority of state cases on this question, supporting Professor Jaffe's generalization that "recovery has long been allowed" in "actions against a police officers . . . ."[20] We urge the Court to review the

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[19] The remainder of the *Irwin* opinion is a demonstration that the police officers owed the plaintiffs a duty to remove the drunk driver from the roadways. 467 N.E.2d at 1299-1304. That is a question which the respondents in this case did not brief before the district court, and thus which the district court did not consider; and under the settled decisions of this Court, that point has thus been waived forever. *See Gifford v. Galaxie Homes of Tampa, Inc.*, 204 So.2d 1 (Fla. 1967); *City of Miami v. Steckloff*, 111 So.2d 446 (Fla. 1959); *Truxell v. Truxell*, 259 So.2d 766 (Fla. 1st DCA 1972); *Lesperance v. Lesperance*, 257 So.2d 66 (Fla. 3rd DCA 1972). Thus, even if this Court should affirm the *Everton* and *Duvall* cases on this question of duty instead of the question of sovereign immunity, that affirmance cannot provide a basis for affirmance of the district court's decision in this case. Because the point has been irrevocably waived, we will not discuss the question of duty in this brief.

Should the respondents attempt in their answer brief to raise this issue for the first time, we will deal with it in our reply brief--pointing out that in this case, we have a statute which obviously creates a *special* duty to intoxicated individuals like Mr. Rodriguez, in a jurisdiction which has *abolished* the special-duty doctrine in favor of far-broader standards of measuring duty. At the very least, this statute "'was enacted with a purpose to safeguard . . . the intoxicated person himself . . . .'" *Irwin v. Town of Ware, supra*, 467 N.E.2d at 1301, *citing Adamian v. Three Sons, Inc.*, 353 Mass. 498, 500-01, 233 N.E.2d 18 (1968). There can simply be no question that the officers owed Mr. Rodriguez a duty--or so a reasonable jury could find.

In addition, if we brief this issue, we will demonstrate that even in *Everton* and *Duvall*--even apart from a special statutory duty--the officers had a duty to those who might foreseeably be injured by a drunk driver. We will invoke as a predicate for that conclusion the extensive discussion of this question in the petitioners' reply brief in the *Duvall* case. For the moment, we refer this Court to the Massachusetts Supreme Court's extensive discussion of the question in the *Irwin* case, 467 N.E.2d at 1299-1304.

[20] Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209, 218-19 (1963). *See, e.g., Chambers-Castanes v. King County*, 100 Wash.2d 275, 669 P.2d 451, 456 (Wash. 1983) (en banc); *Nearing v. Webster*, ___ Or. ___, ___ N.W.2d ___ (52 L.W. 2223); *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982) (en banc); *Antkiewicz v. Motorists Mutual Ins. Co.*, 91 Mich. App. 389, 283 N.W.2d 749, 753-54, *appeal vacated*, 285 N.W.2d 659 (1979); *Cooper v. Hollis*, 600 P.2d 109, 111 (Col. Ct. App. 1979); *State v. District Court of the Thirteenth Judicial District*, 550 P.2d 382 (Mont. 1976); *Simon v. Heald*, 359 A.2d 666, 668 (Super. Ct. Del. 1976); *Prattini v. Whorton*, 326 So.2d 576, 579 (La. Ct. App. 1976); *Mason v. Bitton*, 85 Wash.2d 321, 534 P.2d 1360 (1975) (en banc); *Jackson v. City of Florence*, 320 So.2d 68 (Ala. 1975); *Laughlin v. City of Pittsburgh*, 310 A.2d 289 (Pa. 1973); *Cheatham v. Lee*, 277 So.2d 513 (La. Ct. App.), *writ denied*, 279

facts of these cases. Some are virtually indistinguishable from, and all are directly analogous to, both the facts in *Everton* and in this case. They all hold that operational-level negligence by a police officer or other public official is not the kind of conduct protected by the sovereign immunity doctrine. In addition, we refer the Court to a consistent line of cases decided under the F.T.C.A.--which *does* contain an explicit exception for "discretionary" functions, 28 U.S.C. §2680(a)--holding nevertheless that operational-level negligence is not immune from suit.[21/] Every one of these cases

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So.2d 696 (1973); *Armstrong v. Town of Lansing*, 179 N.W.2d 365 (Iowa 1970); *Andrews v. City of Chicago*, 37 Ill.2d 309, 226 N.E.2d 597 (Ill. 1967); *Ruth v. Rhodes*, 66 Ariz. 129, 185 P.2d 304 (1947). *See also Wade v. District of Columbia*, 310 A.2d 857, 860-61 (D.C.C.A. 1973) (*dictum*); *Sherbutte v. Marine City*, 374 Mich. 48, 130 N.W.2d 920 (1964) (*dictum*); *Robinson v. Smith*, 211 Cal. App.2d 473, 27 Cal. Rptr. 536, 541-42 (1963) (*dictum*). In addition, see the following cases which do not involve police officers, but do involve negligence by such other public officials as fire inspectors, building inspectors, licensing agents, and others. *Rush v. Pierson Contracting Co.*, 310 F. Supp. 1389 (E.D. Mich. 1970) (Michigan law); *Drenkhahn v. Smith*, 103 Mich. App. 278, 303 N.W.2d 176 (1981); *Brennen v. City of Eugene*, 285 Or. 401, 591 P.2d 719 (1979); *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979); *Armstrong v. Ross Township*, 82 Mich. App. 77, 81, 266 N.W.2d 674, 677-78 (1978); *Adams v. State*, 555 P.2d 235, 243-44 (Alaska 1976); *Coffey v. City of Milwaukee*, 74 Wis.2d 526, 247 N.W.2d 132 (1976); *Campbell v. City of Bellevue*, 85 Wash. 1, 7, 530 P.2d 234, 241 (1975). *See generally* 18 *McQuillin The Law of Municipal Corporations* §§53.01-02 (Rev. Ed. & Supp. 1981); 2 F. Harper & F. James, *The Law of Torts* §29.1 n.2 (Supp. 1968).

21/ *See, e.g., Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed.2d 354 (1956); *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1089 (D.C. Cir. 1980); *Miller v. United States*, 583 F.2d 857 (6th Cir. 1978); *Jackson v. Kelly*, 557 F.2d 735 (10th Cir. 1977); *Downs v. United States*, 522 F.2d 990, 995-98 (6th Cir. 1975); *Griffin v. United States*, 500 F.2d 1059 (3rd Cir. 1974); *Eastern Airlines v. Union Trust Co.*, 95 U.S. App. D.C. 189, 221 F.2d 62, *aff'd per curiam sub nom. United States v. Union Trust Co.*, 350 U.S. 907, 76 S. Ct. 192, 100 L. Ed. 799 (1955); *Liuzzo v. United States*, 508 F. Supp. 923, 930-32 (E.D. Mich. 1981); *Swanner v. United States*, 309 F. Supp. 1183 (M.D. Ala. 1970). *Cf. Doe v. McMillan*, 412 U.S. 306, 93 S. Ct. 2018, 2028, 36 L. Ed.2d 912 (1973). *See generally Gray v. Bell*, 712 F.2d 490, 506-14 (D.C. Cir. 1983), *cert. denied*, __ U.S. __, 104 S. Ct. 1593, __ L. Ed.2d __ (1984).

Also instructive are those cases recognizing a cause of action against police officers either under 42 U.S.C. §1983, or implied in the Constitution. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed.2d 90 (1974); *Bivens v. Six Unknown Named Agents of F.B.I.*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed.2d 619 (1971); *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed.2d 492 (1961); *Howell v. Cataldi*, 464 F.2d 272 (3rd Cir. 1972); *Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972).

contains language--about the difference between exercising discretion in making policy and exercising discretion in implementing policy--which is directly applicable to this case and to *Everton*. For example, the court noted in *Downs v. United States*, *supra* note 21, 522 F.2d at 995-98--holding that the United States was subject to liability for the decision of some FBI agents to attack a hijacked aircraft:

> We recognize that the agent was called upon to use judgment in dealing with the hijacking. Judgment is exercised in almost every human endeavor. It is not the mere exercise of judgment, however, which immunizes the United States from liability for the torts of its employees.
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> [T]he discretionary function exception immunizes Government employees while they are formulating policy.
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> The functions which this sparse legislative history indicates were to be excepted are those involving policy formulation, as distinguished from the day-to-day activities of persons not engaged in determining the general nature of the Government's business.
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>
> In this case, the FBI agents were not involved in formulating governmental policy. Rather, the chief agent was engaged in directing the actions of other Government agents in the handling of a particular situation. FBI hijacking policy was not being set as an *ad hoc* or exemplary matter since it had been formulated before this hijacking.
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> * * * * *
>
> It is clear that making an arrest involves the exercise of discretion. For purposes of official immunity, however, the fiction that making an arrest is not "discretionary" is maintained because protection of personal liberties is thought to outweigh the danger of less effective law enforcement out of fear of personal tort liability. . . .
>
> The prospect of governmental liability for the actions of law enforcement officers should not cause those officers less viogorously to enforce the law. The need for compensation to citizens injured by the torts of government employees outweighs whatever slight effect vicarious government liability

might have on law enforcement efforts.

These sentiments apply precisely to our case. Certainly the FBI agents who rushed the hijacked aircraft in *Downs* were exercising discretion, and certainly they were performing functions which are vital to our society--no less vital than the decision to apprehend a drunk driver or to take a drunk pedestrian for treatment. Yet even under a statute which, unlike ours, contains an explicit exception for discretionary functions, the federal courts consistently have maintained the distinction between making policy and implementing policy.

Contrary to this Court's consistent pronouncements, and to those of every other appellate district, the recent line of decisions in the second district have obliterated that vital distinction. In an effort to undo what our legislature has prescribed, they have seized upon the element of discretion as the dispositive criterion of statutory construction, failing to recognize that this criterion effectively abolishes the statute altogether. Every official exercises discretion. But every official does not exercise discretion in the policymaking sense; every official does not formulate *prescriptive* guidelines--decisions which have an impact beyond the resolution of one discrete controversy.

When our legislature waived sovereign immunity subject to no exceptions--not even a "discretionary function" exception analogous to the F.T.C.A.--it could not have intended to take away with one hand what it had given with the other. It could not have intended to abolish the sovereign immunity doctrine in a manner which leaves all governmental officials in precisely the same position that they were in before the statute was enacted. Yet that is the effect of the *Everton* decision upon which the decision in the instant case relies--and for that reason *Everton* simply cannot be affirmed. Moreover, as we have argued, since the officer was subject to a mandatory directive in

this case, this case must be reversed independent of this Court's resolution of *Everton* and *Duvall*.

IV
CONCLUSION

It is respectfully submitted that the opinion of the district court should be reversed, with instructions that the cause be remanded to the circuit court for trial.

V
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20th day of November, 1984, to: GERALD PIERCE, ESQ., P.O. Box 280, Ft. Myers, Florida 33902; JOHN M. HARTMAN, ESQ., P.O. Box 2696, Ft. Myers, Florida 33902; XAVIER J. FERNANDEZ, ESQ., P.O. Box 729, Ft. Myers, Florida 33902; and to GEORGE O. KLUTTZ, ESQ., P.O. Box 2446, Ft. Myers, Florida 33902.

Respectfully submitted,

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