IN THE SUPREME COURT OF FLORIDA

RANDALL JERROLD VANN, as Personal Representative of the Estate of FAYE LAMB VANN, deceased,

Petitioner,

vs. CASE NO. 85,415

STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS,

Respondent.

_____/

BRIEF OF RESPONDENT, STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS

APPEAL FROM THE DISTRICT COURT OF APPEAL,
STATE OF FLORIDA, FIRST DISTRICT
CASE NO. 94-00015

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STATEMENT OF THE CASE AND FACTS

Pursuant to Rule 9.210(c), Florida Rules of Appellate Procedure, Respondent accepts the Statement of the Case and Facts as set out in Petitioner's Brief. Respondent, however, supplements those facts as set out below in order to more accurately reflect the facts contained in the record.

In particular, Respondent would expand the facts regarding the issues of whether the Department of Corrections' ("DOC") classification of Donald Dillbeck ("Dillbeck") and his transfer to the Quincy Vocational Center ("QVC") were proper. The facts leading up to Dillbeck's arrival at QVC are as follows:

Dillbeck was incarcerated in June, 1979 and sent initially to Sumter Correctional Institute. (P.Ex. 18, pp. 2007, 2040-2048). He was later transferred to Avon Park Correctional Institution in January, 1986. (P.Ex. 18, pp. 2221, 2223). In keeping with its duties and responsibilities to manage and control the inmate population, DOC performs an inmate evaluation on each and every inmate every six months. [P.Ex. 24, Rule 33-6.009(6)]. There were approximately 49,000 inmates in the correctional system at the time Dillbeck escaped. (P.Ex. 9, Dugger depo. p. 65). The biannual reviews of these inmates are conducted by correctional personnel who meet personally with the inmate and perform an evaluation using a Progress Report Questionnaire and a Progress Report Score Sheet as tools. [P.Ex. 24, Rule 33-6.009(3)]. The numerical score assigned on the score sheet corresponds to one of the custody grades: Close, Medium, or Minimum. [P.Ex. 24, Rule 33-6.009(3)]. An inmate may, over time, progress from the higher to lower custody

grades. [Id., R. 33-6.009(1)(b)]. During his incarceration, Dillbeck was reviewed approximately every six months by corrections officers. (P.Ex. 18; P.Ex. 19, Attachment 29 "Chronology"). A "Progress Report" was issued by the Department for each such review and he was assigned status in one of the custody grades. (P.Ex. 19, Attachment 29 "Chronology"). Dillbeck was assigned a classification grade of "Close" at the time of his initial incarceration. (P.Ex. 18, p. 2048).

In his May, 1989 Progress Report (P.Ex. 19, Attachment 4), which occurred ten years after his initial incarceration, the DOC officer recommended Dillbeck's custody be reduced from Close to Medium. (P.Ex. 19, p. 5). An error was made on the score sheet compiled with that Progress Report. A proper evaluation would have resulted in a score of 4 rather than the score of 5 which he received. A score of 5 qualifies a prisoner for Minimum rather than Medium custody. (P.Ex. 19, p. 5; P.Ex. 2, Hendrickson depo., pp. 15-16; P.Ex. 19, p. 2 and Attachment 4; D.Ex. 1, Sawyer depo., pp. 23-24). However, the Classification Manual used by the reviewers places the judgment of the corrections officer above the numerical indication on the score sheet. (D.Ex. 7, p. 107). The corrections officer therefore overrode the numerical score and assigned Dillbeck a Medium classification, thus obviating the numerical error. (P.Ex. 19, Attachment 4). This review was done by Correctional Probation Officer Frank Carey. (P.Ex. 1, Carey depo., p. 6). Dillbeck's next Progress report was done on November 8, 1989 by a team headed by Correctional Probation Officer James

Benton. (P.Ex. 7, Prevatt depo., p. 18). This report repeated the scoring error in the May report, however, Mr. Benton's recommendation was again for Medium custody status. (P.Ex. 19, Attachment 5; P.Ex. 7, Prevatt depo., pp. 8, 10-11).

Dillbeck was shortly thereafter transferred to Quincy Vocational Center (at his own request and in order to satisfy a DOC need for trained cooks) on February 6, 1990. (P.Ex. 12, Adams depo., pp. 16-17, 22; P.Ex. 18, pp. 2288, 2290; P.Ex. 4, Albritton depo., pp. 9-12). The purpose of the transfer and assignment of Dillbeck to QVC was to provide the inmate with a marketable skill. (P.Ex. 4, Albritton depo., pp. 11, 12). Rehabilitation of inmates is a DOC responsibility established by DOC rules. (P.Ex. 24, p. 68, Rule 33-6.009(1)(a), F.A.C., October, 1989). QVC is a training facility for, among other trades, cooks and kitchen workers. (P.Ex. 12, Adams depo., pp. 16-18). QVC is a Close facility, meaning that it can house prisoners of all three custody grades. (P.Ex. 7, Prevatt depo., p. 33).

QVC often provides inmates for public use in community service projects. (P.Ex. 11, Keels depo., pp. 21-24). Dillbeck was assigned to outside work details without incident on February 22, February 28, March 8 and June 18, 1990. (P.Ex. 12, Adams depo., p. 27; P.Ex. 19, p. 3). On June 19, Dillbeck received his first Progress Report at QVC wherein Correctional Probation Officer II Philip Adams corrected the previous scoring errors made on the last two Progress Reports. (P.Ex. 12, Adams depo., pp. 19, 36-44; P.Ex. 19, p. 3 and Attachment 6). Adams arrived at a score of 5 which is

consistent with a Medium custody classification. (P.Ex. 12, Adams depo., pp. 56-58). However, Adams made a finding of "exceptional institutional adjustment" and lowered Dillbeck's classification to Minimum. (P.Ex. 12, Adams depo., pp. 56-58, 62-64; P.Ex. 19, Attachment 6).

Three days later, on June 22, 1990, Dillbeck was among ten inmates assigned to cater a banquet for the North Florida Educational Development Corporation at the nearby Gretna Elementary School. (D.Ex. 10). The inmates were all Medium or Minimum custody grades and were each eligible for serving on the work detail. (P.Ex. 12, Adams depo., pp. 24-26; P.Ex. 13, Wester depo., pp. 13-14; D.Ex. 10, p. 1). The detail was supervised by the requisite number of corrections officers, under the control of Sergeant Herbert Wester, Correctional Officer II. (P.Ex. 13, Wester depo., pp. 20-21).

At approximately 8:15 p.m. on that date it was determined that Dillbeck was missing from the detail. (P.Ex. 18, p. 1). After securing the remaining inmates and searching the immediate vicinity of the school, QVC was notified. (P.Ex. 13, Wester depo., pp. 29-30). Escape and recapture procedures were implemented, including immediate contact of local law enforcement agencies, including, but not limited to, the Florida Highway Patrol and the Gadsden County Sheriff's Office. (P.Ex. 11, Keels depo., pp. 27-29, 43, 45-46; P.Ex. 14, Washington depo., pp. 32-33). Both QVC and neighboring facilities sent out search parties, including canine units, but Dillbeck was not recaptured until he had committed the murder of

Ms. Vann. (P.Ex. 18, p. 2307). Today, Dillbeck sits on Death Row at the State prison in Raiford. (P.Ex. 18, pp 2002, 2321).

SUMMARY OF ARGUMENT

The question certified by the District Court should be answered in the negative and the analysis set out in the Opinion of the District Court should be adopted. In order for the Respondent to be liable in negligence, there must be a common law or statutory duty and the alleged action is one for which sovereign immunity is waived. There is no common law or statutory duty of care which inures to the benefit of Mrs. Vann as a result of the alleged negligence. The Department of Corrections owes a general duty to all citizens to control and restrain prisoners, but it is not liable for injuries resulting from criminal acts of escapees.

Having determined that Respondent has no duty, it is not necessary to reach the issue of whether the alleged action is one for which sovereign immunity has been waived. In any event, the actions complained of in this care are law enforcement activities for which immunity has not been waived as set out in Trianon Park v. City of Hialeah, 468 So. 2d 912 (Fla. 1985).

POINT I

The question certified by the District Court of Appeal, First District, is:

> WHETHER THE STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS, MAY BE HELD LIABLE AS A RESULT OF THE CRIMINAL ACTS OF AN ESCAPED PRISONER.

The District Court, in a well-reasoned opinion, answered the question in the negative. Petitioner has not cited one case to this Court in which the State of Florida has been held liable for the criminal acts of an escaped prisoner. As stated in the District Court opinion, there are, however, "a number of cases" in which "the courts of this state have determined that the state is not liable for injuries resulting from the criminal acts of escapees." (Opinion, page 6).

The District Court stated that "[i]n determining the liability of a governmental entity for negligence, the court must look at two separate and distinct issues: (1) whether there exists a common law or statutory duty of care which inures to the benefit of the Mrs. Vann as a result of the alleged negligence, and (2) whether the alleged action is one for which sovereign immunity has been waived." The court found that there was no common law or statutory duty of care which inured to the benefit of the plaintiffs in the instant case. If there is no duty then there is no necessity to determine whether the act giving rise to the injury is planning or operational level activity. The Petitioner ignores this first step in the analysis and proceeds to argue that the complained of actions of the Department of Corrections officials were operational

level activities which were not immune from suit. While it is understandable why Petitioner would urge such analysis, it is nonetheless faulty.

The definitive Florida Supreme Court case containing a comprehensive discussion of the question of the wavier of sovereign immunity and its application to various governmental torts is Trianon Park v. City of Hialeah, 468 So. 2d 912 (Fla. 1985). Trianon Park involved a suit against the City of Hialeah arising out of the negligent performance of their building inspector which resulted in a defective condominium project. This Court took the opportunity to clarify the entire area of the law relating to governmental tort liability and waiver of sovereign immunity.

The Court begins by explaining that Florida Statute § 768.28, which waived the sovereign immunity, did not create any new cause of action but merely eliminated the immunity which had prevented recovery for existing common law torts when committed by a government employee. Trianon Park at 914. The Court noted that there has never been a common law duty to individual citizens for the enforcement of police power functions. Trianon Park at 915.

The Court then answers the question of whether a governmental entity has a duty to prevent the misconduct of a third party, for example an escaped prisoner, and who the governmental entity must protect. At page 917 of the Opinion, citing with approval Section 288 of the Restatement of Torts, the Court says:

> legislative enactments for the protection of the interest of the community as a whole, rather than for protection of any individual class, create no duty or liability.

This Court's opinion sets out five basic principles to use in determining whether governmental tort liability exists:

> [F]irst, for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct. For certain basic judgmental or discretionary governmental functions, there has never been an applicable duty of care. Commercial Carrier. Further, legislative enactments for the benefit of the general public do not automatically create an independent duty to either individual citizens or a specific class of citizens. Restatement (Second) of Torts, § 288 comment b 1964).
>
> Second, it is important to recognize that the enactment of statute waiving sovereign immunity did not establish any new duty of care for governmental entities. The statute's sole purpose was to waive that immunity which prevented recovery for breaches of existing common law duties of care.
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> * * *
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> Third, there is not now, nor has there ever been, any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals. In addition, there is no common law duty to prevent the misconduct of third persons. See, Restatement (Second) of Torts, § 315 (1964).
>
> Fourth, under the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights. [Cites omitted]. Judicial intervention through private tort suits . . . would violate the separation of powers doctrine.
>
> Fifth, certain discretionary functions of government are inherent in the act of governing and are immune from suit. Commercial Carrier. It is 'the nature of the conduct, rather than the status of the actor,'

> that determines whether the function is the type of discretionary function which is, by its nature, immune from tort liability. [United States v. Empresa de Viacao Rio Grandese (Varig Airlines, ____ U.S. ____, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984)].

Trianon Park at 918.

In order to further clarify the entire field of waiver of governmental immunity, the Court enumerated four categories of government functions and activities:

(I) legislative, permitting, licensing, and executive function;

(II) enforcement of laws and the protection of the public safety;

(III) capital improvements and property control operations; and

(IV) providing professional, educational and general services for health and welfare of citizens.

As to the category II function, this Court at page 919 of its Opinion stated that a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body as a matter of governance and there has never been the common law duty of care associated with the exercise of those powers. The operations of the Department of Corrections and the conduct of its employees in the instant case falls within the parameters of a category II function as defined by the Court. The Court then cites a number of cases in which discretionary police power functions did not give rise to any private right of action by citizens. The

examples included decisions to take a person into protective custody; prisoner classification; decisions to make arrests; provision of police protection; and the failure to provide adequate police protection.

Using these five principles in conjunction with the reasoning set forth in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1715 (Fla. 1979), (i.e. that enforcement of laws and protection of the public safety were "matters of governance"), this Court could find no duty of care owed the condominium association by the City of Hialeah. In light of the special consideration given law enforcement personnel in that case, it is even more clear that the Court did not envision a duty of care to Mrs. Vann by DOC in the instant case.

Applying the facts in the case below to the Trianon Park holding helps illustrate DOC's position. The alleged negligent conduct involving the classification, control and supervision of inmates by DOC are not activities giving rise to a common law or statutory duty of care. The Trianon Park court said that, in order for there to be governmental tort liability, there must be a common law or statutory duty of care underlying the alleged negligence. Id. The statute waiving sovereign immunity did not create any new duties of care for the government. There is no common law or statutory duty owed to individual citizens in the prisoner classification process.

The courts have consistently ruled that corrections officers, police, law enforcement officers of all kinds do not owe a duty to

individual citizens. This principle is clearly stated by this Court in HRS v. Whaley, 574 So. 2d 100 (Fla. 1991). Addressing a case where the Department of Corrections was sued for negligence, the Whaley Court held that "the Department of Corrections has no specific duty to protect individual members of the public from escaped inmates." Id., footnote 1 at pp. 102-103, referencing Reddish v. Smith, 468 So. 2d 929 (Fla. 1985).

In Parker v. Murphy, 510 So. 2d 990 (Fla. 1st DCA 1987), the First District Court of Appeal was faced with another escaped prisoner case. An inmate working outside the prison escaped and attacked the Parkers, an elderly couple. The inmate was recaptured, but then he escaped again, attacking the Parkers again. The Parkers sued on grounds that the DOC had breached its duty to them in failing to have the prisoner shackled; failing to have doors secured; and allowing the prisoner access to unsecured areas. The Court, citing Whaley, held that even where the citizens had been previously attacked, by the same escapee, the government owed no duty to those individuals to prevent the escape. If DOC and/or its officers owe no duty to properly guard a prisoner or to protect citizens previously attacked by an escaped prisoner, they certainly owe no duty to protect a random victim who was attacked by an escapee who had progressed positively through the corrections system for 12 years.

Another example is the case of Everton v. Willard, 468 So. 2d 936 (Fla. 1985), involving the release of an intoxicated driver by local police. The driver (Willard) had been stopped for driving

erratically; he was ticketed and released, despite Willard's admission he had been drinking and the sheriff's deputy's observation that Willard appeared to have been drinking. Fifteen minutes later he was involved in an accident causing the death of one person and serious injuries to another. The Supreme Court reasoned that:

> [T]he victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common law duty of care to the individual citizen and resulting tort liability, absent a special duty to the victim.

Id. at 938.

The result in Everton was that an injured individual was precluded from filing a negligence action against the State. The courts have had to balance the public policy of affording individual citizens the right to seek redress against the right and necessity of the State to carry out its more difficult discretionary duties without interference. The free exercise of this discretionary power is recognized as critical to effective discharge of law enforcement duties. Everton, 468 at 932.

There are a few limited circumstances where law enforcement officers have been deemed to have a duty to individual citizens. But these are circumstances in which a relationship between the law enforcement officer and the citizen had been created which gave rise to the duty. One example being the case of Kaisner v. Kolb, 545 So. 2d 732 (Fla. 1989). In Kaisner, the plaintiff had been stopped by police for a traffic violation. While in police custody, he was struck by an automobile and severely injured. The

court correctly held that, while plaintiff was in police custody, the police owed him a duty to protect him. The establishment of a duty to a particular citizen under this theory requires that the police officer become personally involved with or responsible for the safety of the citizen. There was no such special relationship between any employee of DOC and Mrs. Vann.

There are certainly other instances when a governmental agency owes a duty of care to individuals. See for example, HRS v. Yumani, 529 So. 2d 258 (Fla. 1988); Dunagan v. Seely, 533 So. 2d 867 (Fla. 1st DCA 1988); and Hutchison v. Miller, 548 So. 2d 883 (Fla. 5th DCA 1989). To exist, however, the duty must be based upon a specific relationship, or it must be statutorily created. The Yumani case is a good example of the type of relationship between a citizen and the State which must exist before a specific duty of care is owed to an individual citizen. "HRS has a statutory duty of care to prevent further harm to children when reports of abuse are received." 529 So. 2d 261. DOC never had a relationship with Mrs. Vann and was never mandated by law to protect her. Mrs. Vann was a random victim of a senseless act of violence over which DOC had no control.

Petitioner relies on two cases which do not involve government agencies to support his contention that the Department of Corrections owed a duty of care to Mrs. Vann. Nova University, Inc. v. Wagner, 491 So. 2d 1116 (Fla. 1986), and Garrison Retirement Home Corporation v. Hancock, 484 So. 2d 1257 (Fla. 4th DCA 1985). The fact that the defendants in those cases were not

governmental agencies is sufficient in and of itself to distinguish those cases from the instant case. When a private entity voluntarily undertakes the care and custody of individuals who may be dangerous, that entity has a duty to exercise reasonable care to avoid foreseeable incidents which may cause harm to third parties. No such duty exists with regard to the governmental agency that is responsible for the custody of prisoners. HRS v. Whaley, supra, and Parker v. Murphy, supra. Petitioner seemingly argues that at least one private company operates a correctional facility and that therefore monitoring prisoners is not a purely governmental function. The private operation of one facility, however, does not change the fact that maintenance and control of prisoners is a governmental function. As the District Court pointed out in the instant case, the only duty was a general duty owed to the public not to allow a prisoner to escape.

POINTS II AND III

Because, as the District Court found DOC owed no duty to Mrs. Vann, the issues of whether the injury was foreseeable and whether the DOC was engaging in planning or operational level activities do not arise. Consequently, they were not addressed in the District Court opinion.

Assuming, arguendo, that the analysis must move beyond a determination of whether a duty was owed to Mrs. Vann, the next issue to be addressed as pointed out by the District Court is "whether the alleged action is one for which sovereign immunity has been waived." The DOC activity complained of is clearly immuned as law enforcement activity under Trianon Park, supra. The extent to which sovereign immunity has been waived as to a given governmental action is measured against the guidelines prescribed in the Trianon Park case. As mentioned in Point I above, this Court established four categories of State governmental activity:

> I. Legislative, permitting, licensing and executive officer functions.
>
> II. Enforcement of laws and the protection of the public safety.
>
> III. Capital improvements and property control operations.
>
> IV. Providing professional, educational, and general services for the health and welfare of citizens.

Trianon Park, at 919. Emphasis added.

The Court confirmed that sovereign immunity did not apply to discretionary activities carried out under Category II which are

inherent in the act of governing. The Court reasoned that those types of activities had never had a common law duty of care associated with them.

The activities engaged in by DOC for which the Petitioner alleged negligence are as follows:

Count I:	Negligent Failure to Supervise
Count II:	Negligent Failure to Warn the Public of Dillbeck's Escape
Count III:	Negligent Failure to Properly Train Personnel in Classification Procedures
Count IV:	Negligent Failure to Supervise Personnel in the Classification of Dillbeck
Count V:	Negligent Failure to Supervise and Control Classification Operations
Count VI:	Negligent Failure to Use Designated Procedures for Classifications
Count VII:	Negligent Failure to Maintain an Adequate and Complete Record on Dillbeck for Review by Classification Personnel.

(Third Amended Complaint, Record pp. 53-94).

Each of the alleged negligent acts by DOC fall within Category II of the Trianon Park test. Therefore, even if Mrs. Vann could establish a legal duty owed to her by DOC, the actions fail because they fall within the sovereign immunity protection which has not been waived by the State.

Dillbeck, at the time of his escape, was classified in the Minimum custody grade. Compare the Dillbeck situation to that of

the inmate Prince in the case of Reddish v. Smith, 468 So. 2d 929 (Fla. 1985). Prince was serving a life sentence for first degree murder. After being sentenced in 1973, Prince was transferred to a minimum security vocational training center in 1974. He escaped and was recaptured. In 1976 he was downgraded from Medium to Minimum custody status by Defendant J. R. Reddish, a DOC employee. Reddish had used Prince as a servant in this (Reddish's) home for a period, then Prince was transferred to another facility. After obtaining Minimum security status and being transferred to a minimum security facility, Prince escaped and shot Smith, causing damages for which a negligence action was filed.

Smith alleged that DOC failed to conform to the proper standard of care in classifying and assigning the prisoner, Prince. This is the same claim made by Petitioner in the instant action. DOC moved for and was granted dismissal of the Smith Complaint on the basis of sovereign immunity. The DCA reversed the decision, but certified this question to the Supreme Court: "May prisoner classifications ever give rise to tort liabilities, and, if so, under what circumstances?" The Supreme Court answered the question in the negative saying that classification of a prisoner could never give rise to liability, and quashed the district court decision. Reddish, 468 at 932. The classification of Dillbeck from Medium to Minimum status, therefore, does not give rise to tort liability in the instant action.

Dillbeck's reclassification is also similar to that of inmate Baumgardt in Ursin v. Law Enforcement Inc. Co. Ltd., 450 So. 2d

1282 (Fla. 2d DCA 1984), aff'd 469 So. 2d 1382 (Fla. 1985). Baumgardt was serving in excess of 20 years as a result of convictions for rape, kidnapping and robbery. While awaiting a ruling on his status in the Mentally Disabled Sex Offenders (MDSO) program, a decision that would have affected his right to be placed on outside work details, Baumgardt was assigned to the trustee kitchen detail. He walked away from the detail and, within minutes, kidnapped and sexually assaulted Ursin. Noting that this case involved Category II functions under the Trianon Park test, the Court held that sovereign immunity barred recovery by Ursin against the governmental agency despite the fact that the prisoner had been allowed on kitchen detail when his eligibility for that assignment was still in question.

Dillbeck's classification, whether to Close, Medium, or Minimum, is a law enforcement governmental activity falling within the Category II classification under the Trianon Park case. There is no common law duty of care associated with classification procedures. This is true as to an inmate's custody grade as well as his assignment. In Green v. Inman, 539 So. 2d 614 (Fla. 4th DCA 1989), the Court considered the claim by plaintiff that the Broward County Sheriff was negligent in placing certain inmates together. Rejecting the negligence claim, that Court reiterated:

> [N]ormally, the government assumes no liability for decisions regarding the placement of inmates or the selection of trustees. See, Reddish v. Smith, 468 So. 2d 929 (Fla. 1985); Davis v. State Department of Corrections, 460 So. 2d 452 (Fla. 1st DCA 1984), pet. for rev. dismissed, 472 So. 2d 1180 (Fla. 1985); Ursin v. Law Enforcement

Insurance Co., 450 So. 2d 1282 (Fla. 2d DCA 1984), approved, 469 So. 2d 1382 (Fla. 1985). [Other citations omitted].

Clearly, the sum and substance of these decisions is that the DOC is not liable in tort for these classification-related actions. The facts of the instant case, when applied to existing case law, results in the inevitable conclusion that sovereign immunity acts as a bar to the negligence suit filed below.

It is the duty of the DOC to hire, train and supervise its personnel. See, generally, Section 943.13, Florida Statutes, and Rule 33-25, Florida Administrative Code. This is a law enforcement administrative governmental function which falls within the purview of those activities for which sovereign immunity has not been waived.

The plaintiffs cite as negligence the fact that Correctional Officer Carey had been with the Department for only a short period of time before performing Dillbeck's semi-annual review in May, 1989. (Third Amended Complaint, Counts III-VII, D.Ex. 1, Carey Depo., pp. 5-6, 15). The fact is irrelevant in that it violates no rule or standard relating to the performance of the employee's duties. The training and assignment of duties is an administrative law enforcement Category II activity for which sovereign immunity has not been waived. Furthermore, the employment and use of law enforcement (or correctional officers) is considered to be immune policy-making activity. See, Maybin v. Thompson, 514 So. 2d 1129 (Fla. 2d DCA 1987).

In Parker v.Murphy, supra, discussed above, the plaintiffs alleged that the prisoner escaped as a result of the law enforcement agency's negligence, including: failing to have prisoner shackled; failing to have doors locked; allowing prisoner to have access to an unsecured area, etc. Those allegations are similar to the ones made by Vann in this case. However, the Court did not consider those actions to be a sufficient basis for waiving sovereign immunity and the action was barred. The Court, in Parker, stated very clearly the law of the State in these kinds of actions:

> [I]n ruling that the action against appellee was barred by the doctrine of sovereign immunity, the court below relied upon decisions of the Florida Supreme Court in Everton v. Willard, 468 So. 2d 936 (Fla. 1985), and Reddish v. Smith, 468 So. 2d 929 (Fla. 1985). These cases, together with Trianon Park Condominium Association v. City of Hialeah, 468 So. 2d 912 (Fla. 1985), establish that governmental decisions as to the enforcement of laws and the protection of citizens from criminal offenses are generally within the category of governmental activity which involves planning and policy judgments beyond the limited wavier of sovereign immunity provided in Section 768.28, Florida Statutes.

Parker, 510 So. 2d at 991.

Early cases addressing claims of negligence in the escape of even dangerous inmates (and there is no evidence that Dillbeck was considered dangerous prior to the escape) focused on questions of inmate classifications as a contributing factor to the escape. See, e.g., Ursin v. Law Enforcement Ins. Co., 450 So. 2d 1282 (Fla. 2d DCA 1984), aff'd, 469 So. 2d 1382 (Fla. 1985). In Ursin, as in

the instant case, the inmate was assigned to kitchen duty and walked away from the assignment and assaulted a citizen. Like Dillbeck, the inmate could not have been on that assignment but for his custody level. The Ursin court rejected the plaintiff's claims on the basis of sovereign immunity.

In Parker v. Murphy, supra, the inmate escaped from the confines of a jail and assaulted the Plaintiffs (twice) because, claimed Parker, there were not sufficient personnel around to prevent the escape. In the present case, the allegation is that the guards on duty failed to properly supervise. In either case, the actions of the law enforcement or correctional personnel are not subject to micro-management. That is, citizens are not allowed to assert personal claims based on the exercise of discretionary functions by law enforcement officials. See, Reddish v. Smith, supra, and Ursin v. Law Enforcement Ins. Co., supra. The actions of the law enforcement personnel in Parker, or the correctional officer in Reddish, like the actions of DOC at issue in the instant case, are beyond the kinds of actions for which sovereign immunity has been waived.

The Petitioner claims that DOC was negligent in the classification, transfer and/or supervision of inmate Dillbeck. This claim is apparently based on the fact that Dillbeck ultimately assaulted Mrs. Vann after his escape from DOC custody.

According to the DOC Classification Manual, however, (D.Ex. 7, p. 106), inmates should always be assigned to the lowest custody grade appropriate to their situation. Nothing in the rules

prohibited DOC from classifying Dillbeck at Minimum custody; the classification was consistent with DOC standards. (P.Ex. 12, Adams depo., pp. 58-59; P.Ex. 7, Prevatt depo., p. 14). The rationale for this standard is obvious. (1) Florida's prisons are over-crowded and prisoners need to be moved out whenever possible. (2) It is more expensive to house higher security risks. (3) ". . . it is just good correctional practice." (D.Ex. 7, p. 109). The classification of prisoners and use of DOC employees was proper, consistent with Agency rules and did not give rise to a negligence claim. Likewise, the supervision of inmate Dillbeck was done in accordance with existing rules and regulations, and there can be no finding of negligence associated with that activity.

The DOC was required to supervise Dillbeck's work detail by visual means, i.e., no restraints were required. Under the rules existing at that time, the inmates were to be kept within sight and sound with no specific requirements as to how to conduct such supervision. See, Rule 33-6, Florida Administrative Code. (D.Ex. 7, p. 108). Likewise, the rules did not mandate that the inmates were to be guarded utilizing armed supervision. (D.Ex. 7; P.Ex. 13, Wester depo., p. 26). In fact, Dillbeck (as a Minimum custody inmate at the time) did not even have to be visually supervised, but could have been "placed on task outside a secure perimeter and . . . checked on a periodic basis." (D.Ex. 7, p. 108).

There is simply no indication that any of the officers conducted themselves in a manner inconsistent with their general responsibilities. There is no claim by the Plaintiff had a DOC

employee acted outside his or her scope of employment. The Plaintiff has not filed suit against any individual, but against the State. However, the State (through its employees) has not failed in its responsibilities so as to give rise to a claim in negligence.

Assuming, arguendo, that the errors made on Dillbeck's progress reports did result in him being down-graded to the Medium (and then Minimum) custody grade sooner than he otherwise might have been, the classification procedures are a purely governmental function performed by DOC employees in accordance with the rules and regulations governing such activities.

Even if inmate Dillbeck lied about having family members in North Florida, the decision to transfer him to QVC was an act consistent with governing rules. It is not a violation of rule (or breach of an established duty) to make an error about an inmate's stated rationale for desiring a change of site.

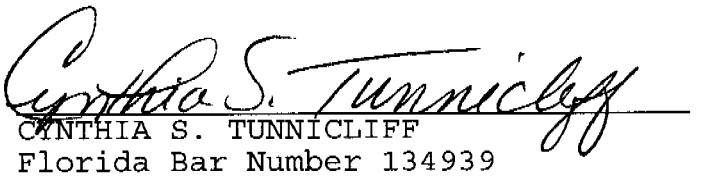
Even though Dillbeck used the work detail as a vehicle for his escape and, as a convicted murdered might have been considered dangerous, DOC breached no duty to the public because there was no violation of rules relating to supervision, and all appropriate actions were taken subsequent to the escape. There was no breach of duty in the decisions relating to Dillbeck's assignment.

Even if it was a lower grade correctional officer making decisions about Dillbeck rather than the agency chief or upper level supervisor, the decisions were still within the purview of the regulatory directives for such activities.

CONCLUSION

For the foregoing reasons, the question certified by the District Court of Appeal should be answered in the negative. The Department of Corrections owed a general duty to control and restrain prisoners, but had no duty of care to an individual citizen under these circumstances. Consequently, the Department should not be held liable for the criminal acts of an escaped prisoner.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to EDWARD M. PRICE, JR., ESQUIRE, of Farmer, Price, Hornsby & Weatherford, Post Office Drawer 2228, Dothan, Alabama 36302; and LOREN E. LEVY, ESQUIRE, Post Office Box 10583, Tallahassee, Florida 32302, this 23rd day of May, 1995.

Cynthia S. Tunnicliff

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