od7

SUPREME COURT OF FLORIDA

Case No.: 87,071

FILED
SID J. WHITE
FEB 22 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

LEVADA LEE, ETC.,

Petitioner,

vs.

DEPARTMENT OF HEALTH *AND* REHABILITATIVE SERVICES,

Respondent.

_____/

BRIEF OF AMICI CURIAE, THE ACADEMY OF FLORIDA TRIAL LAWYERS *AND* THE ASSOCIATION FOR RETARDED CITIZENS of Florida

---

Loren E. Levy
Fla Bar No. 0814441
The Levy Law Firm
Post Office Box 10583
Tallahassee, Florida 32302
904/222-7680

Counsel for amici curiae

TABLE OF CONTENTS

TABLE OF CITATIONS

United States Constitution:

Florida Statutes:

Other Authorities:

INTRODUCTION

The Academy of Florida Trial Lawyers (academy) and the Association of Retarded Citizens (ARC) submit this brief as amici curiae in support of the petitioner, Lavada Lee (Lee). The academy is a statewide association of attorneys specializing in litigation, including personal injury litigation. ARC is the largest advocacy association in the United States for persons who are developmentally disabled. The academy and ARC appear as amici curiae in the instant case because the question certified by the district court as being one of great public importance, i.e., where a severely retarded resident of an HRS facility becomes pregnant while in HRS' care, but neither the specific circumstances of her impregnation nor any specific act of HRS' negligence is alleged or established at trial, can HRS be held liable in tort for alleged negligent supervision of the resident, given the "normalization principle," section 393.13-393.14, Florida Statutes (the Bill of Rights of persons who are developmentally disabled), should be explored from all points of view. The amici curiae adopt the briefs and arguments of Lee and respectfully urge this Court to answer the certified question in the affirmative and to quash the district court's decision.

PREFACE

petitioner, Lavada Lee, will be referred to herein as "Lee." Respondent, Department of Health and Rehabilitative Services, will be referred to herein as "HRS." The Academy of Florida Trial Lawyers will be referred to herein as the "academy," and the Association of Retarded Citizens will be referred to herein as "ARC."

STATEMENT OF THE CASE AND OF THE FACTS

The amici curiae adopt by reference the Statement of the Case and of the Facts presented in the petitioner's initial brief.

SUMMARY OF ARGUMENT

It is the academy's and ARC's position that HRS is not immune from suit in tort for injuries sustained from the sexual assault of a developmentally disabled resident at one of its facilities by another resident where the assault resulted from HRS' negligent supervision. Although the normalization principle as adopted in Florida requires that the state treat the developmentally disabled as normal as possible, and maintain its institutionalized residents in the least restrictive environment, the principle does not eviscerate HRS' obligation to supervise its residents in such a manner to avoid sexual assault. In the instant case, Lee has alleged and adduced at trial sufficient facts to support her claim of negligent supervision.

ARGUMENT

HRS is not immune from suit in tort for the sexual assault *of* a developmentally disabled resident at one of its facilities resulting from its negligent supervision,

This case involves the following question which the district court certified to this Court as one of great public importance:

> Where a severely retarded resident of an HRS facility becomes pregnant while in HRS' care, but neither the specific circumstances of her impregnation nor any specific act of HRS' negligence is alleged or established at trial, can HRS be held liable in tort for alleged negligent supervision of the resident, given the "normalization principle," section 393.13-.14, Florida Statutes ("The Bill of Rights of Persons who are Developmentally Disabled")?

Department of Health & Rehab. Servs. v. Lee, 20 Fla. L. Weekly D2735, 2736 (Fla. 1st DCA Dec. 13, 1995). The academy and ARC respectfully submit that the certified question should be answered in the affirmative and that the district court's decision should be quashed.

A review of the question as the district court certified indicates that two issues actually are presented. The first issue is whether HRS is immune from suit for injuries to a developmentally disabled resident at one of its facilities resulting from its alleged negligent supervision. This issue involves the interplay of the "normalization principle" and traditional case law regarding sovereign immunity. The second issue involves what proof must be alleged and adduced at trial to

support a claim of negligent supervision and a jury verdict in the resident's favor. The academy's and ARC's amici brief primarily will address the first issue.

It is the academy's and ARC's position that HRS is not immune from suit in tort for the sexual assault of a developmentally disabled resident at one of its facilities resulting from its negligent supervision. The district court did not squarely address this issue because it concluded that Lee's general allegations of negligent supervision actually were challenging HRS' policies regarding supervision. After reaching such a conclusion, the district court then relied upon Department of Health & Rehab. Servs. v. B.J.M., 656 So.2d 906 (Fla. 1995), for the proposition that courts, through tort actions, are ill suited to second guess HRS' decisions as to the provision and choice of services each time there is an unsatisfactory outcome. The district court therefore held that HRS was immune from suit.

The district court, however, appeared particularly troubled by the application of the normalization principle to Lee's allegations of negligent supervision. The court felt that secure, restrictive and constant supervision was inconsistent with the normalization policy and that the "wisdom of the normalization policy, with its attendant benefits and risks, is a discretionary matter involving budgetary and public policy considerations outside the realm of the courts." Lee, 20 Fla. L. Weekly at D2736. Accordingly, the academy's and ARC's brief will

discuss the normalization principle and its effect on sovereign immunity principles in the instant case.

(1) The normalization principle and rights of the developmentally disabled.

The Florida legislature has defined the normalization principle as "letting the client obtain an existence as close to the normal as possible, making available to the client patterns and conditions of everyday life which are as close as possible to the norm and patterns of the mainstream of society." § 393.063(33), Fla. Stat. (1995). This principle originated from a cluster of ideas, methods, and experiences expressed in practical work for the developmentally disabled in Scandinavian countries. The principle underlies the demands for standards, facilities, and programs for the developmentally disabled as expressed by the Scandinavian parent movement. Marvin Rosen, Gerald K. Clark, and Marvin S. Kivitz, The History of Mental Retardation, (Univ. Park Press, 1976). The principle can be simply stated as letting the developmentally disabled obtain an existence as close to the normal as possible.

The normalization principle has been described as involving the following eight main facets:

1. Normalization means a normal rhythm of day for the retarded.
2. The normalization principle also implies a normal routine of life.
3. Normalization means to experience the normal rhythm of the year, with holidays and family days of personal significance.
4. Normalization also means an opportunity to undergo normal developmental experiences of the life cycle.

5. The normalization principle means that the choices, wishes, and desires of the mentally retarded themselves have to be taken into consideration as nearly as possible, and respected.

6. Normalization also means living in a bisexual world.

7. A prerequisite to letting the retarded obtain an existence as close as possible is to apply normal economic standards.

8. An important part of the normalization principle implies that the standards of the physical facilities, e.g., hospitals, schools, group homes and hostels, and boarding homes, should be the same as those regularly applied in society to the same kind of facilities for ordinary citizens.

The History of Mental Retardation.

The Florida legislature has declared that the design and delivery of treatment and services for the developmentally disabled should be directed by the principles of normalization and therefore should:

1. abate the use of large institutions.

2. Continue the development of community-based services which provide reasonable alternatives to institutionalization in settings that are least restrictive to the client.

3. Provide training and education to individuals who are developmentally disabled which will maximize their potential to lead independent and productive lives and which will afford opportunities for outward mobility from institutions.

393.13(2)(b), Fla. Stat. (1995). The legislature also has enacted a developmentally disabled person's "bill of rights" in section 393.13(3), Florida Statutes (1995). Section 393.13(3) provides that:

(a) Persons with developmental disabilities shall have a right to dignity, privacy, and humane care, including the right

to be ~~free from sexual abuse in residential~~ facilities.

(b) Persons with developmental disabilities shall have the right to religious freedom and practice. Nothing shall restrict or infringe on a person's right to religious preference and practice.

(c) Persons with developmental disabilities shall receive services, within available sources, which protect the personal liberty of the individual and which are provided in the least restrictive conditions necessary to achieve the purpose of treatment.

(d) Persons who are developmentally disabled shall have a right to participate in an appropriate program of quality education and training services, within available resources, regardless of chronological age or degree of disability. Such persons may be provided with instruction in sex education, marriage, and family planning.

(e) Persons who are developmentally disabled shall have a right to social interaction and to participate in community activities.

(f) Persons who are developmentally disabled shall have a right to physical exercise and recreational opportunities.

(g) Persons who are developmentally disabled shall have a right to be free from harm, including unnecessary physical, chemical, or mechanical restraint, isolation, excessive medication, abuse, or neglect.

(h) Persons who are developmentally disabled shall have a right to consent to or refuse treatment, subject to the provisions of s. 393.12(2)(a) or chapter 744.

(i) No otherwise qualified person shall, by reason of having a developmental disability, be excluded from participation in, or be denied the benefits of, or be subject to discrimination under, any program or activity which receives public funds, and all prohibitions set forth under any other statute shall be actionable under this statute.

(j) No otherwise qualified person shall, by reason of having a developmental disability, be denied the right to vote in public elections.

(Emphasis added.)'

The legislature also has set forth the rights of "clients." Those rights include the unrestricted right to communication, possession and use of clothing and personal effects, prompt and appropriate medical treatment and care, access to individual storage space for private use, appropriate physical exercise, humane discipline, no treatment to eliminate bizarre or unusual behaviors without first being examined by a physician to determine whether such behaviors are organically caused, compensation for labor in accordance with federal wage-per-hour regulations, the right to be free from unnecessary physical, chemical, or mechanical restraint, a central record, and the right to vote. See § 393.13(4), Fla. Stat. (1995).

Many of these rights of the developmentally disabled are similar to those standards set forth in Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), aff'd in part and rev'd in part sub. nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). In reaction to the horrible conditions at some Alabama institutions, Wyatt articulated a broad range of civil rights to which all developmentally disabled patients are entitled. These Wyatt standards were the role model for other litigation and legislation--generally labeled as "Patients' Bills of Rights"--

---

' The specific right to be free from sexual abuse in residential facilities was included in the bill of rights in 1994, subsequent to the incident at issue in this case. See Ch. 94-154 § 16, Laws of Florida.

enacted by almost every state as well as Congress. Michael L. Perlin, Hospitalized Patients and the Risht to Sexual Interaction: Beyond the Last Frontier?, 20 N.Y.U. Rev. L. & Soc. Change 517, 528 (1993-1994).

The United States Supreme Court addressed the constitutional rights of institutionalized developmentally disabled individuals under the Fourteenth Amendment of the United States Constitution in Youngberg v. Romeo, 457 U.S. 307 (1982). Romeo involved a profoundly retarded 33-year old man with an I.Q. of between 8 and 10 and the mental capacity of an 18-month old child. When his family became no longer able to care for him, Romeo was committed to a state institution. At the institution, Romeo was injured on numerous occasions, both by his own violence and by the reactions of other residents to him. See 457 U.S. 309-310.

Romeo's mother filed suit for damages under the Eighth and Fourteenth Amendments, arguing that he had a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution and that the state violated those rights by failing to provide constitutionally required conditions of confinement.[2] Romeo, 457 U.S. at 315. The state conceded that Romeo had a right to adequate food, shelter, clothing, and medical care.

---

[2]The complaint also sought injunctive relief. That claim was dropped because Romeo was a member of a class action seeking such relief in another action.

The Court held that institutionalized developmentally disabled individuals have constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests. In determining whether Romeo's due process rights had been violated, the Court held that his liberty interests must be balanced against the relevant state interests. "The Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." Romeo, 457 U.S. at 307, quoting Romeo v. Younsberg, 644 F.2d 147, 178 (3d Cir. 1980)(Seitz, C.J., concurring). The Court further stated that persons who are institutionalized are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish but that this standard is lower than the compelling or substantial necessity tests required for a state to justify use of restraints or conditions of less than absolute safety. Romeo, 457 U.S. at 321-322.

In a related case, the Court addressed whether the federal Developmentally Disabled Assistance and Bill of Rights Act created substantive rights and obligations upon states under the Fourteenth Amendment. Pennhurst State Sch. & Hosp. v. Balderman, 451 U.S. 1 (1980). The Court observed that Congress in recent years had enacted several laws to improve the way in

which the developmentally disabled were treated and that the Act established a national policy to provide better care and treatment to the retarded by creating funding incentives for the states. 457 U.S. at 31. The Court, however, held that the Act was a voluntary funding program. Accordingly, it did not create any substantive rights enforceable upon states to provide appropriate treatment in the least restrictive environment under the Fourteenth Amendment. 457 U.S. at 18.

The Court subsequently has observed that the federal government has outlawed discrimination against the developmentally disabled in federally funded programs and provided those individuals with the right to receive appropriate treatment services and habilitation in a setting that is least restrictive of their personal liberty. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985). This case, however, addressed the appropriate level of scrutiny under an equal protection claim. The Court rejected the argument that mental retardation was a quasi-suspect class requiring application of a heightened scrutiny equal protection test, although it did find the zoning regulation at issue unconstitutional under the rational basis test. See also Heller v. Doe, 113 S.Ct. 2637 (1993)(applying rational basis test to uphold state's involuntary commitment statute which provided that a lower burden of proof was required in committing the mentally retarded than that required for the mentally ill.)

(2) The normalization principle does not alter the traditional analysis of sovereign immunity.

It is the academy's and ARC's position that the normalization principle does not alter the traditional analysis of sovereign immunity. Although the normalization principle is a discretionary matter involving budgetary and public policy considerations, all decisions implementing that principle and all acts in furtherance of that principle are not necessarily immune.

Any tort action against the state or one of its agencies begins with a review of the waiver of sovereign immunity set forth in section 768.28, Florida Statutes (1993), which states in pertinent part that:

> (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances ~~in which the~~ state or such agency or ~~subdivision, if~~ a ~~private person, would be liable to the~~ claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.
>
> * * * *
>
> (5) The state and its asencies and ~~subdivisions shall be liable~~ for ~~tort claims in the same manner and to the same extent as a private individual under like~~ circumstances, but liability shall not

include punitive damages or interest for the period before judgment.

(Emphasis added.) This statute, on its face, waives immunity for the state to "the same extent as a private individual" under similar circumstances. See § 768.28(5), Fla. Stat. (1993).

This Court, however, has placed a more restrictive interpretation upon the language of section 768.28. Commercial Carrier Corn. v. Indian River County, 371 So.2d 1010 (Fla. 1979). As this Court stated:

> So we, too, hold that althouqh section 768.28 evinces the intent of our lesislature to waive sovereign immunity on a broad basis, nevertheless, certain "discretionary" governmental functions remain immune from tort liability. This is so because certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance. In order to identify those functions, we adopt the analysis of *Johnson v.* State, supra, which distinguishes between the "planning" and "operational" levels of decision-making by governmental agencies. In pursuance of this case-by-case method of proceeding, we commend utilization of the preliminary test iterated in Evangelical *United Brethren Church v.* State, *supra*, as a useful tool for analysis.

Commercial Carrier, 371 So.2d at 1022 (emphasis added).

This Court further explained Commercial Carrier Corp. in Trianon Park Condominium Assoc., Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985). There, the court stated that:

> To better clarify the concept of governmental tort immunity, it is appropriate to place governmental functions and activities into the following four categories: (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; and (IV) providing professional, educational, and general services for the health and welfare of the citizens.
>
> * * * *
>
> In considering governmental tort liability under theae four categories, we find that there is no governmental tort liability for the action or inaction of governmental officials or employees in carrying out the discretionary governmental functions described in categories I and II because there has never been a common law duty of care with respect to these legislative, executive, and police power functions, and the statutory waiver of sovereign immunity did not create a new duty of care. On the other hand, there may be substantial sovernmental liability under catesories III and IV. This result follows because there is a common law duty of care regarding how property is maintained and operated and how professional and general services are performed.

Trianon Park, 468 So.2d at 919, 921 (emphasis added).

As Trianon Park specifically observed, however, the legislature's enactment of section 768.28 did not establish any new duty of care for governmental entities. Starting from this premise, this Court held that there can be no governmental liability unless a common law or statutory duty of care existed that would have been applicable to an individual under similar circumstances. Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989). Accordingly, a court must look at two separate and distinct issues in determining the liability of a governmental entity for negligence: (a) whether there exists a common law or statutory duty of care which inures to the benefit of the plaintiffs aa a

result of the alleged negligence, and (b) whether the alleged action is one for which sovereign immunity has been waived.

(a) Duty of Care.

Based upon a review of the district court's decision and the briefs submitted to that court, there does not appear to be any serious dispute as to whether HRS owed L. a duty of care. Indeed, this Court previously has held that a person taken into custody is owed a common law duty of care. Department of Health & Rehab. Servs. v. Whaley, 574 So.2d 100 (Fla. 1991); Kaisner. Moreover, Whaley specifically held that HRS had a duty to protect an alleged juvenile delinquent in its custody from potential harm from third persons where the risk of such harm was foreseeable. 574 So.2d at 104. In fact, Whaley involved a sexual assault by third persons.

In reaching its decision, Whaley also relied upon the Restatement (Second) of Torts § 320 (1965), which states that:

> Duty of Person Having Custody of Another to Control Conduct of Third Persons
>
> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he had the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control.

The comments to § 320 provide in pertinent part:

a. The rule stated in this Section is applicable to a sheriff or peace officer, a iailer or warden of a penal institution, officials in charge of a state asylum or hospital for the criminally insane, or to teachers or other persons in charge of a public school. It is also applicable to persons conducting a private hospital or asylum, a private school, and to lessees of convict labor.

b. *Helplessness of other* . . . . the actor who takes custody of a prisoner or of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.

c. Peculiar *risks to which other exposed.* The custody of another may be taken under such circumstances as to associate the other with persons who are peculiarly likely to do him harm from which he cannot be expected to protect himself. If so, the actor who has taken custody of the other is required to exercise reasonable care to furnish the necessary protection. This is particularly true where the custody not only involves intimate association with persons of notoriously dangerous character, but also deprives the person in custody of his normal ability to protect himself, as where a prisoner is put in a cell with a man of known violent temper . . . .

d. Duty *to anticipate danger.* One who has taken custody of

> another may not only be required to exercise reasonable care for the other's protection when he knows or has reason to know that the other is in immediate need of it, but also to make careful preparations to enable him to give effective protection when the need arises, and to exercise reasonable vigilance to ascertain the need of giving it.

Whaley, 574 So.2d at 103 n.2 (emphasis added).

In addition, BRS has a statutory duty of care pursuant to the enumerated rights of the developmentally disabled in section 393.13. Thus, the academy and ARC urge this Court to hold that HRS has a common law and statutory duty of care to protect the institutionalized developmentally disabled from sexual assault by third persons where the risk of such harm is foreseeable. The question of foreseeability in this case properly was a question of fact for the jury to decide. See McCain v. Florida Power Corp., 593 So.2d 500 (Fla. 1992).

(b) Immunity from suit.

As the district court observed, the key inquiry in determining whether an alleged negligent act is immune from suit is resolving whether the act involves a discretionary or operational activity. In commenting upon the distinction between these terms, this Court has stated that both terms are susceptible of broad definitions. "Indeed, every act involves a degree of discretion, and every exercise of discretion involves a physical operation or act." Kaisner, 543 So.2d at 736. To

provide a sharper distinction between these terms, Kaisner relied upon the basic premise that courts should not infringe on the decision-making process of the executive and legislative branches of government. As this Court stated:

> We ourselves repeatedly have recosnized that the discretionary function exception is srounded in the doctrine of separation of powers. That is, it would be an improper infringement of separation of powers for the judiciary, by way of tort law, to intervene in fundamental decisionmaking of the executive and legislative branches of government, including the agencies and municipal corporations they have created.
>
> We reaffirm this principle and are persuaded that governmental immunity derives entirely from the doctrine of separation of powers, not from any duty of care or from any statutory basis. Accordingly, the term "discretionary" as used in this context means that the governmental act in question involved an exercise of executive or legislative power such that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning. An "operational" function, on the other hand, is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented.

Kaisner, 543 So.2d at 736, 737 (emphasis added, citations omitted). In the instant case, resolution of whether the alleged negligent act is discretionary or operational requires analysis of three decisions of this Court in cases involving HRS. See B.J.M.; Whaley; Department of Health & Rehab. Servs. v. Yamuni, 529 So.2d 258 (Fla. 1988).

Yamuni involved the certified question of whether HRS was immune from suit for the negligent conduct of an HRS caseworker. This Court rejected HRS' arguments that its caseworkers were exercising discretion in handling the reported child abuse and that their actions were planning level activities under Commercial Carrier. As this Court stated:

> We have no doubt that the HRS caseworkers exercised discretion in the dictionary or English sense of the word, but discretion in the *Commercial Carrier* sense refers to discretion at the policy making or planning level. We agree with the district court that the actions of caseworkers investigating and responding to reports of child abuse simply cannot be elevated to the level of policy-making or planning. To accept the HRS argument would require that we recede from *Commercial Carrier* by negating any meaningful distinction between operational and planning level activity. We firmly rejected this argument in *Commercial Carrier* and decline to recede therefrom. We hold that the caseworker activities were operational level for which there is a waiver of immunity. We answer the certified question with a qualified no, noting that we adopted a case-by-case approach in *Commercial Carrier* and it is at least theoretically conceivable, although pragmatically unlikely, that some action of a Caseworker might rise to the level of basic policy making.

Yamuni, 529 So.2d at 260 (emphasis added).

Whaley held that the assignment of juveniles to a particular room or location in an HRS detention facility was an operational act which was not immune from suit. There, the HRS counselor placed two large youths with previous criminal histories of violent crimes in a holding cell with Whaley, who was much smaller than the other two youths. The counselor later

discovered the two youths forcing Whaley to perform oral sex. HRS investigated the incident and determined that Whaley had been the victim of a sexual assault. Relying on Yamuni, this Court stated that:

> Operational level acts, therefore, are not necessary to or inherent in policy or planning, but, rather, reflect only secondary decisions for implementing discretionary plans and policies. Kaisner *v. Kolb*, 543 So.2d 732 (Fla.1989). We went on in *Yamuni* to hold that the caseworker activities at issue constituted operational level acts for which immunity had been waived. 529 So.2d at 260. Similarly, the instant intake counselors' actions were operational level acts implementing HRS' discretionary policies.

Whaley, 574 So.2d at 103.

B.J.M. involved an abused, neglected, and abandoned child who had been diagnosed as borderline retarded and adjudicated both dependent and delinquent in the juvenile system. This Court held that HRS was immune from suit for its discretionary placement decisions and for its decisions made in allocating services to dependents and delinquents. This Court distinguished B.J.M. from Whaley and Yamuni, stating that:

> Both *Whaley* and *Yamuni* involved BRS caseworker-level decisions concerning the physical safety of children within the agency's protective custody which did not implicate any "discretionary planning or judgment function" as contemplated by *Trianon*. Neither case involved discretionary calls with regard to choice of services. *Whaley* involved the physical placement of a child in a specific room in an HRS detention facility known by HRS to be occupied by dangerous juveniles. We held that placing the child in such danger was an operational function not protected by sovereign immunity.

> 574 So.2d at 101. In *Yamuni*, we held that HRS's negligent failure to adequately protect a child from further physical abuse also occurred on an operational level. 529 So.2d at 260. These operational level decisions exposing children to specific dansers should be distinguished from the broad discretionary authority vested by the legislature in HRS to determine an appropriate course of remedial treatment for the children that come within its custody through dependency and delinquency proceedings.

B.J.M., 656 So.2d at 913 (emphasis added).

It is the academy's and ARC's position that Yamuni and Whaley are controlling and that B.J.M. should be distinguished because it involves decisions HRS makes in allocating services. Lee's claim does not involve HRS' failure to provide her with certain services, remedial treatment, or her classification level. HRS should not be immune for the sexual assault of one of its clients by another client resulting from its negligent supervision. Supervision does not involve a decision inherent in policy but reflects only a secondary decision for implementing discretionary plans and policies.

Indeed, the instant case falls squarely within this Court's decision in Whaley. As Whaley stated in distinguishing Reddish v. Smith, 468 So.2d 929 (Fla. 1985), complaints based upon the classification and assignment of prisoners are not actionable; however, complaints based upon the department's employees having a direct and operational-levy duty of supervision are actionable. Whaley, 574 So.2d at 102 n.1.; see also Dunagan v. Sealy, 533 So.2d 867 (Fla. 1st DCA 1988)(prison employees' failure to follow prison policies for supervising,

classifying, and maintaining inmates is operational, but the prison's making of such policies is discretionary).

Without setting forth the facts alleged and adduced at trial, the district court opined that Lee really was not challenging HRS' negligent supervision but, instead, was challenging HRS' policies regarding supervision. Because these facts are extensively set forth in Lee's initial brief, they will not be so discussed by the academy and ARC. Importantly, Lee does not challenge her classification as severely and profoundly retarded or that the level of supervision required should have been other than 2:1 decided by HRS. Instead, Lee contended that HRS was negligent in its supervision as classified. Questions of whether HRS was negligent in its supervision, whether the sexual assault was foreseeable, and whether L. was sexually assaulted are fact questions for the jury to decide.

Further, the normalization principle does not require a contrary result or somehow convert claims of negligent supervision into discretionary acts which are immune from suit. The practical implication of the district court's holding is that reasonable supervision to attempt to prevent sexual assault is inconsistent with the normalization principle. Such a holding eviscerates both HRS' common law and statutory duty of care to protect developmentally disabled individuals who cannot protect themselves. The very basis of the normalization principle is to allow developmentally disabled individuals to live as normal a life as possible. Once HRS determines that an individual is

severely and profoundly retarded and requires close supervision, however, allegations and proof that HRS was negligent in its supervision and that such failure may have lead to the foreseeable injury of that individual are not barred by sovereign immunity.

CONCLUSION

Based upon the aforementioned argument and authorities, this Court respectfully is requested to answer the question certified by the district court as being of great public importance, i.e., where a severely retarded resident of an HRS facility becomes pregnant while in HRS' care, but neither the specific circumstances of her impregnation nor any specific act of HRS' negligence is alleged or established at trial, can HRS be held liable in tort for alleged negligent supervision of the resident, given the "normalization principle," section 393.13-393.14, Florida Statutes (the Bill of Rights of persons who are developmentally disabled), in the affirmative. Thus, the district court's decision should be quashed.

Respectfully submitted,

Loren E. Levy
Fla Bar No. 0814441
The Levy Law Firm
Post Office Box 10583
Tallahassee, Florida 32302
904/222-7680

Counsel for amici curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to DEAN R. LeBOEUF, ESQUIRE, and RHONDA S. BENNETT, ESQUIRE, Brooks, LeBoeuf and Bennett, 863 East Park Avenue, Tallahassee, Florida 32301; EDWIN R. HUDSON, ESQUIRE, Post Office Box 1049, Tallahassee, Florida 32301-1049; KIMBERLY J. TUCKER, ESQUIRE, General Counsel-BRS, 1317 Winewood Boulevard, Tallahassee, Florida 32399; and LAURA RUSE, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 an this the 21st day of February 1996.

Loren E. Levy