c/a 1-12-84

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,441

KATHY JEAN DUVALL, a minor, by her father and next friend, WILLIAM R. DUVALL; RICHARD FONTAINE, as Administrator of the Estate of DONALD JOSEPH FONTAINE, a minor, deceased; CAMITA BEDDOW, as Administratrix of the Estate of JUDY LYNN SCROGGINS; and JOHN THOMAS TKAC and ANGELA TKAC,

Petitioners,

vs.

CITY OF CAPE CORAL,

Respondent.
_____/

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

PETITIONERS' REPLY BRIEF ON THE MERITS

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ARGUMENT[1/]

A. THE DISTRICT COURT ERRED IN CONCLUDING THAT ITS RECENT INTERPRETATION OF THE SOVEREIGN IMMUNITY DOCTRINE REQUIRED REVERSAL OF THE JUDGMENT IN THIS CASE.

Even if the district court was correct to apply the sovereign immunity doctrine to the decision about whether or not to make an arrest, the police in this case were negligent in at least eight other ways, and they have nothing to do with the policies protected by the sovereign immunity doctrine (see our brief on the merits at 20-24). To the contrary, they were simple acts of carelessness in the implementation of the officers' decision not to take McNally into custody, and governmental officials are not entitled to immunity for negligent acts committed in the implementation even of protected decisions.[2/]

Except for one paragraph at the end of its brief (pp. 40-41), the City chooses not even to address this argument. In that paragraph, it asserts without any supporting authority that almost all of these theories of negligence "simply alleged different steps which the police department could have taken in their attempt to remove McNally from the street" (brief at 41). But some of these were positive acts of negligence (like confirmation of the wrong address)--and in any event the City makes no showing any of these acts of negligence should be protected. The failure to look into a wallet to confirm

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1/ The issues on appeal are stated in our table of contents, and are restated in argumentative terms below.

2/ And because the City did not request special verdicts on the plaintiffs' various theories of negligence, the independent sufficiency of these other theories of negligence required the district court to affirm the judgment in this case. The City says (brief at 5) that it did request a special verdict on these theories. That is simply false, and we can only refer back to our brief on the merits at 10. The City may be correct (brief at 5) that its offhand reference to "these other things" referred to the issues "ultimately appealed to the Second District." But our whole point is that the issue of sovereign immunity was not appealed to the Second District. As the trial court noted, there was only a request for a special verdict "on this question on non-delegable duty" (Tr. XII at 919)--and not on any of the theories of negligence.

an address--the failure of the police dispatcher to look on his machine and get the city right--the affirmative verification of the wrong address--the failure to keep McNally's car keys, or to call his home, or to hurry after him when he left the scene--all of these were acts of negligence wholly outside the purposes of the sovereign immunity doctrine. They have nothing to do with policymaking or governing.[3/]

It should also be noted that this entire argument is consistent with a major thesis advanced by the City in its brief (pp. 27-35)--that governmental officers should have no greater liability than private persons, and that private persons are only liable when they affirmatively volunteer to do something, and then do it (or fail to do it) negligently. The officers in this case did not simply ignore McNally (as the City suggests they might have at page 26 of its brief); as the City admits (brief at 34), they "took steps." They stopped McNally; they entered (indeed, initiated) the chain of events which ended in tragedy. But for their conduct, this accident would not have occurred. It was their affirmative conduct after intervening which was an

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3/ In addition to the Florida cases which we cite on this point, see FOCHMAN v. HONOLULU POLICE AND FIRE DEPARTMENTS, 649 P.2d 114, 116 (Hawaii 1982); ADAMS v. STATE, 555 P.2d 235, 241 (Alaska 1976), aff'd, 602 P.2d 520 (1979); 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), petition for certification denied, 412 A.2d 806 (N.J. 1980). In every one of these cases, the officers were found to have been negligent in the implementation of decisions which might or might not have been protected. The City would disagree with all of these decisions, on the sole ground that anyone can second-guess a police officer (brief at 40). That is why we have juries. To the same effect, see the following cases under the Federal Tort Claims Act: UNITED STATES v. STATE OF WASHINGTON, 351 F.2d 913, 916 (9th Cir. 1965); UNITED AIRLINES, INC. v. WIENER, 335 F.2d 379, 397-98 (9th Cir.), cert. dismissed sub nom. UNITED AIRLINES, INC. v. UNITED STATES, 379 U.S. 951, 85 S.Ct. 452, 13 L. Ed.2d 549 (1964); 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).

actual cause of this tragedy. It was not simply the failure of the officers to act; it was the entire course of conduct in which they engaged.[4/] Thus, instead of rebutting it, the City has made this argument for us. The negligent implementation of a protected decision deserves no protection.

B. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE SOVEREIGN IMMUNITY DOCTRINE INSULATES THE DECISION OF A POLICE OFFICER ABOUT WHETHER OR NOT TO MAKE AN ARREST.

The City has made a tactical decision not to defend the district court on the basis of its construction of the sovereign immunity doctrine.[5/] We agree that the district court's analysis is indefensible (see our brief at 24-43). Since the City does too, there is no point in repeating our position.[6/] The

4/ In that recognition, any asserted distinction between misfeasance and nonfeasance is "tenuous" to say the least. Note, Police Liability For Negligent Failure To Prevent Crime, 94 HARV. L. REV. 821, 825-26, n.23 (1981), 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 which we cited in footnote 3, 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.

5/ The City says (brief at 14) that the problem is better analyzed as one involving liability; that while it relies upon the EVERTON rationale, it will not defend it because its own analysis of duty is "the best analysis" (brief at 18 n.9); that it "strains the analysis" of the four-pronged EVANGELICAL test adopted in COMMERCIAL CARRIER to attempt to fit this case within that analysis (brief at 21-22); and that although the City "could undoubtedly make a good argument" under that analysis, it declines to do so because the City "does not believe such an analysis by this Court would be the best analysis" (brief at 22). The City has walked away from the rationale of the district court in this case. And despite its assertion to the contrary (brief at 3), it did the same thing at trial. It raised §768.28 only as a cap on damages, and at no time invoked sovereign immunity as a defense to the negligence claims (see our brief on the merits at 2-3).

6/ However, we do want to add a number of cases from other jurisdictions: 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,

City is right to concede that the district court's decision in this case simply cannot fit into the analytical framework established by COMMERCIAL CARRIER. As one commentator has written, any jurisdiction which maintains a distinction between planning-level and operational-level decisions must acknowledge that the sovereign immunity doctrine does not apply to decisions made by police officers on the street.[7/]

Thus we turn to the alternative thesis advanced for the first time in the respondent's brief--that this issue should be considered one of duty--not sovereign immunity. To the respondent's lengthy discussion, we offer three responses. First, the point is not preserved for appellate review. At no time at trial or on appeal did the City argue that the plaintiffs had failed to satisfy their burden of demonstrating that the City owed them a duty of care.

656 P.2d 597 (1982) (en banc); ANTKIEWICZ v. MOTORISTS MUTUAL INSURANCE 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); 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 So.2d 696 (1973); STRONG 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 COLOMBIA, 310 A.2d 857, 860-61 (D.D.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). Finally, see the following cases which do not involve police officers, but do involve negligence by governmental officials: 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); ARMSTRONG v. ROSS TOWNSHIP, 82 Mich. App. 77, 81, 266 N.W.2d 674, 677-78 (1978).

7/ Note, Police Liability for Negligent Failure to Prevent Crime, 94 HARV. L. REV. 821, 836-37 (1981). If there is any remaining doubt about this point, it is resolved by a recent en banc decision of the court which decided the EVANGELICAL case--CHAMBERS-CASTANES v. KING COUNTY, 100 Wash.2d 275, 669 P.2d 451, 456 (Wash. 1983) (en banc), holding that the failure of officers promptly to respond to a police call is not protected by the sovereign immunity doctrine as articulated by that court in EVANGELICAL, because it was clearly an operational-level omission. CHAMBER-CASTANES denied liability on other grounds, which we discuss below--grounds which make clear the necessity of reversal in this case.

As the City itself acknowledges (brief at 19), this issue of duty is wholly separate from any question of immunity. As the Washington Supreme Court said in CHAMBERS-CASTANES, supra, 100 Wash.2d 275, 669 P.2d at 459:

> [I]t should be noted that of late, criticism has been leveled against the public duty doctrine on the basis that it in fact reinstates the doctrine of sovereign immunity. . . . That criticism is not well founded. Abrogation of the doctrine of sovereign immunity did not create duties where none existed before. It merely permitted suits against governmental entitites that were previously immune from suit. Consequently, unless legislation or judicially created exceptions create a duty, where none existed before, liability will not attach.

It hardly requires demonstration that wholly apart from the doctrine of sovereign immunity, a plaintiff in every negligence case must prove that the defendant owed him a duty.[8/] And it hardly requires demonstration that the City is not permitted to raise so fundamental an issue as the issue of duty for the first time before the Supreme Court of Florida. The point is not preserved for appellate review.

Second, and despite its protestation to the contrary (brief at 33-34), the City is doing nothing here but resurrecting the special-duty doctrine rejected in COMMERCIAL CARRIER. To demonstrate that, we need look no farther than the City's exclamation (brief at 17) that the plaintiffs in this case "did not even know that the police officer existed." It argues that the plaintiffs "did not rely to their detriment upon Detective Ryckman" (brief at 34). And

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8/ See, e.g., STAHL v. METROPOLITAN DADE COUNTY, 438 So.2d 14 (Fla. 3rd DCA 1983); CRISLIP v. HOLLAND, 401 So.2d 1115, 1117 (Fla. 4th DCA), review denied, 411 So.2d 380 (Fla. 1981). Thus, a number of cases have drawn the same distinction as that drawn by CHAMBERS-CASTANES. See NAMAUU v. CITY AND COUNTY OF HONOLULU, 614 P.2d 943, 945 (Hawaii 1980); ZAVALA v. ZINSER, 333 N.W. 2d 278, 280 (Mich. Ct. App. 1983); MASSENGILL v. YUMA COUNTY, 104 Ariz. 518, 521, 456 P.2d 376, 379 (1969) (en banc) ("We did not, by [abolishing sovereign immunity] change the basic elements of actionable negligence the components of which [include] a duty owed by the plaintiff . . ."), cited in Note, supra, 94 HARV. L. REV. at 823 n.13; WHITCHOMBE v. COUNTY OF YOLO, 73 Cal. App.3rd 698, 141 Cal. Rptr. 189, 193 (1977); TOMLINSON v. PIERCE, 178 Cal. App.2d 112, 2 Cal. Rptr. 700, 702 (1960).

in support of its theory of liability, the City cites 19 cases (brief at 24-25), eleven of which were expressly decided under the special-duty doctrine which this Court rejected.[9/] Yet the City offers no reason for returning to that doctrine. To the contrary, it repeatedly urges that governmental officials should be treated no different than private persons. Yet the duty of private persons is not defined by a fixed or known relationship; it is defined by the foreseeable scope of risk: "The extent of the defendant's duty is circumscribed by the scope of the anticipated risks to which the defendant exposes others."[10/] The law should be no different regarding public officials, because

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9/ In the order of their citation, these 11 cases are the following: WALTERS v. HAMPTON, 14 Wash. App. 548, 543 P.2d 648 (1975); TOMLINSON v. PIERCE, 178 Cal. App.2d 112, 2 Cal. Rptr. 700 (1960); O'CONNOR v. CITY OF NEW YORK, 58 N.Y.2d 184, 460 N.Y.S.2d 485 (N.Y. Ct. App. 1983); EVERS v. WESTERBERG, 38 A.D.2d 751, 329 N.Y.S.2d 615 (N.Y. App. Div. 1972), aff'd, 32 N.Y.2d 684, 296 N.E.2d 257, 343 N.Y.S.2d 361 (N.Y. Ct. App. 1973); SHORE v. TOWN OF STONINGTON, 187 Conn. 147, 444 A.2d 1379 (1982); TRAUTMAN v. CITY OF STAMFORD, 32 Conn. Supp. 258, 350 A.2d 782 (Conn. Supp. 1975); DOE v. HENDRICKS, 92 N.M. 499, 590 P.2d 647 (N.M. App. 1979); WUETHERICH v. DELIA, 155 N.J. Super. 324, 382 A.2d 929 (N.J. App. 1978); ROBERTSON v. CITY OF TOPEKA, 231 Kan. 358, 644 P.2d 458 (1982); HENDRIX v. CITY OF TOPEKA, 231 Kan. 113, 643 P.2d 129 (1982); ZAVALA v. ZINSER, 333 N.W.2d 278 (Mich. Ct. App. 1983). And a twelfth case--RISS v. CITY OF NEW YORK, 22 N.Y.2d 579, 240 N.E.2d 860, 861 (N.Y. Ct. App. 1968)--effectively applies the special-duty doctrine, although it does not say so. See Note, supra, 94 HARV. L. REV. at 823 n.10 (describing RISS as a special-duty case).

While we are on this list of the City's citations, we should mention the other seven cases cited. Four of them enforce state statutes which explicitly exempt the police from liability for the failure to arrest. STONE v. STATE, 106 Cal. App.3d 924, 165 Cal. Rptr. 339 (1980); HARTZLER v. CITY OF SAN JOSE, 46 Cal. App.3d 6, 120 Cal. Rptr. 5 (1975); ANTIQUE ARTS CORP. v. CITY OF TORRANCE, 39 Cal. App.3d 588, 114 Cal. Rptr. 332 (1974); JAMISON v. CITY OF CHICAGO, 48 Ill. App.3d 567, 6 Ill. Dec. 558, 363 N.E.2d 87 (1977). That leaves three cases. MASSENGILL v. YUMA COUNTY, 104 Ariz. 518, 456 P.2d 376 (Ariz. 1969), was expressly overruled in RYAN v. STATE, 143 Ariz. 308, 656 P.2d 597 (1982). The City also cites RYAN in its footnote; we cannot imagine why. It abolishes the special-duty doctrine and holds that the victim of an assault by an escaped inmate did have a cause of action against the State for its negligence in supervising the inmate. Finally, the City cites CHAMBERS-CASTANES v. KING COUNTY, 100 Wash.2d 275, 669 P.2d 451 (Wash. 1983) (en banc), which does support its general position, and which we will discuss in a moment.

10/ CRISLIP v. HOLLAND, 401 So.2d 1115, 1117 (Fla. 4th DCA), review denied, 411 So.2d 380 (Fla. 1981). Thus, in a variety of contexts too numerous to mention, the courts of this State have held that private defendants owe

our legislature has determined that public officials should be liable to no lesser extent than private people. The imposition of a privity requirement--the resurrection of a special-duty requirement--would be antithetical to that legislative mandate.

Third and finally, the City is wrong on the merits. It is wrong to argue for an artificial distinction between acts of omission and acts of commission by governmental officials. The central theme of the City's brief is that public officials should be treated no differently than private individuals, and that private individuals have no affirmative duty to arrest or otherwise apprehend drunk drivers. But even if this assertion had properly been preserved for appellate review, it would not be well-taken, because this case does not squarely present the issue. This is not a case in which a police officer simply ignored a drunk driver without stopping, and took no action which in any way interrupted the drunk's activity. In such a case the issue would be squarely presented: although the officer did nothing which altered the chain of activity resulting in injury, is he nonetheless liable for a pure act of omission--for the failure to interrupt that chain of activity and thus prevent injury? That is a very hard question.[11/]

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a duty to strangers under circumstances in which their conduct creates a foreseeable risk to such strangers. See VINING v. AVIS RENT-A-CAR SYSTEM, INC., 354 So.2d 54 (Fla. 1978) (per curiam); STAHL v. METROPOLITAN DADE COUNTY, 438 So.2d 14 (Fla. 3rd DCA 1983); WALSTON v. FLORIDA HIGHWAY PATROL, 429 So.2d 1322 (Fla. 5th DCA 1983); CRISLIP v. HOLLAND, 401 So.2d 1115, (Fla. 4th DCA), review denied, 411 So.2d 380 (Fla. 1981). Cf. DUARTE v. CITY OF SAN JOSE, 100 Cal. App.3d 648, 161 Cal. Rptr. 140, 145 (1980); DRAKE v. STATE, 97 Misc. 1015, 416 N.Y.S.2d 734 (Ct. Cl. 1979), aff'd sub nom. MADIGAN v. STATE, 73 A.D.2d 1031, 425 N.Y.S.2d 532 (N.Y. Ct. App. 1980); EISMAN v. PORT AUTHORITY TRANS HUDSON CORP., 96 Misc.2d 678, 409 N.Y.S.2d 578 (N.Y. Supp. Ct. 1978). See also Note, supra, 94 HARV. L. REV. at 837 (arguing that it makes no sense to impose a privity requirement in actions against police officers).

11/ For an excellent argument that even pure acts of omission by the police should be actionable in proper cases, see Note, supra, 94 HARV. L. REV. at 832-35. Examples of such cases are provided by the City at pages 30-31 of its brief. Another such case is CHAMBERS-CASTANES, supra, in which the only claim was that the police failed to respond to a call. The

But that is not the issue in this case, because in this case the officers did stop the drunk. Even apart from all the acts of negligence which they committed after doing so--but simply by interrupting the chain of causation --the police in this case became active participants in the sequence of events which led to tragedy. Thus, the question here is not the tough one; the question here is whether the act of intervention gave rise to a corresponding duty to those who might foreseeably be injured by the failure of the officers to exercise reasonable care.

In this case, the failure of the officers to arrest McNally was itself an affirmative act in the context of their decision to stop him. McNally was in custody. It required affirmative conduct by the officers to take him out of custody and to initiate a chain of events which put him back in his car. It is in this sense that the distinction between omission and commission becomes blurred. It is not simply the failure of the officers to make an arrest which is at issue; it is just as much the affirmative intervention into a chain of causation, only after which the officers failed to arrest, which gives rise to a positive duty.[12/]

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rationale of that decision, however--that the police owe a duty only to those in privity with the police--goes far beyond its facts, and is wrong. Indeed, it is nothing but a back-door return to the special-duty doctrine. In this State, duty is defined by the scope of foreseeable risk--not by a known or fixed relationship.

12/ See Note supra, 94 HARV. L. REV. at 825-26 n.23. For the same reason, the fallacy of such a distinction is recognized in this Court's declaration that even in areas otherwise protected by the sovereign immunity doctrine, a governmental entity may be liable for the failure to warn or correct a known dangerous condition. We discuss this "trap" theory of liability at pages 31-33 of our brief on the merits. It is not simply the positive act of creating such a trap which establishes liability, but just as much an act of ommission--the failure either to warn or to correct it. The City answers (brief at 38-39) that this "trap" theory has no applicability because the City could not possibly have warned everyone on the road. But it ignores this Court's pronouncement in CITY OF ST. PETERSBURGH v. COLLOM, 419 So.2d 1082, 1083 (Fla. 1982), that when the government creates a known dangerous condition, it must warn "or protect the public from, the known danger." (our emphasis).

The City also argues (brief at 10, 39-40), that its officers could not

This analysis is entirely consistent with the City's repeated protest that public officials should be treated no differently than private individuals, who ordinarily have no duty to prevent the foreseeable injury to some people by other people. But as the City acknowledges (brief at 27-28), private people do have a duty to act reasonably when they choose to act.[13/] In this case, the officers chose to stop McNally, and thus assumed a duty to those who might foreseeably be injured by their failure to act carefully. It then becomes a jury question whether that duty required the officers to arrest McNally or otherwise take him into custody, and whether their failure to do so was an actual and proximate cause of the plaintiffs' injuries.

The City would have this Court take it on faith that no reasonable jury could find that the officers' failure to arrest was a cause of this tragedy, because the officers' conduct "did not increase the risk of harm" (brief at 35). But that point concerns causation, and has nothing to do with either duty or sovereign immunity. And anyway a reasonable jury could find otherwise. There is no question that "but for" the officers' failure to take McNally into custody, this accident would not have occurred. Their decision clearly

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have gotten back to the scene in time to prevent McNally from leaving in his car. But they could have corrected the known dangerous condition by insuring that McNally never returned to his car in the first place. And as we demonstrated at length in our initial brief (pp. 16-20), the jury easily could have found that the officers had sufficient time to re-apprehend McNally if only they had hurried. The City says that the distance back was at least one and one-half miles, on the basis of "maps and odometer readings" (brief at 10). But nothing of the kind was introduced at trial--only the officers' self-serving testimony; and even at that distance the officers were tragically slow (see our brief on the merits at 16-18). The "trap" theory stands unrebutted, and it illustrates this Court's appreciation that in proper cases acts of omission are no less actionable than acts of commission.

13/ See PADGETT v. SCHOOL BOARD OF ESCAMBIA COUNTY, 395 So.2d 584, 585 (Fla. 1st DCA 1981) (per curiam), citing BANFIELD v. ADDINGTON, 104 Fla. 661, 140 So. 893, (1932); GEER v. BENNETT, 237 So.2d 311, 316-317 (Fla. 4th DCA 1970). See also HILL v. UNITED STATES FIDELITY AND GUARANTY CO., 428 F.2d 112, 115-116 (5th Cir. 1970) (Florida law), cert. denied, 400 U.S. 1008, 91 S. Ct. 564, 27 L. Ed.2d 621 (1971); JOHNSON v. AETNA CASUALTY AND SURETY CO., 348 F. Supp. 627, 629 (M.D. Fla. 1972) (Florida law).

increased the risk to these particular plaintiffs. Indeed, it was the officers' affirmative decision to stop McNally which began the sequence of events leading to the collision. If that sequence had been changed by only a few seconds, this accident would not have happened. It is absurd to say that the officers' conduct in this case "did not increase the risk of harm" to these plaintiffs. And at the very least, that was a classic question for the jury. In abandoning the sovereign immunity rationale of the district court in favor of its own analysis of duty, the City has not helped its position. It has not made a persuasive case that an officer who chooses to stop the worst drunk he has ever seen does not have a duty to those who might foreseeably be injured by his failure to assure that that drunk does not return to the road.

C. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY REGARDING §856.011(3), Fla.Stat. (1981), REQUIRED REVERSAL OF THE JUDGMENT IN THIS CASE.

We discuss this point at pages 43-49 of our brief on the merits; the City has answered none of the arguments raised there. It asserts that it "specifically asked" for a jury instruction on §856.011(3), but completely ignores our point that the only reason it asked for that instruction was to evidence the state of mind of the police chief in instructing his officers. The trial court was right to keep it out on that basis, and there was never any other request for such an instruction on any other basis--nor any argument for an instruction on any basis on appeal.

The City also fails to answer our point that the statute did not apply in this case because another statute (§396.072(1), quoted in our merits brief at 14) provides that when a drunk appears to be incapacitated--that is, unable to make rational decisions--an officer "shall" take him for treatment, and has no discretion at all. The City complains that §396.072(1) was not raised at trial, but they forget that if the trial court was right for any reason, its

decision not to instruct about §856.011(3) must be upheld.[14/]

The City also ignores our point (brief at 48) that any refusal of the trial court to instruct about the statute was entirely harmless in light of both the plaintiff's theory of this case and the fact that the jury heard repeatedly about this statute during the course of the trial. And it ignores our position that in light of the many theories of negligence in this case, the absence of an instruction concerning one theory was harmless in light of the City's failure to request a special verdict (brief at 48-49). Finally, this point at best warrants a new trial.

D. THE NEW ISSUES RAISED BY THE CITY DID NOT WARRANT A NEW TRIAL OR A DIRECTED VERDICT.[15/]

1. The Instruction Concerning Non-Delegable Duty Was Not Erroneous.

The trial court did not instruct that the City had a non-delegable duty; its instruction permitted the jury to determine whether its duty was non-delegable (Tr. XIV at 1121). The City objected on three and only three grounds --that the plaintiffs had not raised the issue in their complaint; that the question of non-delegable duty was an issue for the court and not the jury; and that §856.011(3) provides as a matter of law that such a duty is not non-delegable (see Tr. XII at 835-42). But the plaintiffs' complaints did allege

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14/ See IN RE ESTATE OF YOHN, 238 So.2d 290 (Fla. 1970); ESCARRA v. WINN DIXIE STORES, INC., 131 So.2d 483 (Fla. 1961). The City also asserts (brief at 11, 44) that the statute defines an individual as incapacitated only if he is in need of emergency medical attention, completely ignoring the second definition in the statute--that a person is also deemed incapacitated if he is "unable to make a rational decision about his need for care." There can be no question that McNally fit within that category; he was the worst drunk this officer had ever seen, and the medical evidence shows that he was near a coma at the time the officer stopped him (see our brief on the merits at pp. 5-6).

15/ The City has resurrected four issues which it raised in its appellant's brief before the district court, but which the district court expressly declined to address in its opinion. We think that if this Court should reverse the district court's opinion on the grounds stated, it would be best to remand the case to the district court for consideration of those issues which it passed the first time around. Our appellees' brief in the district court treats these issues in detail. Nevertheless, we will attempt as best we can to address them in the space remaining.

that the City was negligent in appointing an agent to perform its function (R. 92-101), and the issue of non-delegable duty was tried by implied consent of the parties anyway (Tr. III at 419-20; Tr. VI at 132-33, 137-38; see Tr. XI at 690). That issue was appropriate for the jury, not the court.[16/] And §856.011(3) did not foreclose the instruction; it says only that the officer is empowered to delegate responsibility, but nothing about whether the City remains liable for any negligence committed by the delegatee.[17/]

2. The Trial Court did not Improperly Instruct the Jury that the City's Right of Control Over McNally's Car Rendered it Responsible for McNally's Use of that Car. The trial court's instruction left to the jury the question of whether or not the City had such a right of control (Tr. XIV at 1121). And RABIDEAU v. STATE, 409 So.2d 1045 (Fla. 1982), only supports the instruction. It holds that a state employee's use of the state's vehicle "does not enlarge state liability [for] acts, committed outside the employee's scope of employment" (our emphasis). Thus, the state is liable when a vehicle's custodian is acting within the scope of employment. That is this case; if the police officers did have custody of McNally's vehicle, they did so within the scope of their official duties.[18/]

3. The Trial Court did not Improperly Fail to Direct a Verdict Concerning the Police Department's Negligent Failure to Reapprehend McNally. The

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16/ See BURCH v. STRANGE, 126 So.2d 898, 901 (Fla. 1st DCA 1961). See also DAVIS v. CHARTER MORTGAGE CO., 385 So.2d 1173 (Fla. 4th DCA 1980) (jury instruction approved). Cf. ADELHELM v. DOUGHERTY, 129 Fla. 680, 176 So. 775, 777 (1937) (question of agency for jury).

17/ See ATLANTIC COAST DEVELOPMENT CORP. v. NAPOLEAN STEEL CONTRACTORS, INC., 385 So.2d 676, 679 (Fla. 3rd DCA 1980) (a non-delegable duty does not preclude delegation, but renders the delegator liable for the conduct of the delegatee). And as we have noted, §396.072(1) would appear even to forbid an officer to delegate such responsibility when a drunk appears incapacitated.

18/ And the City has raised no contention that the evidence was not sufficient to permit the jury to conclude that the officers did have custody of McNally's vehicle.

evidence on this point is outlined in detail in our brief on the merits at pages 16-20, and we will not repeat it.[19/] That evidence makes absolutely clear that had the officers even hurried in the slightest to catch McNally, they would have done so.

4. The Trial Court did not Improperly Submit to the Jury the Issue of Foreseeability. The City contends that no reasonable jury could have found it foreseeable that if the officers did not ensure that McNally was not returned to his car, he might hurt someone in his drunken state. That question is almost always for the jury.[20/] In this case a reasonable jury could have concluded that if the officers negligently allowed McNally to return to his car, he might cause an accident in his drunken condition; we offer the following cases by analogy.[21/]

IV
CONCLUSION

It is respectfully submitted that the opinion of the district court should

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19/ We specifically refer this Court to the excerpt from the transcript quoted at pages 18-19 of our brief, which shows that instead of hurrying after McNally when they returned to the scene, the officers not only sat in their car, but told one witness that "its their problem, not ours."

20/ See GIBSON v. AVIS RENT-A-CAR SYSTEM, INC., 386 So.2d 520, 522 (Fla. 1980); VINING v. AVIS RENT-A-CAR SYSTEMS, INC., 354 So.2d 54, 56 (Fla. 1977). The defendant need only foresee that the act of negligence might result in injury--not the exact sequence of events. See CRISLIP v. HOLLAND, 401 So.2d 1115, 1117 (Fla. 4th DCA), review denied, 411 So.2d 380 (Fla. 1981); CONCORD FLORIDA, INC. v. LEWIN, 341 So.2d 242 (Fla. 3rd DCA), cert. denied, 348 So.2d 946 (Fla. 1977); MOZER v. SEMENZA, 177 So.2d 880 (Fla. 3rd DCA 1965).

21/ GIBSON v. AVIS RENT-A-CAR SYSTEM, INC., supra note 20; HENDELES v. SANFORD AUTO AUCTION, INC., 364 So.2d 467 (Fla. 1978); SCHWARTZ v. AMERICAN HOME ASSURANCE CO., 360 So.2d 383 (Fla. 1978); VINING v. AVIS RENT-A-CAR SYSTEMS, INC., supra note 20; DAVIS v. SOBIK'S SANDWICH SHOPS, INC., 351 So.2d 17 (Fla. 1977); K-MART ENTERPRISES OF FLORIDA, INC. v. KELLER, _____ So.2d _____ (Fla. 3rd DCA 1983) (1983 FLW DCA 2383); STAHL v. METROPOLITAN DADE COUNTY, 438 So.2d 14 (Fla. 3rd DCA 1983); WALSTON v. FLORIDA HIGHWAY PATROL, 429 So.2d 1322 (Fla. 5th DCA 1983). See DUARTE v. CITY OF SAN JOSE, 100 Cal. App.3d 648, 161 Cal. Rptr. 140, 145 (1980); SUAREZ v. DOSKY, 171 N.J. Super. 1, 407 A.2d 1237, 1241 (App. Div. 1979), petition for certification denied, 412 A.2d 806 (N.J. 1980).

be reversed, and the cause remanded to the district court for further proceedings.

V
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the following was mailed this 2nd day of December, 1983, to: CHRIS W. ALTENBERND, ESQ., Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., P.O. Box 1438, Tampa, Florida 33601; and to RICHARD V. S. ROOSA, ESQ., P.O. Box 535, Cape Coral, Florida 33804.

Respectfully submitted,

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