IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,602

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,	:	
Petitioner,	:	
vs.	:	ON PETITION FOR REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT
STELLA YAMUNI, as adoptive mother, next friend and guardian of SEAN YAMUNI, a minor,	:	
Respondent.	:	

BRIEF OF PETITIONER ON THE MERITS
(With Separate Appendix)

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BRIEF OF PETITIONER ON THE MERITS
(With Separate Appendix)

INTRODUCTION

This is a petition for review of the decision of the Third District Court of Appeal affirming a money judgment against the defendant/appellant/petitioner, State of Florida, Department of Health and Rehabilitative Services (hereinafter HRS) and holding that sovereign immunity is not applicable to the activities of HRS in investigating, evaluating, and acting upon allegations of child abuse pursuant to section 827.07, Florida Statutes (1979). (App. 2-6)[1] The decision of the district court will significantly impact all HRS officers and employees throughout

[1]In this brief "R" refers to the record on appeal; "T" refers to the court reporter's transcript; and "App" refers to appendix. All emphasis herein is supplied unless otherwise indicated.

Florida who perform the very essential functions at issue in this case and, ultimately, will impact those served by HRS. Due to the profound significance of this case, HRS moved the Third District Court of Appeal to certify to this Court that the case involved a question of great public importance. The district court agreed, and certified the following question: "Has the State of Florida, pursuant to section 768.28, Florida Statutes (1983)[2], waived sovereign immunity for liability arising out of the negligent conduct of an HRS case worker?" (App. 1) HRS respectfully submits that this question should be answered in the negative based on this Court's interpretation of section 768.28, particularly as expressed in recent landmark decisions of the Court on sovereign immunity.

STATEMENT OF THE CASE

Plaintiff/appellee/respondent, Stella Yamuni, filed a complaint for personal injuries sustained by her adopted son, Sean Yamuni, alleging that HRS was negligent in allowing the minor child "to remain in the care and custody of third parties known to the defendant to be dangerous and previously abusive of [the minor child] . . . ." (R. 1) The third parties referred to were the natural mother of the minor child and the mother's boyfriend. HRS moved to dismiss the complaint on the grounds

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[2]Since the incidents in suit occurred from December of 1979 to August 18, 1980, the applicable statute is section 768.28, Florida Statutes (1979). See, § 768.28(14), Fla. Stat. (1983).

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that: 1) the acts or omissions alleged by plaintiff "fall within the 'discretionary functions' exception to the limited waiver of sovereign immunity in the State of Florida"; and 2) the complaint fails to state a cause of action against HRS by virtue of the statutory immunity set forth in section 827.07(7), Florida Statutes. (R. 10)[3] The motion to dismiss was denied. (R. 14) HRS answered the complaint by denying the allegations of negligence, and asserting as affirmative defenses, among others, sovereign immunity and the statutory immunity provided by section 827.07(7), Florida Statutes. (R. 15)

Plaintiff sought and was granted leave to amend her complaint. (R. 58-59, 76) In her amended complaint, plaintiff alleged that from December 22, 1979 through August 18, 1980, there were several child abuse referrals made to HRS pertaining to Sean Yamuni, and that HRS "owed a duty to the Plaintiff . . . to properly handle and investigate all of the child abuse referrals . . . and . . . breached said duty in that it was negligent in its handling and investigating of these child abuse referrals . . . ." (R. 55-56) HRS moved to dismiss plaintiff's amended complaint on the grounds of sovereign immunity and the statutory immunity set forth in section 827.07(7), Florida

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[3]Section 827.07(7), Florida Statutes (1979) provides as follows: "IMMUNITY FROM LIABILITY--Any person, official, or institution participating in good faith in any act authorized or required by this section shall be immune from any civil or criminal liability which might otherwise result by reason of such action."

Statutes. (R. 78-79) This motion was denied. (R. 91) In its answer to the amended complaint, HRS again denied the allegations of negligence, asserted sovereign immunity, and asserted that HRS was immune from suit pursuant to section 827.07(7), Florida Statutes. (R.77-79)

Prior to trial, HRS moved for summary judgment on the ground, among others, that the activities of HRS in suit are discretionary, judgmental functions to which absolute sovereign immunity attaches. (R. 110-111, 131-144) This motion was denied, and the case was tried to a jury. (R. 171) HRS' motion for directed verdict on this same ground was also denied. (T. 550-554, 557, 668-669) The jury awarded plaintiff damages in the amount of $3,100,000. (R. 242, T. 720) HRS' motion for new trial and motion to enter judgment in accordance with motion for directed verdict was denied. (R. 244-247, 251) The trial court granted HRS' motion to alter or amend final judgment pursuant to section 768.28(5), Florida Statutes (1979) (R. 249-251) and entered a judgment in the amount of $50,000 in favor of plaintiff. (R.643, 644)

Subsequent to the entry of final judgment, this Court issued its recent series of landmark decisions on sovereign immunity, including Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985); Reddish v. Smith, 468 So.2d 929 (Fla. 1985); Everton v. Willard, 468 So.2d 936 (Fla. 1985); Carter v. City of Stuart, 468 So.2d 955 (Fla. 1985); Rodriguez v. City of Cape Coral, 468 So.2d 963 (Fla. 1985), approving 451

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So.2d 513 (Fla. 2d DCA 1984); and City of Daytona Beach v. Palmer, 469 So.2d 121 (Fla. 1985). HRS appealed the final judgment asserting, in pertinent part, that the trial court erred in denying HRS' motions for summary judgment and for directed verdict on the ground that sovereign immunity bars plaintiff's lawsuit. The Third District affirmed the lower court, holding that sovereign immunity did not apply to the activities of HRS in investigating, evaluating and acting upon child abuse complaints. (App. 2-6) However, as was previously stated, upon HRS' motion the district court certified as a question of great public importance the issue of whether the State of Florida is immune from liability for the negligent conduct of an HRS case worker by virtue of sovereign immunity. (App. 1)

STATEMENT OF THE FACTS

The plaintiff, Stella Yamuni, is the mother of Desiree Yamuni. (T. 501) Desiree married Gary McAnnis, and on May 26, 1979, gave birth to Sean McAnnis. (T. 502-503) In November of 1979, Gary McAnnis was imprisoned in a federal penitentiary. (T. 502) After her husband was incarcerated, Desiree and her son, Sean, moved to Stella Yamuni's house. (T. 143)

In December of 1979, Desiree informed her mother that she and Sean were going to move into the home of a man named Mark Levitt. (T.504) Although Stella Yamuni did not approve of her daughter's decision, she helped Desiree move her belongings to Mark Levitt's house. (T. 504) Mark Levitt's ex-wife, Deborah,

and the Levitts' young son were residing in the same household. (T. 504, 281)

Between December of 1979 and June of 1980, seven reports of alleged child abuse were made to HRS pertaining to Sean McAnnis. (App. 7-8, 9-11, 15-16, 17-18, 19, 20-21, 24) HRS' records reflect that the first abuse referral was made on December 22, 1979 at 11:46 p.m. by Eugene McKnight, Stella Yamuni's brother-in-law. (T. 588-590, App. 7-8) McKnight phoned HRS and reported that Sean had punctures to his feet from needles and bruises over his left eyebrow and right ear. (T. 589-590, App. 7) McKnight further reported that the suspected abuser was Desiree's boyfriend, Mark Levitt. (T. 590, App. 7) The abuse referral was received by Sue Henry, an intake counselor for HRS. (T. 587-590) Sue Henry telephoned Stella Yamuni in order to obtain Mark Levitt's phone number. (T. 590) Mrs. Yamuni expressed concern about the child's safety. (T. 590)

When the first abuse referral was received by HRS at 11:46 p.m., there were no on-call intake counselors available to investigate the report. (T. 591) Sue Henry therefore called the Public Safety Department and asked the police to go to Mark Levitt's house and check whether the child was safe. (T. 591) At 12:55 a.m., Officer Hall telephoned Sue Henry and reported that an officer had seen Sean McAnnis, and that the child appeared to be fine. (T. 591) Sean had a scrape on the bottom of his foot, but did not have any bruises. (T. 591) Officer Hall further reported that the child's mother was not drugged or alcohol

intoxicated, and that the officer did not see any reason to be concerned for the child's immediate safety. (T. 591) As a result of Officer Hall's report, Sue Henry concluded that the report of child abuse was unfounded. (App. 8)

The second report of alleged child abuse to Sean McAnnis was made on December 25, 1979. (App. 9-10) Stella Yamuni called HRS during the afternoon on Christmas Day and reported that Sean had small black spots that appeared to be puncture wounds on the bottom of his left foot. (App. 9-10) Stella reported that Mark Levitt hits Desiree and that both Desiree and Mark Levitt used drugs. (App. 9) The report of child abuse was received by Judith Kaplan, an intake worker for HRS. (T. 217-218) At the time Stella made the report, Sean was at Eugene McKnight's home. (T. 151) Judith Kaplan called the police department and requested that Sean be picked up at McKnight's home. (T. 218) Kaplan also called Mary Gordon, another HRS intake counselor, and informed her that the police would be bringing Sean to HRS' office and that she would have to do an investigation. (T. 218)

Detective John Parmenter was dispatched. (T. 230) Upon arriving at McKnight's home, Detective Parmenter observed that Sean had marks on his foot and that the child did not respond to the officer's presence. (T. 231-233) Detective Parmenter felt that the baby had been given something to make him nonreactive. (T. 232) The detective brought Sean to HRS and told Judith Kaplan what he had observed. (T. 238-239) Detective Parmenter testified that he could not make an arrest for child abuse

because, in his own words, "in this case it wasn't something that I could prove that night to be able to arrest somebody." (T.244)

Ms. Kaplan was concerned because she did not know how Sean could have received the marks on his foot. (T. 219) She therefore wrote a detention petition authorizing HRS to detain Sean and decided to refer the case to the HRS court unit for further investigation. (T. 219) Kaplan also asked Mary Gordon, an intake counselor for HRS, to take Sean to Jackson Memorial Hospital in order to investigate the allegations of child abuse. (T. 610) Gordon took Sean to Jackson Memorial Hospital late on Christmas Day, where he was examined by the child protection team. (T. 612, 624-625) Sean was alert and smiling. (T.613) The physician who examined Sean could not distinguish whether Sean's condition was caused by actual pin pricks or by contact with prickers from a bush or plant, as was contended by Sean's mother, Desiree. (T. 613, 620, 245)

After Sean was examined at Jackson Memorial Hospital on Christmas Day, Mary Gordon reported back to Judith Kaplan at HRS. Ms. Kaplan decided at 11:00 p.m. on Christmas Day to detain Sean and arranged for him to be placed in a shelter. (T. 614-615, 171) When Sean's mother, Desiree, returned to Mr. McKnight's home on Christmas Day she became hysterical when she learned that Sean had been taken to HRS, and acted like her family was trying to steal her baby. (T. 148, 245, 531).

There are two types of judicial procedures whereby HRS can take a child into custody in the event of alleged child abuse. If, in the opinion of the HRS staff there is good cause to

believe that the child is being abused, HRS can, on a temporary basis, place the child in protective custody in a private or foster home (T. 171) Within 24 hours after a child is taken into custody, HRS must file a detention petition in the circuit court. (T. 173, 657-658) The detention petition authorizes HRS to detain the child for probable cause that the child is being abused or neglected. (T. 633) The detention petition is the first step of a dependency proceeding. (T. 639) After a detention petition is filed in circuit court, HRS has three days to either dismiss the petition or file a dependency petition. (T. 213-214) HRS is authorized to file a dependency petition where there is probable cause to believe that a child has been abused or abandoned. (T. 633) Unlike a detention petition, a dependency petition has a permanent effect on the child, as the court is asked to adjudicate that the child is a dependent of the State of Florida. (T. 639)

Before filing a dependency petition, HRS consults with the state attorney to determine if there is probable cause. (T. 212) James Smart is the assistant state attorney assigned to the juvenile division of the state attorney's office. (T. 621) Mr. Smart testified that he represents the State of Florida in contested dependency cases. (T. 640) He explained that it is the function of HRS to decide whether to file a dependency petition and proceed with a case. If he disagrees with HRS, Mr. Smart can overrule HRS' decision and file his own dependency petition on behalf of the state. (T. 640-641) Mr. Smart also testified that

a private individual may file a dependency petition in the circuit court, and request the court to issue an order for the child to be taken into immediate custody. (T. 641-642) According to Mr. Smart, there must be probable cause to file a dependency petition. The dependency petition must be proven by the preponderance of the evidence. (T. 642)

Mr. Smart testified that it was his job to advise the HRS court unit as to the sufficiency of the evidence pertaining to a particular child, and that he must approve and sign all dependency petitions prepared by HRS before the petitions are filed in court. He approves the petitions for legal sufficiency and signs them to indicate to the judges in the juvenile division that he has reviewed the petitions. (T. 212, 647)

In December of 1979, Betty Nelson, a social worker for HRS, was assigned to the HRS court unit. (T. 164, 191) On December 26, 1979, Betty Nelson was requested to file a detention petition in the circuit court after Judith Kaplan made the decision the night before to place Sean McAnnis in a shelter. (T. 167-168) Mrs. Nelson reviewed the intake report prepared by Judith Kaplan, filed a detention petition in the circuit court and commenced an investigation. (T. 175)

Mr. McKnight met with Mrs. Nelson at the HRS offices and stated that he wanted the State of Florida to take Sean away from his mother. (T. 123, 125) Mrs. Nelson responded that it was very difficult to do that, and that there would have to be cause for HRS to take the baby away from his mother. (T. 125-126)

Mrs. Nelson asked Mr. McKnight if he had been a witness to any child abuse, and he said no. (T. 149) When Desiree and Mark Levitt met with Mrs. Nelson, they denied the allegations of child abuse and contended that Desiree's family was interfering in her life and harassing her. (T. 175-176, 198, 532). Desiree told Mrs. Nelson that Mr. McKnight wanted to take Sean away from her and keep the baby to raise as part of his own family. (T. 127)

Mrs. Nelson had Sean brought to her office on December 26, 1979. (T. 176) She did not observe any signs of child abuse at that time. (T. 196) Pursuant to her investigation, she brought Sean to George Lister, M.D., the child's pediatrician since birth. (T. 176, 194) Dr. Lister examined Sean on December 26, 1979, and told Mrs. Nelson that there were no signs of abuse and, further, that he had never seen any signs of child abuse to Sean. (T. 194, 195) In response to the suggestion that the marks on Sean's foot were needle marks, Dr. Lister testified that he found nothing on the child's foot except "possibly some splinters" and that the inference that the marks were from needles was "ridiculous." (T. 561, R. 431, 438).

Mrs. Nelson testified that as a result of Dr. Lister's findings "the State and I recommended that the detention petition be dismissed and as a result the court order was entered . . ." dismissing the petition. (T. 197)

James Smart testified that he saw Sean McAnnis on December 26, 1979, while Sean was in transit to or from the child protection team. (T. 623) He observed what looked like pin

pricks on the sole of Sean's foot. (T. 623) Mr. Smart discussed with Betty Nelson "whether or not there was sufficient indication to warrant the filing of a dependency petition . . . ." (T. 624) Mr. Smart testified:

> It was my feeling that we did not have enough evidence to meet even the threshold standards for filing a dependency petition.

(T. 624) Mr. Smart had spoken to Dr. Julie Rosenkrantz, the head of the child protection team at Jackson Memorial Hospital. (T. 625) Dr. Rosenkrantz indicated to Mr. Smart that there was no medical evidence that the child had been physically abused. She felt that the injury to Sean's foot was not from abuse. (T. 625) Mr. Smart testified that within a reasonable degree of legal probability there was not sufficient evidence on December 26, 1979 for HRS to file a dependency petition because there was no medical evidence that the child had been abused. (T. 628-629)

A hearing was held before Judge Mario Goderich on December 26, 1979 on the detention petition filed by HRS. (App. 13) Desiree McAnnis was represented at the hearing by attorney Mel Black. (App. 13) James Smart, Betty Nelson, and Sean McAnnis were also present at the hearing. (App. 13) As a result of the hearing, Judge Goderich entered the following order:

> The Court heard from those present and finds said child's mother had agreed to have said child examined by a pediatrician and also voluntarily submit to supervision by Health and Rehabilitative Services.

> It is thereupon Ordered and Adjudged that said child is hereby released to the custody of his mother pending further investigation in this case.

(App. 13)

On December 27, 1979, HRS received a phone call from attorney Mel Black that Desiree was in the hospital because she had attempted to commit suicide. (T. 185, App. 29) Mrs. Nelson noted in her log book that on December 28, 1979, Desiree was out of the hospital but was "still being harassed by family." (T. 186, App. 29) Mrs. Nelson testified that her view of the case at that time and the information she received was not that Sean was being abused, but that Desiree was being harassed by her family. (T. 186) Stella Yamuni and Desiree testified that Desiree did not attempt suicide, but instead Levitt had her take too many sleeping pills, and then brought her to the hospital when he became concerned for her safety. (T.534, 578)

On January 5, 1980, HRS received a call from an anonymous reporter stating that Sean had strap marks on his feet and was constantly sedated. (T. 254) The reporter indicated that there was a high level of drug activity in Levitt's home and that the child was being sedated to keep him out of the way. (T. 254, App. 15) Mary Yeardley, an intake counselor, was asked to investigate the report. (T. 255)

Ms. Yeardley went to Mark Levitt's house and interviewed Mark Levitt, his ex-wife, Deborah, and their son. Desiree and Sean were not there at the time. (T. 255) Ms. Yeardley observed that Mark Levitt's home was in an expensive neighborhood, and was

neat and well cared for. (T. 264, 281) She thought the home setting was rather unusual, given the presence of Levitt's ex-wife, Deborah. (T. 264) Ms. Yeardley recalled that she had previously spoken to Mark Levitt at Christmas time and was told by Levitt that there was no abuse going on in his home and that if the child was being abused, Desiree's family was responsible. (T. 256-257)

Ms. Yeardley examined Levitt's home for possible signs of drug involvement. She examined numerous prescription drugs in the home, and testified that "all seemed to be appropriate". (T. 264, 282) During the home visit, Levitt showed Yeardley how he and Desiree had made a "makeshift" bed for Sean and that Sean got splinters in his foot by kicking against the unfinished wood. (App. 16)

On January 7, 1980, Stella Yamuni called HRS at 9:00 p.m. to report that Desiree had been beaten and that Sean's face was swollen, his eyes were red and swollen closed. (T. 532, App. 17) Mrs. Yamuni also testified that Sean appeared sunburned. However, she did not testify that she reported the sunburn to HRS, and HRS' records of her report of this date do not reflect any mention of a sunburn. (T. 511, 532-533, App. 17-18) Mary Yeardley investigated the allegation and made a home visit at Stella Yamuni's home where she saw Desiree and Sean. Ms. Yeardley prepared the following report:

> Home visit to Desiree and mother. Saw Sean. Eyes were red. They had just come from doctor who stated that Sean had allergic reaction to eye drops he had prescribed two

> days earlier. Desiree admitted that Mark beat her, but continued to deny that he in any way mistreated Sean. Desiree states she is going to remain with her mother.

(T. 283-284, App. 18)

Desiree and Sean stayed with Stella Yamuni from January 7, 1980 until February 27, 1980, when Stella went to Guatemala. (T. 535) Before leaving, Mrs. Yamuni rented an apartment for Desiree, bought furniture and stocked the apartment with food. Mrs. Yamuni called Desiree every day from Guatemala. (T. 535) One or two weeks later there was no answer at the apartment whenever Stella attempted to call her daughter. (T. 535)

On March 31, 1980, Eugene McKnight called HRS to report that Sean had been residing with the child's maternal, great grandmother, Mrs. Mesa. (T. 268) Mr. McKnight reported that when Desiree returned Sean to Mrs. Mesa one day, the child was bruised. Desiree claimed that Sean fell from his crib. (T. 268) Mr. McKnight told Ms. Yeardley that he would have Sean checked by a private physician and would call with the results. (T. 268) Ms. Yeardley was told that the child would be remaining with Mrs. Mesa. (T. 268, App. 19)

Mr. McKnight testified at trial that Sean had burns and scratches on his body in March, although he was not sure of the time frame. (T. 133-134) However, neither HRS' records nor the testimony of the HRS worker who saw Sean in late March indicate any such injuries to the child. (T. 268-269, 272, 275, App. 19) Mr. McKnight brought Sean to HRS and showed him to Ms. Yeardley. (T.269) Yeardley testified that she observed a bruise under one

of the child's eyes. (T. 269) She further testified that Mr. McKnight later contacted her and stated that he had taken Sean to the doctor, the child had been examined, and it was determined there was no abuse. (T. 269, 272, 275-276) He told Ms. Yeardley that he would like to withdraw the referral. (T. 268-269, 272, 275-276) Ms. Yeardley prepared the following report concerning the abuse referral made by Mr. McKnight on March 31, 1980:

> The reporter took said child to their family doctor who could not confirm abuse. Stated bruise could have been result of said child falling. Family withdrew report.

(T. 275, App. 23)

On April 3, 1980, Stella took Sean to Guatemala, where they remained until June 3, 1980. (T. 159, 513) Mr. McKnight visited Sean in Guatemala, and observed that Sean was in excellent health. (T. 159) Stella returned to Miami with Sean on June 3, 1980. (T. 159, 514-515) She was met at the airport by Desiree and Mark, who took Sean and said they would get the car to pick up Stella. Instead, they left her stranded at the airport. (T. 514) As a result of this incident, Stella went to HRS to make a report on June 4, 1980. (T. 514) She asked HRS to make home visits because when Stella went to Levitt's house, they would not open the door. (T. 514) Mrs. Yamuni called HRS several times and was told that HRS had been to Levitt's house, but there was nobody home. (T. 514-515, 542)

In response to Stella Yamuni's report of June 4, 1980 and another anonymous report of June 8, 1980, HRS attempted to

contact Desiree or Mark Levitt by means of home visits, written messages, and telephone calls, but were unsuccessful. (T. 665-666, App. 30-31). On the occasion of the last telephone call to Levitt's house, the HRS officer was advised that Levitt's phone had been disconnected. (T. 665-666, App. 30-31).

For at least part of the time that HRS was attempting to contact Levitt or Desiree, they were out of town. (T. 542) Stella Yamuni testified that after she and Sean returned from Guatemala on June 3, 1980, Desiree and Levitt went to Georgia with Sean to visit Levitt's parents. (T. 542, 568) After that, at the end of June, Desiree went to her father's house with Sean. (T. 543) Desiree had been beaten, and Sean had cigarette marks on his arms and foot. (T. 543) Desiree promised Stella she would have nothing more to do with Levitt, and agreed to take Sean to Guatemala. Mrs. Yamuni did not report this incident to HRS. (T. 543-544)

Stella Yamuni sent Desiree, Sean, and Desiree's grandmother, Mrs. Mesa, to Guatemala where they remained until August 8, 1980. (T. 545, 569-570) Sean was in excellent health during this period. (T. 569-570) On August 8, 1980, Desiree returned to Miami with Sean. Desiree and Sean returned to Mark Levitt upon their arrival in Miami. (T. 545)

No abuse report was made to HRS between August 8, 1980 -- when Desiree and Sean returned to Miami -- and August 18, 1980. (App. 7-31) On August 18, 1980, Sean was taken to Jackson Memorial Hospital by Deborah Levitt, who stated that she was the

child's mother. (App. 29) Sean had two complete fractures to his right forearm and severe burns. (App. 29) Both Desiree and Mark Levitt stated that Sean had sustained trauma to his right forearm three or four days earlier when he caught the arm in the metal brace of a collapsible mesh playpen. (T. 576) Desiree testified that she had treated Sean with ice packs for three days, and then applied a heating pad before Sean was taken to the hospital. (T. 577) As a result of those injuries and the delay in seeking medical care, Sean's right forearm was amputated on August 19, 1980. (App. 29)

In order to avoid unduly lengthening this brief, defendant will refer to additional facts of record in the argument section that follows.

SUMMARY OF ARGUMENT

The Department of Health and Rehabilitative Services was sued for its alleged negligence in failing to properly enforce laws which were enacted by the State of Florida to prevent and protect the public from child abuse. The defendant raised the defense of sovereign immunity before, during and after the trial of the cause. However, the trial court rejected the defense, holding that the challenged activities were "operational" and that "HRS was obligated to perform certain obligations and duties." (T. 557)

Subsequent to the entry of final judgment and the denial of defendant's post-trial motions, this Court clarified the law of sovereign immunity in a series of definitive decisions which were

not available to the trial court at the time this case was before it. These decisions hold that there is no duty and therefore no liability for causes of action premised upon a governmental agency's alleged negligence in the enforcement of laws and protection of the public safety. In addition, the manner in which a governmental agency enforces compliance with the law has been recognized by the Court to be a discretionary rather than an operational function. The decisions in Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985); Reddish v. Smith, 468 So.2d 929 (1985); and Rodriguez v. City of Cape Coral, 468 So.2d 963 (Fla. 1985), approving 451 So.2d 513 (Fla. 2d DCA 1984), are directly applicable here, and fully support HRS' contention that it is entitled to sovereign immunity in the case at bar.

The alleged negligent conduct complained of by the plaintiff involves HRS' discretionary power to enforce compliance with the laws against child abuse and neglect. As such, the activities in suit fall within the category of governmental functions described by this Court as "the enforcement of laws and the protection of the public safety" -- a category of governmental conduct which is absolutely immune from tort liability. Trianon, 468 So.2d at 919, 921. Moreover, the activities in suit are not subject to tort liability because they are uniquely governmental functions which are not performed by private persons. See Trianon, 468 So.2d at 921; Reddish, 468 So.2d at 932. The limited waiver of sovereign immunity expressed in section 768.28, Florida Statutes

(1979) provides that governmental entities "shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances." § 768.28(5), Fla. Stat. (1979).

The statute governing HRS, section 827.07, Florida Statutes (1979), does not create a statutory duty and a corresponding right of recovery for the benefit of individual citizens because the statute does not contain language expressing such legislative intent. Instead, the legislature has indicated that the laws against child abuse and HRS' role in enforcing compliance with those laws are intended to benefit and protect the general public because of the pervasive impact that child abuse has on "all citizens of the state." § 415.501(1), Fla. Stat. (1983).

Moreover, pursuant to the Evangelical Brethren[4] test and other case law on "planning vs. operational" or "discretionary vs. ministerial" governmental functions, the activities of HRS in investigating, evaluating and acting upon child abuse complaints are discretionary and judgmental as opposed to operational or ministerial functions, and as such are immune from tort liability.

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[4]Evangelical United Brethern Church v. State, 67 Wash.2d 246, 407 P.2d 440 (1965).

POINT INVOLVED

WHETHER THE STATE OF FLORIDA, PURSUANT TO SECTION 768.28, FLORIDA STATUTES (1983), HAS WAIVED SOVEREIGN IMMUNITY FOR LIABILITY ARISING OUT OF THE NEGLIGENT CONDUCT OF AN HRS CASEWORKER.

ARGUMENT

HRS respectfully submits that the above-stated certified question should be answered in the negative. In the landmark case of Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985), this Court refined and expanded upon its prior analysis, in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), of the scope of sovereign immunity subsequent to the enactment of section 768.28, Florida Statutes (1975). In Trianon, the Court set forth certain basic principles which are essential to a determination of whether a particular governmental activity is subject to, or immune from, tort liability. Pursuant to these principles, as expressed in Trianon and other recent landmark decisions of this Court, the acts complained of by the plaintiff fall squarely within the category of discretionary and judgmental governmental functions which are absolutely immune from tort liability.

A. Absence of an underlying common law or statutory duty of care

In Trianon, the Court emphasized that a prerequisite of governmental tort liability is "an underlying common law or statutory duty of care with respect to the alleged negligent conduct." Trianon, 468 So.2d at 917. Section 768.28, Florida Statutes (1979) provides for a waiver of sovereign immunity in

certain circumstances, but does not establish any new duties of care or causes of action. The statute simply permits suit against governmental entities for "existing common law torts committed by the government." 468 So.2d at 914. The resulting liability of governmental entities is comparable to that of private persons, in that the statute provides that governmental entities "shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances." § 768.28(5), Fla. Stat. (1979); Trianon, 468 So.2d at 917.

In order to assist the trial and appellate courts in determining which governmental functions are immune from liability because of the absence of an underlying common law duty of care, the Court in Trianon formulated four discrete categories of governmental functions: "(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." Trianon, 468 So.2d at 919. Whereas there can be governmental tort liability under certain circumstances in regard to categories (III) and (IV), there is no governmental tort liability for the functions described in categories (I) and (II) because those categories describe inherently discretionary governmental activities for which there has never been a common law duty of care.

HRS is immune from liability in this case because the activities of HRS which form the basis of plaintiff's complaint fall within category (II) -- the enforcement of laws and protection of the public safety -- for which there has never been a common law duty of care. The governmental functions which belong in this category are broadly described by the Court as "[h]ow a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body. . . ." 468 So.2d at 919. Examples include the discretionary power given to "judges, prosecutors, arresting officers . . . other law enforcement officials . . . fire protection agencies . . ." and various types of inspection agencies. 468 So.2d at 919. These agencies and employees all exercise the police power of the state.

The powers and duties conferred by law on HRS involve the enforcement of the laws regarding child abuse and the protection of the children and families of the state, and, as such, clearly involve the "discretionary power to enforce compliance with the laws duly enacted by a governmental body." 468 So.2d at 919. See section 827.07, Florida Statutes (1979). When HRS investigates child abuse referrals and decides whether or not to petition to remove a child from its home, HRS is exercising the police power of the state. The investigative functions performed by HRS in child protection matters are directly analogous to those performed by the police in investigating the alleged commission of a crime.

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In its opinion, the Third District Court of Appeal based its holding of governmental liability, in part, on its finding that there was an underlying common law duty on the part of HRS to the plaintiff. As a legal basis for this holding, the district court concluded that "[t]he services performed by HRS for abused children can only be characterized as professional, educational and general services . . . a category which may subject a governmental entity to liability," [citing Trianon, 468 So.2d 912 at 921, and Miller v. Department of Health and Rehabilitative Services, 474 So.2d 1228 (Fla. 1st DCA 1985)]. (App. 4). In its reference to "a category which may subject a governmental entity to liability," the district court is, of course, referring to the four categories of governmental activities utilized by this Court in Trianon. In characterizing the activities of HRS in the case at bar as "professional, educational and general services," the district court placed these activities in "category IV," instead of in "category II" as contended by HRS.

In characterizing the activities of HRS as "category IV" services, the district court overlooked or misapprehended that portion of this Court's opinion in Trianon which indicates that an essential element of a "category IV" activity is that such an activity is performed by private persons as well as governmental entities. For example, medical and educational services are provided by both private persons and governmental entities. The Court in Trianon states that the involvement of private persons is an important distinguishing factor between "category IV" and

"category II" functions. See Trianon, 468 So.2d at 921. This essential factor is also emphasized in Reddish v. Smith, 468 So.2d 929, 932 (Fla. 1985), wherein the Court holds that the decision to transfer a prisoner from one corrections facility to another is not subject to tort liability because it is an "inherently governmental function not arising out of an activity normally engaged in by private persons."

> [R]ecovery [against a governmental entity] is to be allowed only to the extent that such is available against a private person for the same kind of conduct as that committed by a state employee and charged as being tortious. Thus, where a Department of Corrections driver negligently operates his van while transporting prisoners thereby causing a collision resulting in injuries to another, a body of tort law exists by which liability can be established based on the negligent conduct of the driver. This kind of activity is covered by the waiver of sovereign immunity. But the decision to transfer a prisoner from one corrections facility to another is an inherently governmental function not arising out of an activity normally engaged in by private persons. Therefore the statutory waiver of sovereign immunity does not apply.

Id. The same concept is expressed in section 768.28 itself, wherein the statute provides that governmental entities "shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances." § 768.28(5) Fla. Stat. (1979); see, Trianon, 468 So.2d at 917.

The functions performed by HRS pursuant to section 827.07, Florida Statutes (1979) are not performed by private persons. Private persons have neither the statutory authority nor the responsibility to receive, investigate, evaluate, and act upon

child abuse reports as does HRS. On this point, the testimony of Jim Smart, the assistant state attorney assigned to the juvenile division of the state attorney's office, is noteworthy, as follows:

> Q. Do you know by law any other entity or party other than HRS that's required to step in and protect these children from child abuse?
>
> A. In a civil action, no, sir. There is none. HRS is the agency.
>
> Q. HRS is it, is that correct?
>
> A. Yes, sir. In civil cases.

(T. 653).

In erroneously concluding that the activities of HRS in this case are "category IV" activities, the district court relied on the case of Miller v. Department of Health and Rehabilitative Services, 474 So.2d 1228 (Fla. 1st DCA 1985). In relying on the Miller case, the district court misapprehended the essential distinction between Miller and the case at bar. In Miller, HRS was sued for its alleged failure to exercise reasonable care in its supervision of a patient in a state mental hospital, as a result of which the patient attacked and injured the plaintiff. The supervision of a patient in a mental hospital can be classified as a "category IV" activity because it is a function engaged in by private persons as well as by governmental entities. Thus, the Miller case is readily distinguishable from the case at bar, and does not constitute authority for holding

that the activities of HRS in this case are subject to tort liability.

In holding that the activities of HRS in investigating, evaluating, and acting upon allegations of child abuse are subject to tort liability, the district court also held that there is an underlying statutory duty which gives rise to a cause of action on behalf of the plaintiff. The district court found that section 827.07, Florida Statutes (1979), provides a basis for governmental tort liability on the ground that said statute expresses an intention "to protect a class of individuals from a particularized harm," and that therefore HRS "owes a duty to individuals within the class." (App. 3)

In Trianon, this Court soundly rejected the argument that the existence of a regulatory statute which imposes certain duties on the part of a governmental entity necessarily gives rise to a cause of action for a specific individual or group. The Court emphasized that it is essential for governmental entities to be able to enact and seek to enforce laws without "creating new duties of care and corresponding tort liabilities that would, in effect, make the governments and their taxpayers virtual insurers of the activities regulated." 468 So.2d at 922.

> To hold otherwise would result in a substantial fiscal impact on governmental entities which was never intended by the legislature. Such a holding would inevitably restrict the development of new programs, projects, and policies and would decrease governmental regulation intended to protect the public and enhance the public welfare. Further, such a holding would represent an unconstitutional intrusion by the judiciary into the discre-

> tionary judgmental functions of both the legislative and executive branches of government.

468 So.2d at 922-923. The determining factor regarding whether a statute can provide a basis for governmental tort liability is whether the statute itself expresses the intent to give rise to a duty and a corresponding right of recovery on behalf of a particular individual or group.

In Trianon the plaintiff, a condominium association, claimed that a cause of action on its behalf arose by virtue of the building inspectors' duty to enforce the building code. However, the Court did not find that the building code expressed the legislative intent to establish a "statutory right of recovery" for individual citizens. 468 So.2d at 922. In determining that the code did not demonstrate the requisite intent to give individual citizens a statutory right of recovery, the Court noted that the announced purpose and intent of the code was to "allow reasonable protection for public safety, health, and general welfare for all the people of Florida . . . ." 468 So.2d at 922 [citing section 553.72, Fla. Stat. (1983)] (Court's emphasis). The Court concluded that this statute was "no different than other acts of the legislature which seek to protect by regulation the welfare of society." Id.

In the case at bar, as in Trianon, there is a regulatory statute which provides powers and duties to HRS in regard to its exercise of the police power of the state in enforcing compliance with the laws against child abuse. The legislature has declared

that the prevention of child abuse pursuant to this statute is essential for the welfare of society as a whole because of "[t]he impact that abuse or neglect has on the victimized child, siblings, family structure, and inevitably on all citizens of the state . . . ." § 415.501(1), Fla. Stat. (1983).[5] Thus, as in Trianon, this statute seeks to protect the welfare of society as opposed to giving any individual a cause of action against HRS.

Moreover, there is simply no language in section 827.07, Florida Statutes (1979) which expresses an intention to create a statutory right of recovery for the individuals it seeks to protect. In fact, the statute contains language to the opposite effect. Specifically, section 827.07(7) grants immunity to those who participate in enforcing the provisions of the act, as follows:

> IMMUNITY FROM LIABILITY - Any person, official, or institution participating in good faith in any act authorized or required by this section shall be immune from any civil or criminal liability which might otherwise result by reason of such action.

§ 827.07(7) Fla. Stat. (1979).

Plaintiff argued below that this section provides immunity to private persons who participate in reporting child abuse but not to HRS itself. HRS has been unable to find any case law on this particular point. However, section 827.07(7) clearly expresses

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[5]Section 827.07, Florida Statutes (1979) was recodified in 1983 as Sections 415.502 - 514, Florida Statutes (1983).

the intention to encourage good faith participation in the activities required by the statute by providing immunity from suit to those who act in good faith. This reasoning is clearly applicable to HRS.[6]

Moreover, pursuant to section 768.28(5), Florida Statutes (1979), and the Court's interpretation of same in Trianon, governmental entities can only be held liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." § 768.28(5), Fla. Stat. (1979); see, Trianon, 468 So.2d at 917. According to this principle, since private persons cannot be held liable for their good faith participation in certain activities described by section 827.07, then HRS also should not be liable for its good faith participation in the activities it performs pursuant to this same statute.

In its opinion, the Third District Court of Appeal stated, in a footnote: "[T]he issue having been raised for the first time on appeal, we are precluded from reviewing the issue of whether section 827.07(7), Florida Statutes (1979), grants specific immunity to HRS." (App. 3) HRS respectfully submits that this footnote is erroneous and reveals that the district court misunderstood the thrust of HRS' argument on appeal regarding the immunity expressed in section 827.07(7).

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[6]Plaintiff has not contended in the prior proceedings at the trial or district court level that the HRS caseworkers were not acting in good faith.

First, the issue of whether section 827.07(7) grants specific immunity to HRS was raised in the trial court in HRS' motions to dismiss plaintiff's original and amended complaints and in its answers. (R. 10, 15, 77-79) Second, the district court does not appear to have considered the fact that the immunity set forth in section 827.07(7) can be relied upon on behalf of HRS in two ways: 1) as an independent basis for immunity, and 2) pursuant to Trianon, as an expression of the intent of the legislature that section 827.07 does not create a statutory right of recovery against anyone who participates in good faith in any activities set forth in the statutes, including HRS. In the trial court, HRS raised and relied upon section 827.07(7) as an independent basis for immunity in its motions to dismiss plaintiff's original and amended complaints and in its answers. (R. 10,15, 77-79) HRS' motion for summary judgment and motion for directed verdict relied, in pertinent part, on the doctrine of sovereign immunity. (R. 110-111, 131-144, 550-554, 557, 668-669)

As was previously stated, the Court's decision in Trianon was not issued until after the entry of final judgment and the denial of HRS' post-trial motions. Thus, although HRS repeatedly raised the issue of sovereign immunity at the trial level, HRS could not rely on the Court's specific reasoning in Trianon until it took its appeal to the district court. At that point, having preserved its reliance on sovereign immunity, HRS properly raised the issue, as expressed in Trianon, of the absence of the requisite legislative intent in section 827.07 to create a

statutory right of recovery against HRS on the part of any individual or group. As part of its argument on this issue of legislative intent, HRS properly relied upon the language of secton 827.07(7) regarding immunity from suit.

Regardless of the manner in which section 827.07(7) is relied upon (i.e., as an independent basis for immunity or an indication of statutory intent) the result is the same, that is, an absence of liability for HRS. Thus, the district court should have considered the language of section 827.07(7) as part of its evaluation of the legislative intent of the statute governing HRS. The district court should have found that section 827.07 does not express the requisite legislative intent, pursuant to Trianon, to give rise to a statutory cause of action against HRS on behalf of any individual or group, including the plaintiff herein. See also, Alderman v. Lamar, 493 So.2d 495, 497 (Fla. 5th DCA 1986) (no legislative intent expressed in the Florida statutes or in Florida Highway Patrol rules and regulations to provide individual citizens with a "statutory or rule right of recovery" for a law enforcement officer's negligent enforcement of the law).

As was previously stated, the district court found that section 827.07 provides a basis for governmental tort liability on the ground that it expresses an intention to protect "a class of individuals from a particularized harm." (App. 3) However, pursuant to this Court's decision in Rodriguez v. City of Cape Coral, 468 So.2d 963 (Fla. 1985), approving 451 So.2d 513 (Fla.

2d DCA 1984), the fact that a statute may express the intention to protect a class of individuals from a particularized harm does not create a statutory right of recovery against a governmental entity for the performance of discretionary and judgmental functions.

In Rodriguez, as in the case at bar, the plaintiff sued a governmental entity for damages allegedly arising out of the negligence of certain governmental officers in failing to take an individual into protective custody. Plaintiff alleged that the governmental officers had a statutory duty to take the individual into protective custody, citing section 396.072(1), Florida Statutes (1977).[7] This statute requires that a police officer provide protective custody for any person who is intoxicated in a public place and appears to be incapacitated. The intent of this statute can certainly be viewed as the protection of a class of individuals, that is, intoxicated persons, from a particularized harm, that is, injury resulting from their inebriated condition. Nevertheless, the Court held that the governmental entity was immune from liability because the conduct required by the statute was discretionary and judgmental.

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[7]Section 396.072(1) provides, in pertinent part: "Any person who is intoxicated in a public place and appears to be incapacitated shall be taken by the peace officer to a hospital or other appropriate treatment resource. A person shall be deemed incapacitated when he appears to be in immediate need of emergency medical attention, or when he appears to be unable to make a rational decision about his need for care." 468 So.2d at 964. (Court's emphasis)

The decision in Rodriguez is directly analogous to the case at bar. Plaintiff herein has sued a governmental entity for its alleged negligence in failing to take certain steps so as to ultimately remove the minor plaintiff from the custody of his natural mother. In the case at bar, as in Rodriguez, plaintiff attempts to avoid the fact that the governmental functions in suit are purely discretionary and immune from liability by contending that there is a statutory duty to the plaintiff to perform these functions. However, as in Rodriguez, the fact that a statute may set forth certain duties does not render a governmental entity liable for discretionary and judgmental conduct. See also, Everton v. Willard, 468 So.2d 936 (Fla. 1985).

The language of the statute in the case at bar anticipates and calls for the use of the discretion and judgment of the governmental officer. HRS is empowered to investigate reports of "known or suspected" child abuse and determine whether such reports are"indicated" or "unfounded". § 827.07(10)(a), (f), Fla. Stat. (1979). In conducting investigations, the HRS officer must determine, among other things, whether there is any indication that a child is being abused or neglected, what the "immediate and long-term risk" is to the child if the child remains in its home, and what "protective, treatment, and ameliorative services" are necessary to "safeguard and ensure the child's well-being and development, and, if possible, to preserve and stabilize family life." § 827.07(10)(2)(3) and (4), Fla. Stat. (1979).

HRS is also empowered to temporarily take a child into protective custody, pursuant to the provisions of Chapter 39 of the Florida Statutes, if the HRS officer "has reasonable grounds to believe that the child has been abandoned, abused, or neglected, is suffering from illness or injury, or is in immediate danger from his surroundings and that his removal is necessary to protect the child." §§ 827.07(6) and 39.401(1)(b), Fla. Stat. (1979). Thus, as in the Rodriguez case, HRS' statutory functions are, by their very nature, discretionary and immune from tort liability.

B. Application of the "Evangelical Brethren" test and other case law on discretionary and judgmental governmental functions.

Still another factor to be considered when assessing which governmental activities are immune from liability is the four-part test espoused in Evangelical United Brethren Church v. State, 67 Wash.2d 246, 255, 407 P.2d 440, 445 (1965) and adopted by this Court in Commercial Carrier, 371 So.2d 1010 at 1019. The Evangelical Brethren test provides certain criteria for attempting to distinguish between those governmental functions which are discretionary and judgmental and thereby immune from tort liability, and those which are not. As the Court explained in Trianon, it is not necessary to utilize the Evangelical Brethren test where there is no underlying common law or statutory duty of care, as in the case at bar. However, this test nevertheless demonstrates that even if there is an underlying duty of care on the part of HRS (which there is not), the particular conduct

complained of constitutes purely discretionary and judgmental activity which is absolutely immune from liability. The Court in Trianon reaffirms the value of the Evangelical Brethren test, and reiterates that if all of the pertinent questions can be answered in the affirmative, then the governmental activity in question is clearly "discretionary and 'nontortious.'" 468 So.2d at 918.

The first question is "[d]oes the challenged act, omission or decision necessarily involve a basic governmental policy, program or objective?" Id. There should be no dispute in this case that this question can be answered in the affirmative, since both plaintiff and the Third District Court of Appeal have agreed with HRS in the prior proceedings that its activities in investigating, evaluating, and acting upon child abuse complaints involve the basic governmental policy, program and objective of preventing child abuse.

Similarly, no controversy should be presented by question four, as follows: "Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission or decision?" The district court properly found that HRS has the authority and the duty to carry out the objectives of section 827.07, Florida Statutes (1979), "through the legislature's delegation of power." (App. 5)

On the other hand, question two of the test presents an area of disagreement, as follows: "Is the questioned act, omission, or decision essential to the realization or accomplishment of

that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?" Plaintiff argued on appeal that question two cannot be answered in the affirmative because the case at bar involves only one particular child. The district court based its decision, in part, on its finding that the decisions of HRS' caseworkers in any individual case do not "change the course or direction of the protective services program provided by HRS." (App. 5)

HRS respectfully submits that the reasoning of the district court as abovestated has been rejected by this Court in Reddish v. Smith, 468 So.2d 929 (Fla. 1985). In Reddish, the Court applied the Evangelical Brethren test so as to determine that the Department of Corrections was immune from liability for its alleged negligence in reclassifying and assigning one particular prisoner to a minimum security facility. Significantly, in the Reddish case at the district court level [see, Smith v. Department of Corrections, 432 So.2d 1338, 1340 (Fla. 1st DCA 1983)] the court had applied the Evangelical Brethren test in a manner similar to that utilized by the district court in this case. That is, in regard to the second question of the test the district court in Smith reasoned that the question could not be answered in the affirmative because although inmate classification in general is essential to the maintenance of the prison system, the reclassification of the particular inmate in question "appears to have been made for reasons unrelated to the functioning of the prison system and without use of agency expertise."

Reddish, 468 So.2d at 930, citing Smith, 432 So.2d 1338 at 1340. This reasoning is directly analogous to the reasoning of the Third District Court of Appeal in this case in stating that "[i]t is hard to imagine how the decisions of HRS' caseworkers in carrying out an investigation, though affecting individual cases, could change the course or direction of the protective services program provided by HRS." (App. 5)

In holding that the Department of Corrections was immune from liability in Reddish, this Court rejected the district court's application of the Evangelical Brethren test, and specifically stated that it had "little difficulty" concluding that all four questions of the test could "clearly and unequivocally be answered in the affirmative." Reddish, 468 So.2d at 931. Certainly, for purposes of question two of the test, the reclassification and assignment of any one prisoner is equivalent to the activities of HRS caseworkers in investigating, evaluating and acting upon abuse complaints regarding any one child. Thus, pursuant to the Court's opinion in Reddish, the second question of the Evangelical Brethren test can be answered in the affirmative even where the questioned act relates to one specific individual or entity.

HRS submits that the correct interpretation of the second question of the test is whether the type of act, omission, or decision in question is essential to the realization or accomplishment of the policy, program, or objective as opposed to one which would not change the course or direction thereof. For

example, in the Reddish case the "questioned act, omission or decision" would be the classification of prisoners in general, as opposed to the classification of one particular prisoner. This certainly appears to be the way the Court addresses the question in Reddish, when it states "that with regard to the classification and assignment of prisoners within the state prison system, all four of these questions can clearly and unequivocally be answered in the affirmative." 468 So.2d at 931. In the case at bar, the challenged acts would be the investigation, evaluation, and decision-making regarding child abuse complaints in general, as opposed to the investigation, evaluation and decision-making regarding one particular child. Clearly, such acts are essential to the realization or accomplishment of the objective of preventing child abuse and thus question two should be answered in the affirmative.

The district court also held that question two could not be answered in the affirmative because the decisions made by HRS caseworkers "implement the policy decisions and objectives which have already been made by the legislature and HRS." (App. 5) However, the decision to classify, transfer or assign prisoners to a certain facility as in the Reddish case implements policy decisions and objectives which have already been made by the legislature and the Department of Corrections. See, § 945.09(4), Fla. Stat. (1977) (which requires that transfers and reclassifications of prisoners be made pursuant to regulations provided by the Department of Corrections). Despite this fact, this Court

stated in Reddish that question two could "clearly and unequivocally be answered in the affirmative." 468 So.2d at 931.

The third question of the Evangelical Brethren test is "[d]oes the act, omission, or decision require the exercise of basic policy evaluation, judgment and expertise on the part of the governmental agency involved?" Trianon, 468 So.2d at 918. HRS submits that the investigation and evaluation of child abuse complaints and the ultimate decision-making as to how to best protect the interests of the child and the family unit require the exercise of basic policy evaluation, judgment, and expertise on the part of HRS.

In finding that question three must be answered in the negative, the Third District Court of Appeal stated: "[T]hough a caseworker's decisions obviously call for some discretion, a caseworker need not reflect upon basic policy in deciding whether to make a personal visit rather than a telephone call, nor does a caseworker require policy expertise to determine if a child abuse report is unfounded." (App. 5)

HRS strongly disagrees. In this case, HRS utilized telephone calls after home visits had been made with no success since no one was at home. (T. 665-666, App. 30-31) The caseworker who is making a home visit to the Levitt household obviously cannot be investigating another case at the same time. After making a number of home visits to the same residence and finding no one at home, an HRS worker may well decide that a better way to serve the needs of all of the agency's clients is to telephone the

residence in question first to determine whether anyone is at home. This is a policy decision on the part of the caseworker as to the best allocation of HRS' limited resources, particularly personnel. In Carter v. City of Stuart, 468 So.2d 955, 957 (Fla. 1985), this Court held that "[t]he amount of resources and personnel to be committed to the enforcement of [a particular] ordinance was a policy decision of the city." In the Carter case, the Court held that a city employee's decision not to impound an allegedly dangerous dog pursuant to a city ordinance was a discretionary act that was immune from liability.

In order to determine whether an abuse report is "indicated" or "unfounded", the HRS caseworker must conduct an investigation to evaluate whether any physical symptoms on the child are from abuse as opposed to from an accidental injury. If abuse is believed to be present, the caseworker must attempt to determine whether the parents or other custodians of the child appear to be responsible for the abuse. See, § 827.07(10)(b) Fla. Stat. (1979) In many cases, including the case at bar, the information gathered by the HRS worker may be conflicting. The evaluation and resolution of these conflicts involves the exercise of the worker's judgment and expertise in handling child abuse cases, and may often involve policy evaluation.

For example, in the case at bar most of the abuse reports were made by the child's uncle, Mr. McKnight, or his grandmother, Stella Yamuni. (App. 7-24) The child's mother, Desiree, denied the reports, and told HRS that Mr. McKnight was motivated by the

desire to take Sean away from her and keep the child as part of his own family. (T. 127, 175-176, 198, 532) Desiree's boyfriend, Mark Levitt, told HRS that the reports were being made as a form of harassment and because Desiree's family did not approve of her lifestyle. (T. 175-176, 198, 532)

The HRS workers had the child examined by the child protection team at Jackson Memorial Hospital and by Sean's own pediatrician. (T. 612, 624-625, 176, 194-195) None of the doctors who examined Sean could confirm the allegations of abuse, and Sean's pediatrician, Dr. Lister, strongly opined that the child was "perfectly well" and that the allegation that Sean had been drugged was "ridiculous". (T. 561, R. 431, 438). On one occasion, a report of abuse was made by Mr. McKnight, who subsequently took Sean to Dr. Lister and withdrew the abuse complaint as a result of the doctor's report. (T. 268-269, 272, 275-276) Under such circumstances, the determination of whether abuse reports are "indicated" or "unfounded" clearly involves the exercise of the caseworker's discretion, judgment and expertise.

The Texas Court of Appeals was presented with a similar case wherein the State Department of Human Resources and two of its employees were sued for their alleged negligence in the investigation of a report alleging child abuse. See, Austin v. Hale, 711 S.W.2d 64 (Tex. App. 1986). As in the case at bar, the plaintiffs alleged that the defendants were negligent in: 1) failing to "adequately investigate" the reports of abuse to the child; 2) failing to "properly handle written memoranda" regard-

ing the reports; 3) failing to remove the child from the "dangerous environment"; and 4) failing to comply with the applicable statute and regulations regarding the prevention of child abuse. 711 S.W. 2d at 66. The child died at the hands of the alleged abusers.

The trial court entered summary final judgment in favor of the Department on the ground of sovereign immunity, and in favor of the employees on the ground of "official immunity". 711 S.W.2d at 65. The plaintiffs appealed only the summary judgment against the employees. On appeal, the plaintiffs contended, as in the case at bar, that the defendants were not immune from liability for their alleged negligent conduct because the conduct in question was ministerial in nature. The defendants responded that they were acting in a "quasi-judicial" capacity which required the exercise of discretion. 711 S.W.2d at 66.

The appellate court upheld the summary judgment in favor of the employees, finding as a matter of law that said employees were acting in a quasi-judicial capacity and that their statutory duties involved the exercise of discretion. The court held that "[w]hen a state employee gathers facts and then acts, such actions are quasi-judicial in nature." 711 S.W.2d at 66 [Citing Augustine By Augustine v. Nusom, 671 S.W.2d 112,115 (Tex. App. 1984) writ ref'd n.r.e.]

The court also examined the pertinent statute to determine whether the employees' activities were ministerial or discretionary. The Texas statute is very similar to section

827.07, Florida Statutes (1979), in setting forth the duties of caseworkers in response to a report of child abuse. As in the case at bar, the Texas statute requires its caseworkers to conduct an investigation to evaluate the home environment and determine the nature, extent and cause of abuse, if any, the identity of the abuser, and what steps should be taken to protect the child.

The court found that although the Texas statute contained certain mandatory provisions, and thereby required the performance of some ministerial acts, other provisions called for the exercise of the caseworker's discretion. For example, one provision directed the caseworker to determine "all other pertinent data." 711 S.W.2d at 68. This was interpreted by the court as allowing for the exercise of discretion as to what additional information is pertinent. Another discretionary provision authorized a caseworker to remove a child from its home before the investigation is complete if necessary for the safety of the child. This provision is very similar to section 39.401(1)(b), Florida Statutes (1979), which authorizes an HRS caseworker to take temporary custody of a child if the caseworker has "reasonable grounds" to believe that the child is in danger.

The reasoning of the Texas court in the Austin case is directly applicable to the case at bar. As has been demonstrated, section 827.07, Florida Statutes (1979) contains provisions which call for the exercise of discretion on the part of the HRS caseworker, including the determination as to whether the child

is being abused, if so by whom, and what services are necessary to ensure the safety and well-being of the child. See, § 827.07(10)(b)(2-4)(1979). The exercise of discretion required of the HRS caseworker is certainly comparable to that required of the caseworkers in the Austin case, and relied on by the Texas court as a basis for their immunity. Thus, the decision in Austin constitutes highly persuasive authority, regarding a very similar factual situation, to support the conclusion that the activities of HRS in this case are immune from liability by virtue of sovereign immunity.

In another highly persuasive case dealing with child abuse and child custody issues, the New York Court of Appeals held that the decision of a governmental officer to allow the mother of two minor children to remove them from the state over the father's objection and contrary to the terms of a custody agreement was a discretionary and judgmental decision which is immune from tort liability. See, Tango v. Tulevech, 61 N.Y.2d 34, 471 N.Y.S.2d 73, 459 N.E.2d 182 (1983). Plaintiff father alleged that he had advised the defendant that the children's mother had physically abused them in the past, and further alleged that as a result of the defendant's negligence in releasing the children into the mother's custody, they were again physically abused by the mother.

In holding that the defendant was immune from liability, the court ruled that the defendant "acted in a discretionary capacity." 61 N.Y.2d at 41, 471 N.Y.S.2d at 77, 459 N.E.2d at

186. The Court noted that the defendant officer had "conferred with the parents and the children, . . . inspected the documents presented and examined the children for signs of abuse, and . . . necessarily exercised judgment as to whether . . . court action was appropriate." Id.

Another noteworthy aspect of the Tango case is the court's comment that "[a] parent's interest in maintaining custody and care of his or her children has been given constitutional recognition [citing Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551] as has the child's interest in the care provided by the family relationship [citing Drollinger v. Milligan, 552 F.2d 1220, 1225-1226]." 61 N.Y.2d at 42, 471 N.Y.S.2d at 77-78, 459 N.E.2d at 186-187. This observation is relevant to the case at bar, wherein the "bottom line" of the plaintiff's complaint is that the HRS caseworkers failed to remove Sean Yamuni from the custody of his natural mother.

In its recent group of decisions involving the scope of sovereign immunity, this Court has described and categorized numerous governmental activities as discretionary and judgmental and therefore immune from tort liability. Thus, the allegedly negligent decisions of fire fighters as to how to fight a fire [City of Daytona Beach v. Palmer, 469 So.2d 121 (Fla. 1985)]; the allegedly improper classification and assignment of a prisoner [Reddish v. Smith, 468 So.2d 929 (Fla. 1985)]; the law enforcement officer's allegedly negligent decision not to arrest an intoxicated motorist [Everton v. Willard, 468 So.2d 936 (Fla.

1985)]; the allegedly negligent failure of a city employee to enforce an animal control ordinance [Carter v. City of Stuart, 468 So.2d 955 (Fla. 1985)]; and the allegedly negligent actions of building inspectors in failing to enforce provisions of a building code [Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985)] have all been held to be discretionary and judgmental functions which are immune from liability. In Trianon, the Court noted that its decision was in harmony with the decisions of the majority of states on this subject and with the recent decision of the United States Supreme Court in United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 81 L.Ed.2d 660, 104 S.Ct. 2755 (1984). See, Trianon, 468 So.2d at 915.

In the Palmer case, plaintiff alleged that he sustained damages as a result of the municipal fire-fighters' departure from standard fire-fighting practices. Those allegations are similar to the contention made in the instant case at trial that HRS employees departed from the accepted standard of care for child abuse investigators. (T. 446-448) The Court in Palmer held that the decisions as to how to fight a fire were purely discretionary decisions and that:

> To hold a city liable for the negligent decisions of its fire-fighters would require a judge or jury to second guess fire-fighters in making these decisions and would place the judicial branch in a supervisory role over basic executive branch, public protection functions in violation of the separation of powers doctrine.

469 So.2d at 123. The same reasoning precludes liability in the

case at bar.

Recent post-Trianon decisions of the Fifth District Court of Appeal also support HRS' position. See, Alderman v. Lamar, 493 So.2d 495 (Fla. 5th DCA 1986) (there is no common law or statutory duty or right of recovery on behalf of individual citizens for a law enforcement officer's negligent enforcement of the laws or failure to follow Florida Highway Patrol regulations); Rhodes v. Lamar, 490 So.2d 1061, 1062 (Fla. 5th DCA 1985) ("[t]he decision to institute pursuit of a lawbreaker is a discretionary, planning level decision for which the [governmental entity] enjoyed sovereign immunity.")

The facts of this case are obviously tragic, as are the facts in most of the recent landmark cases on sovereign immunity decided by the Court. However, the language of section 768.28 and the Court's interpretation of that statute in Trianon, Reddish, Everton, Rodriguez, Palmer, and Carter dictate that the activities of HRS in suit are immune from liability by virtue of sovereign immunity. As Chief Justice McDonald opined in his concurring opinion in Trianon:

> To rule differently from what we do in this case would expect too much from government; it would likely lend to government's cessation of building inspections. Government should not have to pay for the wrongs caused by others because they fail to discover or prevent them through its failure to enforce statutes, ordinances, rules or regulations. I don't think the legislature either intended or envisioned governmental liability in such circumstances when it enacted the waiver of sovereign immunity statute.

468 So.2d at 923. Thus, on the basis of the authority and argument set forth herein, HRS submits that the State of Florida, pursuant to section 768.28, Florida Statutes, has not waived sovereign immunity for liability arising out of the negligent conduct of an HRS caseworker, and therefore the certified question should be answered in the negative.

CONCLUSION

The Court should answer the certified question in the negative, quash the decision of the Third District Court of Appeal, and remand the case with directions to enter a directed verdict in favor of the defendant HRS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on the Merits (With Separate Appendix) was mailed to GEORGE, HARTZ & LUNDEEN, P.A. and DANIELS AND HICKS, P.A., Attorneys for Respondent, 2400 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132-2513, this 8th day of December, 1986.

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JSB2b/bj