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IN THE SUPREME COURT OF FLORIDA

GLENN KAISNER and
BARBARA KAISNER,
his wife,

Petitioners,

vs.

CASE NO. 71,121

GARY JOSEPH KOLB;
DALE ROBERT JONES;
PINELLAS COUNTY
SHERIFF'S DEPARTMENT; and
AMERICAN DRUGGIST
INSURANCE COMPANY,

Respondents.

REVIEW OF THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

INITIAL BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS

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On Behalf of the Academy
of Florida Trial Lawyers

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STATEMENT OF THE CASE AND OF THE FACTS

The Academy of Florida Trial Lawyers ("the Academy") is a large, statewide, independent association of trial lawyers specializing in litigation in all areas of the law and dedicated to protecting the rights of injured individuals. The Academy appears as a friend of the court and files this brief in support of the petitioners. The Academy adopts the petitioner's statement of the case and of the facts.

SUMMARY OF ARGUMENT

The Academy urges the Florida Supreme Court to abandon the Trianon analysis and restore to the citizens of Florida the legislature's unequivocal waiver of sovereign immunity.

Even under the confusing Trianon analysis, however, the positioning of the victim was not the sort of "basic judgmental or discretionary governmental function" which carried no duty of care. The court of appeal's artificial "pre-arrest: no duty/ post-arrest: duty" distinction, though caused by the Trianon analysis, was not necessitated by it. Unlike the decision to stop and detain the victim, the positioning of the victim was, like the operation of a motor vehicle, or the handling of a firearm or fire fighting equipment, "operational" activity having a duty of care, as defined in the Trianon cases.

This court has stated unequivocally that the purchase of liability insurance constitutes an unconditional waiver of sovereign immunity independent of the general waiver in section 768.28.

ARGUMENT

I

THE COURT SHOULD RESTORE TO THE CITIZENS OF FLORIDA THE LEGISLATURE'S UNEQUIVOCAL WAIVER OF SOVEREIGN IMMUNITY

The Academy respectfully adopts the position of Justice Shaw, so eloquently stated in his dissents to Trianon Park Condominium Association v. City of Hialeah, 468 So. 2d 912, 926-28 (Fla. 1985)(Shaw, J., dissenting), and its companion cases[1] (collectively "the Trianon cases"). Justice Shaw's reasoned and scholarly analysis of the legislature's waiver of sovereign immunity is set forth in the appendix to this brief. To the extent it is not in conflict with the position of Justice Shaw, see id. at 928 n.4, the Academy also respectfully adopts the position of Justice Ehrlich, stated in his equally thoughtful dissents to the Trianon cases.[2] In keeping with the dissents of Justice Shaw and Justice Ehrlich, the Academy urges the Florida Supreme Court to end "the near total nullification of the legislative waiver of sovereign immunity," Everton v. Willard, 468 So. 2d

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[1]Duvall v. City of Cape Coral, 468 So. 2d 961, 962 (Shaw, J., dissenting); Carter v. City of Stuart, 468 So. 2d 955, 958-61 (Shaw, J., dissenting); Everton v. Willard, 468 So. 2d 936, 940-55 (Shaw, J., dissenting); Reddish v. Smith, 468 So. 2d 929, 934-35 (Shaw, J., dissenting).

[2]City of Daytona Beach v. Palmer, 469 So. 2d 121, 123-24 (Fla. 1985) (Ehrlich, J., dissenting); Rodriquez v. City of Cape Coral, 468 So. 2d 863, 964-65 (Fla. 1985)(Ehrlich, J., dissenting); Duvall, 468 So. 2d at 961-62 (Ehrlich, J., dissenting); Everton, 468 So. 2d at 939-40 (Ehrlich, J., dissenting); Reddish, 468 So. 2d at 933-34 (Ehrlich, J., dissenting); Trianon Park Condominium Association, 468 So. 2d at 923-26 (Ehrlich, J., dissenting).

936, 941 (Fla. 1985)(Shaw, J., dissenting), effected by the Trianon cases, and restore to the citizens of Florida "the legislature's unequivocal waiver of sovereign immunity," Trianon Park Condominium Association, 468 So. 2d at 923 (Ehrlich, J., dissenting)(emphasis added); accord id. at 928 (Shaw, J., dissenting); see Fla. Stat. § 768.28 (1985).

II

EVEN UNDER THE CONFUSING TRIANON ANALYSIS, THE POSITIONING OF THE VICTIM WAS TORTIOUS CONDUCT FOR WHICH SOVEREIGN IMMUNITY HAS BEEN WAIVED

In Trianon Park Condominium Association v. City of Hialeah, 468 So. 2d 912 (Fla. 1985), and several companion cases released on the same date (collectively "the Trianon cases"), the Florida Supreme Court addressed sovereign tort liability in the context of governmental enforcement of laws and protection of the public safety. As expressed by the 4-3 majority in Trianon Park Condominium Association, for there to be sovereign tort liability in such a context, there must first be an underlying common-law or statutory duty of care with respect to the alleged negligent misconduct. The majority stated that "basic judgmental or discretionary governmental functions" have never had an applicable duty of care. The majority concluded, therefore, that the waiver of sovereign immunity is irrelevant to the consequences of "basic judgmental or discretionary governmental functions" because, where there is no duty, there is no liability from which to be immune. Id. at 917.

However, where there is a duty of care that would apply to a private person, the enactment of section 768.28, Florida Statutes (1985), has waived the sovereign immunity which formerly would have prevented sovereign liability for a breach of that duty. Id. It is the nature of the conduct, not the status of the actor, that determines whether the conduct is the exercise of a "basic judgmental or discretionary governmental function,"

which by its nature has no duty of care, or conduct subject to an existing duty of care applicable to private persons and government entities, officials and employees alike. Id. at 918.

Toward distinguishing between conduct which is the exercise of a "basic judgmental or discretionary governmental function," and conduct subject to a duty of care, the majority in Trianon Park Condominium Association obstensibly reaffirmed the "planning/ operational" test adopted in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979):

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) 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? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) 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?

Trianon Park Condominium Association, 468 So. 2d at 918. The majority stated that if these questions can all be answered in the affirmative, the conduct is a "basic judgmental or discretionary governmental function," and therefore, "nontortious," regardless of its consequences.

If one or more of these questions are answerable in the negative, however, the conduct is "operational." If the "operational" activity is conduct for which there exists a common-law or statutory duty of care applicable to private persons, there

is no sovereign immunity from liability resulting from like conduct on the part of a government entity, official or employee. The inquiry then proceeds, as in any tort action, to whether there has been a breach which is the proximate cause of damage. Id. at 918-19.

In the context of "enforcement of the laws and protection of the public safety," the majority in Trianon Park Condominium Association distinguished the exercise of "discretionary power to enforce compliance with the laws duly enacted by a governmental body," for which there never has been a duty of care, from activity subject to existing duties of care applicable to government officials and employees, such as care in the operation of motor vehicles and the handling of firearms. Id. at 919-20. Applying these principles in Everton v. Willard, 468 So. 2d 936 (Fla. 1985), the supreme court addressed a situation in which a deputy sheriff, after stopping a driver for a traffic violation, recognized from observation and the driver's admission that the driver was intoxicated. Instead of arresting the driver or otherwise preventing him from continuing to drive, the deputy issued the driver a traffic citation and permitted him to continue driving. Approximately fifteen minutes later, the driver was involved in a collision in which one person was killed and a second person severely injured. Id. at 937.

The majority in Everton stated that there has never been a common law duty of care owed to an individual with respect to "the discretionary judgmental power" of a police officer

to make an arrest and enforce the law. Id. at 938. The majority compared the nature of the activity involved to the "discretionary decision" of a prosecutor to prosecute someone and the "decision" of a judge to release a person on bail or to place him on probation. All these decisions, the majority concluded, are "basic discretionary, judgmental decisions" for which no duty of care exits, rather than "operational" activity. Id. at 939.

The majority in Everton noted that its decision related only to the narrow issue of the "discretionary judgmental decision" of whether to make an arrest under the police power of a governmental entity. Id. By contrast, in City of North Bay Village v. Braelow, 469 So. 2d 869 (Fla. 3d DCA 1985), quashed on other grounds, 498 So. 2d 417 (Fla. 1986), which followed the Trianon cases, the court of appeal addressed a lawsuit involving allegations that the plaintiff was unnecessarily injured by a police officer in the course of arresting the plaintiff. Braelow, 469 So. 2d at 870. Finding a duty of care, the court of appeal observed,

> [A]t the time the injuries occurred, [the police officer] was engaged in ministerial duties; that is, having already made the decision to arrest, he was engaged in activities incident to carrying out that decision. At that point, [the police officer] owed a duty, which was specific to [the plaintiff] and to no other person, to act with reasonable care.

Id. at 871 (emphasis added). Finding no fault with the court of appeal's conclusion that the police officer's activity was "operational" conduct for which he owed a duty of care, the supreme court nevertheless quashed the decision upon a holding that there had been no legislative waiver of the individual

police officer's sovereign immunity. Braelow, 498 So. 2d at 418.

The contrast between a police officer's "judgmental or discretionary" activity, as in Everton, and a police officer's "operational" activity, as in Braelow, was also shown by example in two analogous Trianon cases. In Reddish v. Smith, 468 So. 2d 929 (Fla. 1985), the majority distinguished a Department of Corrections decision to transfer a prisoner from one facility to another, which the majority characterized as "an inherently governmental function" with no duty of care, from the negligent and injurious operation of a Department of Corrections van in the transportation of prisoners, which the majority characterized as activity for which there is a duty of care. Id. at 932. In City of Daytona Beach v. Palmer, 469 So. 2d 121 (Fla. 1985), the majority distinguished a fire fighter's decision on how to properly fight a particular fire, how to rescue a victim in a fire or how much equipment to send to a fire, which the majority characterized as "discretionary, judgmental decisions" with no duty of care, from negligent conduct resulting in personal injury while fire equipment is being driven to a fire or personal injury to a spectator from the negligent handling of equipment at the scene, which the majority characterized as activity for which there is a duty of care. Id. at 123.

It is evident that the complex distinctions of the Trianon analysis have, in the present case, so completely, albeit understandably, confused the court of appeal, that the sort of untenable

result predicted by the Trianon dissenters has now occurred. In attempting to apply the Trianon analysis, the court of appeal explained:

> The actions of the deputies in the case before us cannot be likened to the liability-engendering operational activities of category II functions mentioned in Trianon Park, Reddish v. Smith, and City of Daytona Beach v. Palmer (operation of motor or fire vehicles). If Deputy Jones had arrested or taken Mr. Kaisner into custody for some reason, and had been transporting him elsewhere in the deputies' vehicle, and then been negligent in driving the patrol car, a cause of action would have been stated, and sovereign immunity as a defense would have been waived: The mere stopping of the vehicle for a traffic law violation and further investigation does not constitute a "taking into custody." That is so even though the deputy spoke to appellant and indicated that appellant should not approach closer. Generally, placement of the patrol car as was done here is accomplished for the very protection of the stopped vehicle and is certainly a common and reasonable action in these circumstances. Deputies Kolb and Jones had not completed their investigatory activities --which we deem were a part of the discretionary, judgment and sovereign powers of government granted police offices in enforcing the law--when the injury to appellants occurred. Everton v. Willard. In the pre-Trianon Park case of Walston v. Florida Highway Patrol, 429 So. 2d 1322 (Fla. 5th DCA 1983), our sister court reversed and remanded for a judgment in accordance with a jury's finding of negligence on the part of the investigating officer. The plaintiff/appellant in Walston was the drunken passenger of the car the officer had stopped but which passenger the officer did not arrest after ordering him out of the car. The passenger had remained between his own vehicle and the officer's patrol car when the patrol car was rammed from behind, a scenario similar to that in the case before us. We respectfully disagree with the result reached by the fifth district in Walston. There the majority assumes that the mere stopping of a vehicle to investigate a possible drunken driver creates a duty on the part of the officers toward a person whom the officers did not arrest and, in fact, whom the officers had told to leave the scene. Judge Cowart's dissent in Walston properly analyzes the legal questions, the first of which is: "Is there a duty of care owed?" Only after this question is answered in the affirmative can the subsequent questions

of breach of that duty and proximate cause be considered.[4] A more fundamental question in the Walston analysis would have determined whether the conduct of the deputies had crossed that threshold we find must be crossed when dealing with a governmental entity. The governmental entity acts either in the sphere of governing (Trianon Park's categories I and II) where its actions are immune[5] or in the other sphere where it may possibly act as a private person in like circumstances to incur liability. It is only when this threshold is crossed, leaving behind the inherent acts of governing, [that] a traditional negligence analysis [can] be undertaken and applied to conduct later determined to be operational level, and not planning level, using the suggested analysis of Evangelical Brethren as outlined in Trianon Park.

Further, we do not find liability predicated on the recent case of State of Florida, Department of Highway Safety v. Kropff, 491 So. 2d 1252 (Fla. 3d DCA 1986), wherein liability existed based on actions of a patrolman in failing to secure the scene of a traffic collision. There the plaintiff Kropff was struck by another car as she stood on the right-of-way with the patrolman as they surveyed the damage to her car which had collided with another car. The patrolman in Kropff had left his car on the other side of the median which ran down the middle of the boulevard where the accident occurred. Deputies Kolb and Jones, in the case before us, had followed standard police routine in stopping the vehicle and proceeding with their investigation. They had not yet left their discretionary-level activities in deciding whether to arrest or cite Mr. Kaisner and had not yet entered the operational-level sphere of activity which was the case in Kropff. Furthermore, unlike the facts in Kropff, deputies Kolb and Jones were dealing with the individual who, they believed, had committed a traffic violation. Mr. Kaisner was the object of

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[4]Compare City of North Bay Village v. Braelow, 469 So. 2d 869, 871 (Fla. 3d DCA 1985)(officer, after having already made decision to arrest, was engaged in ministerial duties and owed a duty that was specific to arrestee and to no other person to act with reasonable care).

[5]Subject, of course, to the exceptions in category II noted by the supreme court in Trianon Park.

> their investigation and whom, in their discretion, they might arrest based on the results of that investigation. The officer in Kropff was making out his accident report at the scene of an accident that had already occurred and at which he had taken charge. We find this to be a further distinction between the two cases. Had our deputies arrested appellant or exercised actual control of appellant at the time he was injured, then Kropff would apply, the conduct would be operational in nature and, therefore, actionable.

Kaisner v. Kolb, 509 So. 2d 1213, 1218-19 (Fla. 2d DCA 1987)(emphasis added).

The operative distinction drawn by the court of appeal's "pre-arrest: no duty/post-arrest: duty" analysis is further accentuated by the fact that, in Walston, the driver of the automobile which had been stopped by the police officer suffered the same fate as did the passenger: the driver was also crushed between the two automobiles. Yet the court of appeal in the present case has no criticism of the fact that the driver in Walston was allowed to sue the sovereign, for the driver had been placed under arrest prior to the injury. See Walston, 429 So. 2d at 1323-24. Same conditions, same positioning, same injury, but the court of appeal, in attempting to follow the Trianon analysis, would reach completely opposite results based on the "pre-arrest: no duty/post-arrest: duty" analysis. Such are the progeny of the Trianon cases.

In fact, once Mr. Kaisner was positioned by the deputies, he was no more free to move from that position than if he had been formally arrested. His license had been taken, he had been told to "stay right there," or, as the court of appeal would characterize it, to "come no closer," Kaisner, 509 So. 2d

at 1215, 1219. He was, for all practical purposes, having been detained by the deputies, without the legal right to remove himself from where he had been positioned. See M.C. v. State, 450 So. 2d 336 (Fla. 5th DCA 1984).

In climbing the "formidable mountain of tests," Trianon Park Condominium Association, 468 So. 2d at 928 (Shaw, J., dissenting), created by the Trianon cases, the court of appeal has succumbed to the rarefied atmosphere and envisioned a "pre--arrest: no duty/post-arrest: duty" artifice that is nothing more than jurisprudential mumbo jumbo. It is obvious that the result reached by the court of appeal in the present case is more strained than even the Trianon analysis and, though caused by the Trianon analysis, was certainly not necessitated by it.

Under the Trianon analysis, Kaisner was not injured as the result of a "basic judgmental or discretionary governmental" decision to arrest him or as the result of a "basic judgmental or discretionary governmental" decision not to arrest someone else, as in Everton. The decision to arrest or detain was totally unrelated to the decision of where Mr. Kaisner should stand. Mr. Kaisner's physical position after he was detained had nothing to do with why he was detained. At the time of the injury, the deputies were engaged in the ministerial "operational" activities of running a registration and license check and preparing a non-emergency traffic citation. The conduct of positioning Mr. Kaisner between the rear of one stopped automobile and the front of another which was between one and one-half car lengths

distant from the first, in a traffic lane of a busy thoroughfare, while the officers went about their ministerial duties, is clearly not the sort of basic discretionary governmental function envisioned by the majority in the Trianon cases.

Unlike the decision to stop and detain Mr. Kaisner in the first place, the positioning of Mr. Kaisner while the deputies ran registration and license checks and prepared a non-emergency traffic citation was ministerial "operational" conduct which, like driving a motor vehicle, or handling a firearm or fire fighting equipment, has a duty of care. It neither involved nor changed the course of any basic governmental policy, program or objective. It did not require the exercise of any basic policy evaluation, judgment or expertise. There was certainly no duty to position Kaisner between the front of one stopped automobile and the rear of another in a busy traffic lane.

Under the analysis of the Trianon cases, the alleged conduct was "operational" activity. Whether there existed a duty of care, common to governmental official and private citizen alike, not to place someone in such a perilous position, and whether the duty was breached, resulting in proximately-caused injury to Mr. Kaisner, are questions for the jury.

III

THE PURCHASE OF TORT LIABILITY INSURANCE BY A GOVERNMENT ENTITY CONSTITUTES AN UNCONDITIONAL WAIVER OF SOVEREIGN IMMUNITY UP TO THE LIMITS OF INSURANCE COVERAGE

In Avallone v. Board of County Commissioners of Citrus County, 493 So. 2d 1002 (Fla. 1986), this court stated unequivocally,

> When liability insurance is purchased, there will be no assertion of sovereign immunity, up to the coverage limits of the policy, regardless of whether such defense would be otherwise valid. § 286.28(2).
>
> . . . .
>
> . . . We hold that purchase of tort liability insurance by a government entity, pursuant to section 286.28, constitutes a waiver of sovereign immunity up to the limits of insurance coverage and that this contingent waiver is independent of the general waiver in section 768.28.

Avallone, 493 So. 2d at 1004-05 (emphasis added).

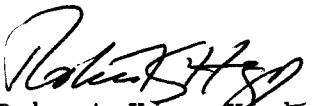
In an alternative holding, premised upon the Trianon analysis, this court also held that the complained-of activity in Avallone was "operational" and, therefore, that sovereign immunity was waived by section 768.28. Avallone, 493 So. 2d at 1005. The court of appeal in the present case has overlooked the fact that the two holdings in Avallone are completely independent of one another. In attempting to reconcile the two holdings, the court of appeal has made meaningless the waiver provision of section 286.28: if the purchase of liability insurance pursuant to section 286.28 only waives immunity for "operational" tortious activity, then the purchase of such insurance pursuant to section 286.28 has, in fact, waived nothing, for such immunity has already

been waived by section 768.28, regardless of the purchase of insurance. The result reached by the court of appeal was not that intended by the legislature or this court. The purchase of tort liability insurance by a government entity constitutes an unconditional waiver of sovereign immunity up to the limits of insurance coverage.

CONCLUSION

For the foregoing reasons, this court should restore to the citizens of Florida the legislature's unequivocal waiver of sovereign immunity. The decision of the court of appeal should be quashed and the judgment under review reversed and remanded for further proceedings consistent with the views expressed and authorities cited herein.

Respectfully submitted,



Robert King ~~High~~ Jr.
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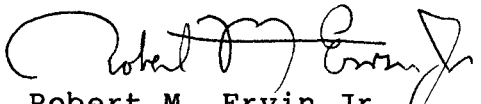

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