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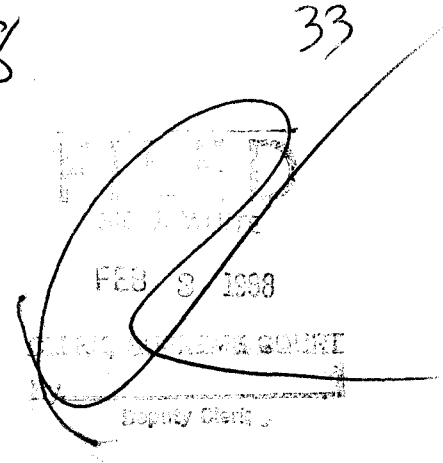

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

GLENN KAISNER and
BARBARA KAISNER, his wife,

Plaintiffs/Appellants/
Petitioners,

vs.

CASE NO. 71,121

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

Defendants/Appellees/
Respondents.

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE, THE FLORIDA SHERIFF'S SELF-INSURANCE FUND

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INTEREST OF THE FLORIDA SHERIFF'S SELF-INSURANCE FUND AS AMICUS CURIAE

The Florida Sheriff's Self-Insurance Fund was created pursuant to that provision in Section 768.28, Florida Statutes which allows the sheriffs of the State of Florida to self-insure certain tort risks. The liabilities insured by this group include the risks discussed in this appeal.

The Florida Sheriff's Self-Insurance Fund does not believe that it is in the best interest of the sheriffs or the citizens of this State for the courts to create broad new duties owing by law enforcement officers to the public. While the Florida Sheriff's Self-Insurance Fund recognizes that duties should properly exist between law enforcement officers and the public, those duties should be carefully defined by statute or common law.

Although the Florida Sheriff's Self-Insurance Fund is not a traditional insurance company for application of this Court's ruling in Avallone v. Board of County Commissioners of Citrus County, 493 So.2d 1002 (Fla. 1986), this Fund does not believe that the existence of insurance, self-insurance funds, or governmental escrow accounts is a factor which should be utilized to create duties which would not exist in the absence of insurance.

STATEMENT OF THE CASE AND OF THE FACTS

This Amicus would rely upon the statement of the case and of the facts as contained in the Second District's opinion. Kaisner v. Kolb, 509 So.2d 1213 (Fla. 2d DCA 1987). In evaluating this set of facts and the duties which this Court's decision could create to apply in other circumstances, several factors are worthy of consideration:

1. This case involves a very common police activity. Cars are stopped by police officers for traffic infractions literally hundreds of times each day in the State of Florida. Each time that an officer stops a car for a traffic infraction, it is possible - - although not probable - - that another motorist will negligently strike a vehicle or a person involved in the stop. The same is true when cars stop at stop signs, traffic lights, and traffic jams.

2. This type of traffic stop is typically the result of a traffic infraction by the motorist. Whether the motorist is speeding, running a stop sign, or operating a vehicle without proper safety equipment, the motorist is stopped because he is creating some traffic risk. Typically, the motorist can avoid the police stop by obeying the law. Whether the ultimate accident is legally "caused" by the motorist's abuse of the driving privilege, one can certainly suggest that "but for" a traffic infraction, the subsequent accident would not happen.

3. The policeman involved in such a traffic stop does not commit a separate tort which directly causes injury to the motorist. The injury occurs only if a negligent motorist strikes someone involved in the stop. This is not a case in which the police officer has committed an intentional tort such as false arrest, false imprisonment, or assault and battery. The police officer did not negligently run over the motorist with the police vehicle.

4. There is no indication in this case that the Plaintiff was reasonably relying upon the police officer to protect him from the negligent driver. The Plaintiff was not incapacitated prior to the accident and appears to have been in full control of his faculties. Anyone with a driver's license certainly knows that a risk of injury occurs when one stands between two parked automobiles. Even without an impact from a third car, there is always the possibility that one car will roll. It cannot reasonably be suggested that a motorist can stand between two automobiles and expect a police officer to protect him from the negligence of a third-party or from the basic laws of physics.

5. Since this case does clearly involve the fault of a third-party, in evaluating the need for a duty upon the State, it may be significant to consider steps which the State has taken. The State, for example, would require the Plaintiff to have no-fault insurance protection for himself and his family. Section 627.730, Florida Statutes. In the event that the third-party

motorist does not have the liability insurance which the State encourages, the State also encourages the Plaintiff to protect himself and his family with uninsured motorist coverage. Section 627.727, Florida Statutes. Claims against the State for "failure to protect" one citizen from the torts of another always seem to occur when neither the plaintiff nor the third-party have adequately obtained the insurance protection which the State encourages.

POINTS ON APPEAL

I.

IN THE ABSENCE OF A RELATIONSHIP IN WHICH A POLICEMAN CREATES REASONABLE RELIANCE UPON THE PART OF A PARTICULAR CITIZEN, THAT PARTICULAR CITIZEN HAS NO LEGITIMATE EXPECTATION TO BE PROTECTED BY A POLICEMAN FROM THE TORTS OF ANOTHER.

II.

CHAPTER 87-134, LAWS OF FLORIDA, HAS ESSENTIALLY OVERRULED AVALLONE V. BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY, 493 SO.2D 1002 (FLA. 1986).

SUMMARY OF THE ARGUMENT

This case involves a Class II law enforcement activity under the Trianon Park analysis. The policeman has stopped a traffic violator to protect the public from the traffic violator. In the absence of a statutory or common law duty to the plaintiff, the court should be hesitant to create any broad "assumed duty". Such an assumed duty should only exist upon the part of a law enforcement officer when the policeman creates a relationship in which the citizen has a legitimate expectation that he can rely upon the policeman to protect him from the negligence of another.

Rather than creating broad duties upon law enforcement officers to protect one motorist from the negligence of another motorist, the Legislature has opted to encourage citizens to obtain adequate automobile liability insurance and adequate uninsured motorist coverage. This Court should not make the State the ultimate insurer when the Plaintiff and the negligent motorist have not obtained sufficient insurance.

In the range of possibilities, as compared to probabilities, the job of law enforcement creates numerous risks for law enforcement officers and citizens alike. These possibilities alone should not create a duty by which a policeman is obligated to protect a plaintiff. Just as the public cannot expect fault-free firefighting merely because a city does provide

a fire department, a citizen cannot have a legitimate expectation of protection by the police in the absence of a relationship in which the policeman creates reasonable reliance.

In this case, the Plaintiff was injured because the Plaintiff placed himself between two parked cars. This is not a concealed risk, but rather is an open and obvious risk known to anyone with a driver's license. A motorist cannot reasonably rely upon the police to protect him from such open and obvious dangers.

This Court's recent decision in Avallone v. Board of County Commissioners of Citrus County, 493 So.2d 1002 (Fla. 1986), has been legislatively overruled by Chapter 87-134, Laws of Florida. Section 30.55, Florida Statutes, has also been repealed. The Legislature intends that chapter to apply to all pending litigation. Because this statutory amendment does not eliminate a cause of action, but rather requires the Plaintiff to submit a claims bill to the Legislature as a remedy, this Court should uphold the constitutionality of Chapter 87-134, Laws of Florida as it applies to pending litigation.

ARGUMENT

I.

IN THE ABSENCE OF A RELATIONSHIP IN WHICH A POLICEMAN CREATES REASONABLE RELIANCE UPON THE PART OF A PARTICULAR CITIZEN, THAT PARTICULAR CITIZEN HAS NO LEGITIMATE EXPECTATION TO BE PROTECTED BY A POLICEMAN FROM THE TORTS OF ANOTHER.

Over the last decade, this Court has discovered that governmental liability is not a simple subject. There have been pressures placed upon this Court to create a simple touchstone which would provide an easy solution for bench and bar. This Court should not be tempted by those pressures because the simple solution does not exist. Our common law system of case law precedent requires patience and perseverance. Those traits are not the most popular in our fast-paced society, but they are essential to the solution. Our courts have taken decades and even centuries to pattern a complex structure of duties which apply to private citizens. It should surprise no one that similar complexity must exist concerning governmental bodies which perform countless public functions as well as many private functions.

In Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979), this Court engaged in its first major analysis of governmental liability under the new limited waiver of sovereign immunity in Section 768.28, Florida

Statutes. This Court's analysis in that case primarily considered the affirmative defense of sovereign immunity. As this Court stated in phrasing the issue:

> "What, then, is the scope of waiver contemplated by Section 768.28?" 371 So.2d at 1016.

The Commercial Carrier cases did not involve a thorough analysis of the types of duties owed by governmental entities. This Court restricted the concepts of "special duty" and "general duty" as those concepts had been utilized to create sovereign immunity, Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967), but did not need to consider refinements in the duties actually owed by governmental entities.

Following the Commercial Carrier decision, there was a heavy emphasis in the district courts of appeal on the Commercial Carrier analysis. In many cases where no legal duty should exist on the governmental entity, the courts ignored the threshold issue of duty and, instead, analyzed the affirmative defense of sovereign immunity under the factors contained in the Commercial Carrier decision.

In the cluster of decisions issued with Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985), and Everton v. Willard, 468 So.2d 936 (Fla. 1985), this Court realized the importance of analyzing the duty owed by a government before one analyzes the sovereign immunity which may exist for an established duty. Because of the complexity of governmental activities, the definition of governmental duties is

not an easy task. It is relatively easy for the Legislature to announce a policy that the State should be liable "under circumstances in which the State or such agency or subdivision, if a private person, would be liable to the claimant . . . ." Section 768.28(1), Florida Statutes. Because the governmental is not in fact a private person and is responsible for many activities which private persons do not conduct, the application of this statutory policy is sometimes difficult.

In Trianon Park, this Court announced to the Legislature that it would not create duties for the State under Section 768.28, Florida Statutes unless identical existing duties apply to private persons. As this Court stated:

> "Second, it is important to recognize that the enactment of the statute waiving sovereign immunity did not establish any new duty of care for governmental entities." 468 So.2d at 912.

This Court expressly held that neither a private person nor a governmental entity has any common law obligation to enforce the law for a specific group of individuals. Since that pronouncement, the Legislature has not chosen to create any new statutory duties requiring police officers to enforce the law for specific groups of individuals.

In this case, the Court is called upon to further analyze the duty owed by the government in an area of police protection which is not easily comparable to the activities of private persons. The Second District analyzed this case under the guidelines of Trianon Park Condominium Association, Inc. v.

City of Hialeah, 468 So.2d 912 (Fla. 1985) and Everton v. Willard, 468 So.2d 936 (Fla. 1985). The Second District correctly determined that this case involves Class II activities for the enforcement of laws and protection of public safety. For such activities, a duty does not exist unless it is created by common law, statute, or a special relationship. Just as such a statutory or common law duty did not exist when this Court decided the Everton case, such a duty is still lacking.

To the largest extent, this case should depend upon the nature of the special relationship which is required between a police officer and a citizen to create an assumed duty. In his dissents in Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985) and Everton v. Willard, 468 So.2d 936 (Fla. 1985), Justice Ehrlich argues that this Court has reinstated Modlin in the newer cases. This Court has not reinstated the Modlin doctrine, but has simply recognized that there is a kernel of truth within that long-recognized doctrine.

The Modlin doctrine held that a governmental officer could not be sued on a duty which was owed generally to the public, but could only be sued for a special duty owed to a particular citizen. Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967). In some areas of governmental activity, this doctrine is clearly unreasonable. In the area of police powers, however, the concept has some merit.

In the area of police powers, the Modlin doctrine is defective primarily in its terminology. It is not accurate to discuss a "general duty" versus a "special duty". Instead, the general activities of a police officer or building inspector, as a matter of law, do not create duties. Duties only exist concerning the performance of police powers when a particular person has a legitimate expectation that he will be protected. The duty is created not by the vast possible risks which may be foreseeable concerning everyone, but rather is created when the police officer allows a citizen to reasonably rely upon that police officer for protection. The "special relationship" between the police officer and the citizen develops from a set of facts which allow the citizen to have a legitimate expectation that he will be protected by the police officer rather than by himself.

In Everton v. Willard, 468 So.2d 936 (Fla. 1985), the plaintiff was struck by a drunk driver which the police officer had stopped but not detained. This Court held that the police officer was not liable to the Plaintiff because there was no "special duty" owing to the victim. There was no relationship between the two individuals which would allow the plaintiff to reasonably rely upon the police officer for police protection. In describing this result, this Court stated that:

> "A law enforcement officer's duty to protect the citizens is a general duty owed to the public as a whole. The victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common

> law duty of care to the individual citizen and the resulting tort liability, absent a special duty to the victim." 468 So.2d at 938.

Although the Amicus agrees with this general analysis, this Amicus believes it would be more accurate to state:

> A law enforcement officer's goal to protect the citizens is a goal for all the public. Such goals, however, do not create duties in tort. A law enforcement officer's duty to an individual citizen is an assumed duty which exists when the law enforcement officer encourages the citizen to reasonably rely upon the officer for protection.

The concept of "reasonable reliance" is helpful in examining other cases. In Trianon Park, for example, no duty was owed by the building inspector under common law or statutory law to assure the safety of the building for the ultimate property owners. There was no privity of contract between these individuals nor any promise by the building inspector that he would protect the interest's of the condominium owners. The government building inspector does not assume a duty to protect the condominium owners when he takes no steps which would authorize them to reasonably rely upon him for protection.

A victim who is shot by an escaped prisoner has not established a special relationship with the correctional officer who allows the prisoner to escape. Reddish v. Smith, 468 So.2d 929 (Fla. 1985). When the plaintiff is not protected by statute or common law, he cannot reasonably rely upon all correctional officers to protect him from escaped prisoners.

When a fire occurs in an office building, a tenant has no statutory or common law right to depend upon non-negligent fire fighting by the fire department. To protect his property, a reasonable tenant relies upon safes, sprinklers, and other private security measures. A particular citizen has no legitimate expectation to be protected from a fire by the fire department simply because the local government has a fire department. City of Daytona Beach v. Palmer, 469 So.2d 121 (Fla. 1985).

Several recent law enforcement cases are instructive. A citizen cannot reasonably rely upon the police department to protect him from a neighbor's attack merely because the police investigated an earlier altercation between the parties. City of Orlando v. Kazarian, 481 So.2d 506 (Fla. 5th DCA 1985), rev. den., 491 So.2d 279 (Fla. 1986). The investigation creates a relationship between the police department and the plaintiff. That relationship, however, simply does not, as a matter of law, create an assumed duty upon which the plaintiff could rely. A similar result was reached by the First District in Parker v. Murphy, 510 So.2d 990 Fla. (1st DCA 1987) .

In Rosenberg v. Kriminger, 469 So.2d 879 (Fla. 3d DCA 1985), the Court considered a case in which an attorney was duped by a police officer into producing his client for arrest. The Third District seemed to assume that a relationship existed between the attorney and the police officer by virtue of their numerous telephone calls and their face-to-face meeting.

Nevertheless, the Court held that the activities of the police officer were immune decisions involving broad policy and planning activity. Although a relationship existed between the police officer and the attorney, the nature of the relationship was not the type which would reasonably allow a lawyer to rely upon the police officer to not enforce the law.

A case in which reasonable reliance does exist is Hartley v. Agricultural Excess and Surplus Insurance Co., 512 So.2d 1022 (Fla. 1st DCA 1987), cert. den., ___ So.2d ___ (Fla. 1988). In the Hartley case, the plaintiff's husband went on a fishing trip and did not return home on time. She called a sheriff's department and requested that they check the boat ramp to determine whether her husband's car was still there. The sheriff did not check the boat ramp, but informed her that the truck was gone. Unfortunately, the man's boat had capsized in the Gulf and he subsequently drowned.

Under these circumstances, the law enforcement officer had assumed a duty upon which the plaintiff could reasonably rely. Such facts are a good example of the circumstances under which a citizen does create the relationship of a reliance which justifies an assumed duty.

Likewise, when a private citizen responds to police requests and provides evidence against a killer, and when the witness then receives threats which are disclosed to the police, he has created a relationship in which he should be able to

reasonably rely upon the police to protect him from the known threats of the killer. Schuster v. City of New York, 5 N.Y.2d. 75, 154 N.E.2d. 534, 180 N.Y.S.2d. 265 (N.Y. 1958).

The Restatement (Second) of Torts certainly does not create Florida common law as suggested by the Plaintiff. Nevertheless, it does provide some helpful ideas. In general, a person has no duty to control the conduct of a third person to prevent harm to a first person unless a special relationship exists between the actor and the first person which gives the first person a right to protection from the third person. Restatement (Second) of Torts, §315. In defining a "special relation" the Restatement (Second) of Torts includes the following statement:

> "§320. Duty of Person Having Custody of Another to Control Conduct of Third Persons
>
> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor
>
> (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control."

Under the circumstances of a normal traffic stop, it does not seem realistic to assume that the motorist is deprived of his "normal power of self-protection". Certainly, any licensed operator of a motor vehicle should understand the risks associated with standing between motor vehicles whether he is stopped by a police officer or a friend. Likewise, neither the plaintiff nor the police officer has any ability to control the negligent driving of the other motorist.

The Restatement (Second) of Torts describes assumed duties in Section 323. Under that section, a party may be liable when he undertakes "to render services to another which he should recognize as necessary for the protection of the other's person or things" if the harm is suffered because of "reliance" by the plaintiff or by the volunteer negligently increasing the risk which required the protection. Section 324, Restatement (Second) of Torts expands this risk concerning one who is "helpless".

In this case, it is obvious that the typical motorist who is stopped for a traffic infraction is not "helpless". The police may owe some duties to helpless people that they choose to protect, but that reasoning should not apply to this type of case.

The basic assumed duty contemplates actions to protect the plaintiff. When a motorist is stopped by a police officer for violation of a traffic infraction, the police officer is trying to protect the other members of the motoring public from the violator. Ironically, the police officer is trying to

protect the public from the danger of the plaintiff - - the officer is not protecting the plaintiff from the public. It seems strange to place an assumed duty upon an officer to protect the person who is stopped for an offense.

Even if a duty is assumed concerning such a person, the duty should only protect for matters involving reliance or for increased risks from the infraction. For example, a speeding motorist creates a risk of accident. If a policeman pulls his car in front of the speeder at an intersection where the speeder cannot stop, the policeman has increased the risk created by the speeder. In this case, however, the accident does not arise out of a risk directly caused by the plaintiff's violation of traffic laws. Instead, it arises out of the negligence of another member of the motoring public.

The Third District's decision in State, Department of Highway Safety v. Kropff, 491 So.2d 1252 (Fla. 3d DCA 1986) and the cases cited in that decision are distinguishable. Ms. Kropff was not injured because of an accident following a stop for a traffic infraction. Following an automobile accident, she had placed herself in a position of safety. She had a duty to cooperate with the police officer concerning an investigation of the accident. Section 316.062, Florida Statutes. She was directed by the officer to stand in the middle of a roadway. Factually, a jury might conclude that a relationship allowing reasonable reliance had occurred in that case.

The cases cited by the Third District in Kropff are distinguishable. In Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932), the plaintiff was burned on her head by a beautician. That case points out that a gratuitous undertaking does not justify a lawsuit for non-feasance as compared to active neglect.

In Kerfoot v. Waychoff, 469 So.2d 960 (Fla. 4th DCA 1985), aff'd., 501 So.2d 588 (Fla. 1987), both the Fourth District and this Court were very hesitant to create any expansive "assumed duty" on the part of one driver who waives another driver through an intersection. This Court attempted to limit the Kerfott case to its facts. If it is precedent for anything, it is precedent for the concept that assumed duties should be narrowly and cautiously created.

In Barfield v. Langley, 432 So.2d 748 (Fla. 2d DCA 1983), the defendants were baby sitting the plaintiff's child. Certainly, that is a relationship which creates reasonable reliance.

In Kaufman v. A-1 Bus Lines, Inc., 416 So.2d 863 (Fla. 3d DCA 1982), there was a question of fact as to whether the bus lines were merely providing bus service or also a tour guide. That decision does not appear to be comparable to this case.

In Padgett v. School Board of Escambia County, 395 So.2d 584 (Fla. 1st DCA 1981), the school system had voluntarily undertaken to provide flashing lights at a school crossing. Once that practice had been established, parents of children certainly

had a reasonable right to rely upon the undertaking. The Padgett case would appear to involve a Class III or Class IV function rather than a Class II function under Trianon Park.

The Plaintiff argues that the deputy sheriff owed a legal duty under Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982) to warn of a "known danger". The analysis for this argument is better supplied in City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982). Concerning a Class III function, this Court held that:

> "When a governmental entity creates a known dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger." 419 So.2d at 1083. (emphasis original)

First, it is not obvious to the undersigned attorney that this rule should apply to short-term Class II police activities as compared to buildings and improvements created by the State. Even if this rule applies, as a matter of law, it should be "readily apparent" to any licensed driver that standing between two automobiles creates a risk of injury. One does not need a police officer or another adult to disclose the open and obvious possibilities created by that position.

Finally, the Plaintiff argues that this case somehow arises out of the operation of a motor vehicle. Admittedly, the police vehicle is the billiard ball which strikes the Plaintiff. At least for the liberal purposes of an insurance policy, the

accident may arise out of the ownership of the police vehicle. The State, of course, has not waived sovereign immunity concerning liability under the dangerous instrumentality doctrine. Rabideau v. State, 409 So.2d 1045 (Fla. 1982). The Plaintiff's fundamental complaint arises out of the deputy's decision to enforce the traffic laws. Under the common law, the Plaintiff is entitled to be protected from false arrest and from the intentional tort of assault and battery. Especially when he selects the specific location in which his car is stopped, he has no legitimate expectation that the police will protect him from a motor vehicle accident arising out of the negligence of a third-party.

II.

CHAPTER 87-134, LAWS OF FLORIDA, HAS ESSENTIALLY OVERRULED AVALLONE V. BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY, 493 SO.2D 1002 (FLA. 1986).

The Amicus agrees with the Second District Court of Appeal that the purchase of liability insurance does not create legal duties where such duties do not otherwise exist. Kaisner v. Kolb, 509 So.2d 1213, 1220 (Fla. 2d DCA 1987). This Court has correctly held that the waiver of the affirmative defense of sovereign immunity does not establish any new duty of care for governmental entities. Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985). It should be equally apparent that the purchase of insurance coverage in conjunction with the waiver of sovereign immunity does not establish any new duty of care for governmental entities.

The Amicus would comment that an ambiguity does exist in the case law concerning the discretionary, planning-level analysis discussed in Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979) and in Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985). In Commercial Carrier, the four-prong test obtained from Evangelical United Bretheren v. State, 67 Wash.2d 246, 407 P.2d 440 (1965) and the policy analysis recommended in Johnson v. State, 69 Cal.2d 782, 72 Cal.Rptr. 740, 447 P.2d 352 (1968) were recommended as an analysis to determine if a claim could be made

under Section 768.28, Florida Statutes. From that decision, one could have the impression that these tests are utilized concerning the affirmative defense of sovereign immunity after a duty has been established.

The discussion in Trianon Park, however refers to the Commercial Carrier analysis in determining when functions are inherently governmental. 468 So.2d at 918. This Court seemed to use that analysis in creating the four categories in which various duties either exist or do not exist.

Since the decision to create a legal duty depends upon a balancing of many public-policy factors, it is sensible that some of the Commercial Carrier analysis may be employed in the process of determining the existence of a governmental duty. The distinction between the creation of a governmental duty and the elements of the affirmative defense of sovereign immunity may inevitably blur in some cases. Unless and until the Legislature enacts a statute creating a duty owing by governmental entities concerning inherently governmental action as well as actions comparable to private individuals, there should exist many areas of governmental activity which simply do not create legal duties.

As a practical matter, the Avallone decision has been essentially overruled by the Florida Legislature. In Chapter 87-134, Laws of Florida, the Legislature repealed both Section 286.28, Florida Statutes and Section 30.55, Florida Statutes. Chapter 87-134, §4, Laws of Florida. In addition to repealing the above-referenced sections, Chapter 87-134 added language to

Section 768.28(5) which provides that the purchase of insurance coverage is not deemed to be a waiver of any defense of sovereign immunity or to have increased the limits of liability for the governmental entity.

Chapter 87-134 was expressly adopted by the Legislature to take effect upon becoming law and:

> ". . . shall apply to all causes of action then pending or thereafter filed, but shall not apply to any cause of action to which a final judgment has been rendered or in which the jury has returned a verdict unless such judgment or verdict has been or shall be reversed." Chapter 87-134, §5, Laws of Florida.

On its face, this legislative enactment is very clearly intended to apply "retroactively" to pending cases. Although a final judgment has been rendered in this case, if this Court reversed the judgment, the Legislature clearly intends for the new enactment to apply.

The Plaintiff may raise a question concerning the constitutionality of the retroactive application of this new statutory provision. It is true that this Court in Rupp v. Bryant, 417 So.2d 658 (Fla. 1982) held unconstitutional a retroactive amendment to Section 768.28, Florida Statutes. That Legislative amendment, however, eliminated a cause of action against governmental employees. Typically, a statute cannot retroactively destroy vested rights.

Chapter 87-134, Laws of Florida, however, does not eliminate a cause of action against the State or against a governmental employee. It merely alters the Plaintiff's remedy. In order to receive payment in excess of the legislative cap, the Legislature now requires that the case be reviewed by the Legislature through a claims bill.

Changes in procedures and remedies can constitutionally be applied in a retroactive fashion. Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978) (retroactively applying uniform contribution among joint tortfeasors); Senfeld v. Bank of Nova Scotia Trust Co., 450 So.2d 1157 (Fla. 3d DCA 1984) (retroactively applying a trebled damages statute); Fogg v. Southeast Bank, N.A., 473 So.2d 1352 (Fla. 4th DCA 1985) (retroactively exempting a mortgage from a forfeiture concerning balloon mortgages); Tel Service Co. v. General Capital Corporation, 227 So.2d 667 (Fla. 1969); City of Orlando v. Desjardines, 493 So.2d 1027 (Fla. 1986).

Even if the new statute were not regarded as purely remedial in nature, the rule concerning retroactive application of statutes is not absolute. The analysis involves a weighing process. State, Department of Transportation v. Knowles, 402 So.2d 115 (Fla. 1981). When suits exist only because the state has permitted itself to be sued, the state should be free to constitutionally limit the relief and require legislative

approval of all awards over specified limitations. Because of this new enactment, the Avallone issues in this case should be moot.

CONCLUSION

This Court should affirm the decision issued by the Second District. The enforcement of laws is an inherently governmental activity. When a citizen is injured by the negligence of a third-party, the citizen should not have an action in tort against a policeman unless the policeman creates a relationship which would reasonably allow the citizen to rely upon the police officer for protection from the negligence of another. In a typical stop of a citizen concerning a traffic infraction, such a relationship does not exist as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 1st day of February, 1988 to Daniel C. Kasaris, Esquire, Post Office Box 4192, St. Petersburg, Florida 33731; Jeffrey Fuller, Esquire and Rex Delcamp, Esquire, Post Office Box 12349, St. Petersburg, Florida 33733.

ATTORNEY