2-27 B/A 4-1-88 23

IN THE SUPREME COURT
STATE OF FLORIDA

GLENN KAISNER and
BARBARA KAISNER, his wife,
Petitioners,

vs.

GARY JOSEPH KOLB,
PINELLAS COUNTY SHERIFF'S
DEPARTMENT, AMERICAN DRUGGISTS
INSURANCE COMPANY, a foreign
corporation, and DALE ROBERT
JONES,
Respondents.
_____/

Supreme Court No. 71,121

District Court of
Appeal No. 85-2507

RESPONDENTS ANSWER BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

Respondents, GARY JOSEPH KOLB, PINELLAS COUNTY SHERIFF'S DEPARTMENT, AMERICAN DRUGGISTS INSURANCE COMPANY, a foreign corportion, and DALE ROBERT JONES, adopt the statement of the case and of the facts contained in the Second District's opinion Kaisner v. Kolb, 509 So2d 1213 (Fla. 2d DCA 1987).

Respondents would emphasize that Petitioner, GLENN KAISNER, was never instructed by the Respondent deputies to exit his vehicle and walk between the two vehicles. (R. 148,153,167) No more than three minutes elapsed from the time Mr. Kaisner was stopped to the time the collision occurred. (R. 143)

In the deposition of plaintiff's expert, GEORGE KIRKHAM, Dr. Kirkham testified that both discretion and training are very important in the conduct of a traffic stop. (R. 193) Deputy Kolb also testified that traffic stops involved the officer's discretion. (R. 138)

SUMMARY OF ARGUMENT

Deputies KOLB and JONES owed no duty of care to the Petitioner, GLENN KAISNER. Police officers have never owed a common law duty of care to an individual while exercising the discretionary judgmental power to enforce the law. The enactment by the Florida Legislature of §768.28, Florida Statutes, did not create any previously unrecognized cause of action, but simply waived sovereign immunity which barred recovery for then existing common law duties of care. Because the Respondent deputies owed no duty of care, Petitioner cannot state a cause of action which would give rise to liability to which the affirmative defense of sovereign immunity would apply.

Even if such a duty of care was owed by Respondents, Deputies KOLB and JONES should not have been sued individually because Petitioner's cause of action was barred by §768.28(9)(a), Florida Statutes. Although Petitioner's cause of action may have accrued prior to the effective date of said statute, application of the statute to the instant case would not constitute an unconstitutional retroactive application of the statute because no substantive right of Petitioner would be affected thereby. Furthermore, any duty owed by the individual deputies is a general duty owed solely to the public at large, the negligent performance of which cannot give rise to individual liability.

Finally, Avallone v. Board of County Commissioners, 493 So2d 1002 (Fla. 1986), was essentially overruled by the Florida Legislature's enactment of 87-137, Laws of Florida. Because the affirmative defense of sovereign immunity is not at issue, however, Avallone is inapplicable to this case.

ARGUMENT

RESPONDENTS ARE NOT SUBJECT TO SUIT BY PETITIONERS FOR THE DISCRETIONARY ACTIONS OF THE RESPONDENT DEPUTIES IN CONDUCTING AN INVESTIGATORY TRAFFIC STOP.

Petitioners correctly note that the initial inquiry for the Court is whether the Respondent Sheriff's Department and deputies owed a duty to the Petitioner, GLENN KAISNER. This Honorable Court answered that question in Trianon Park Condominium v. City of Hialeah, 468 So2d 912 (Fla. 1985), when it held, "there has never been a common law duty to individual citizens for the enforcement of police power functions." Id at 914 and 915.

In Trianon Park, the Court catagorized governmental functions and activities into four categories: "(I) legislative, permitting, licensing and executive officer functions; (II) enforcement of laws and the protection of the public safety; (III) capital improvements and property control operation; and (IV) providing professional, educational and general services for the health and welfare of the citizens." Id at 919. The Court further elaborated that:

> We find . . . no governmental tort liability for the action or inaction of governmental officials or employees in carrying out the discretionary governmental functions described in categories I and II because there has never been a common law duty of care with respect to these legislative, executive, and police power functions, and the statutory waiver of sovereign immunity did not create a new duty of care. On the other hand,

> there may be substantial governmental liability under categories III and IV. This result follows because there is a common law duty of care regarding how properties are maintained and operated and how professional and general services are performed.

Id at 921. The Court, however, added:

> The lack of a common law duty for exercising a discretionary police power function must . . . be distinguished from existing common law duties of care applicable to the same officials or employees in the operation of motor vehicles or the handling of firearms during the course of their employment to enforce compliance with the law. In these latter circumstances there has always been a common law duty of care and the waiver of sovereign immunity now allows actions against all governmental entities for violations of those duties of care.

Id at 920.

Although the Respondent deputies used an automobile to conduct an investigatory traffic stop of the Petitioner, it is not the operation of the motor vehicle for which the Petitioners contend a duty exists. The essence of the Petitioners' claims involves the Respondent deputies' decision to stop Petitioners where they did, and the manner in which the investigatory traffic stop was conducted. Deputy KOLB testified, and the Petitioner's expert even admitted, that such a traffic stop necessarily involves the professional judgment and discretion of the law enforcement officer. In Trianon Park, supra, and Everton v. Willard, 468 So.2d 936 (Fla. 1985), this Court made clear that such "discretionary power is considered basic to the police power function of governmental entities and is recognized as critical to a law

enforcement officer's ability to carry out his duties", for which a common law duty of care has never been owed to an individual. Everton, at 938.

The Court concluded as follows:

> . . . If a governmental entity is going to be held liable for the negligent discretionary, judgmental decisions made by its police officers in enforcing the law, this means of accountability by tort liability should be imposed by the elected representatives in the legislative branch who may create this new duty of care and place this fiscal responsibility on the governmental entity and its taxpayors, rather than having the judiciary establish this new duty by judicial fiat.

Everton, at 939. For the Court to find such a duty:

> Would represent an unconstitutional intrusion by the judiciary into the discretionary judgmental functions of both the legislative and executive branches of government.

Trianon Park, at 923.

Despite this Court's pronouncement that no duty exists, Petitioners vainly grasp at a variety of straw duties which they must assume this Court has overlooked. Petitioners cite §314A of the Restatement (Second) of Torts which provides in subpart (4) "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 opportunities for protection is under a similar duty to the others."

The foregoing proposition forms the basis for the decision in Walston v. Florida Highway Patrol, 429 So.2d 1322 (Fla. 5th DCA 1983). Walston, with which the Second District Court of Appeal expressly and directly disagreed in the instant case, Kaisner v. Kolb, 509 So.2d

1213 (Fla. 2nd DCA 1987), held that the defendant law enforcement officers owed the same duty of care to an intoxicated driver whom they had arrested as an intoxicated passenger who was not taken into custody but who remained at the scene and was injured. Respondents submit that the 5th District Court of Appeal in Walston incorrectly held a duty of care was owed to the intoxicated passenger who was not taken into custody.

The correct analysis and conclusion in Walston can be found in the concurring/dissenting opinion of Judge Cowart who notes that the officers owed no duty to protect the passenger who was not arrested nor taken into custody, and who had been told to leave. The intoxicated driver who was arrested and taken into custody was deprived of the normal opportunity to protect himself and therefore, pursuant to §314A, Restatement (Second) of Torts, was owed a duty of care by the arresting officer. The passenger who was not arrested, however, was not in any way deprived by the law enforcement officers of his ability to protect himself. The Fifth District Court of Appeals was incorrect in holding a duty of care was owed to that individual.

Similarly, the Petitioner in the instant case was not under arrest nor in custody, and in fact walked to his position of peril on his own without direction by either of the Respondent deputies. Petitioner suggests that he was told to "stay right there" and that he could have been charged with obstruction or "fleeing and

eluding" had he taken a step in any direction. The only authority suggested for this proposition, M.C. v. State, 450 So2d 336 (Fla. 5th DCA 1984) involved an investigatory stop of a person who attempted to flee or avoid detention, not someone seeking to avoid bodily injury from a speeding automobile. Petitioner was not in custody and had every right to protect himself against bodily injury caused by third parties.

Petitioners cite a variety of appellate decisions which purport to hold a police officer to a duty of care in the "performance of his job". In City of North Bay Village v. Braelow, 469 So2d 870 (Fla. 3rd DCA 1985), however, the officers were arresting the plaintiff. In Overby v. Willie, 411 So2d 1331 (Fla. 4th DCA 1982), an arrestee was allowed to commit suicide. Both Braelow and Overby obviously involve persons in custody to whom a duty of care would apply. In Sintros v. LaValle, 406 So.2d 483 (Fla. 5th DCA 1981), a law enforcement officer was found to owe a duty of care when driving his vehicle, action clearly recognized by this Court in Trianon Park, supra, as giving rise to a duty of care. Finally, Petitioners cite Weissberg v. City of Miami Beach, 383 So.2d 1158 (Fla. 3rd DCA 1980) in which the officer failed to follow an established municipal procedure regarding direction of traffic at a work site and not involving any discretionary law enforcement function.

Petitioner next seizes upon a legal maxim suggesting "any action undertaken, even gratuitously,

must be performed with an obligation to provide reasonable care." It must be noted that Petitioners leave out the key phrase appearing in all the cases cited as authority for this proposition, that the action is undertaken "for the benefit of another". This Court has recognized that a common law duty of care to an individual has never been owed by a police officer enforcing the law. Everton, at 938. Everton does note, however, that a "special relationship" between an individual and a governmental entity might give rise to a duty of care to an individual in a situation suggesting reliance by the individual.

> This relationship is illustrated by the situation in which the police accept the responsibility to protect a particular person who has assisted them in the arrest or prosecution of criminal defendants and the individual is in danger due to that assistance.

Everton, at 938. Such a special relationship was recognized in the recent case of Hartley v. Floyd, 12 FLW 2098, ____ So2d ____ (Fla. 1st DCA 1987), in which a deputy sheriff advised the plaintiff he would check a boat ramp and notify the Coast Guard regarding the plaintiff's missing husband, and then failed to do so. The Court held that the deputy's agreement to check the boat ramp and notify the Coast Guard, upon which the plaintiff relied, gave rise to a duty to perform the agreed task. In the instant case, however, no such agreement by Respondents or reliance by Petitioners is present.

Of all the cases cited in support of the proposition that an action undertaken for the benefit of another gives rise to a duty of care, the only case

involving a law enforcement officer is State of Florida, Department of Highway Safety and Motor Vehicles v. Kropff, 491 So2d 1252 (Fla. 3rd DCA 1986). In addition to the multiple distinguishing features noted by the Second District Court of Appeal in Kaisner v. Kolb, supra, it is further noted that the State Trooper in Kropff violated the Florida Highway Patrol's own guidelines as in Rupp v. Bryant, 417 So2d 658 (Fla. 1982) and Weissberg, supra. Discretion was not involved.

In the instant case Deputy KOLB testified that the investigatory traffic stop in question involved discretion and this was borne out by the testimony of Petitioner's own expert witness who cited no regulation of the Respondent Sheriff's Department which had been violated.

Petitioners next attempt to impose a duty upon the Respondent deputies to warn Petitioner of a known danger. Again Petitioners omit a key qualifying phrase from the rule of law which they contend imposes a duty of care upon Respondents. In City of St. Petersburg v. Collom, 419 So2d 1082 (Fla. 1982), this Court held that a duty to warn or protect the public arises from the creation of a known dangerous condition "which is not readily apparent to persons who could be injured by that condition". Id, at 1083. This is important because Petitioner, GLENN KAISNER, was well aware that he was stopped ahead of a Sheriff's Department vehicle in an active lane of traffic. Any 16 year old who has taken

a Driver's Education class knows better than to walk or stand between two parked vehicles. And because Petitioner was facing the deputies' vehicle, he was in a better position than the deputies to know of the danger, to wit: a third vehicle speeding up behind the deputies' vehicle. A cursory review of the authorities cited by Petitioners in support of this proposition, however, reveals that the cases are not remotely on point. All four of the cases cited by Petitioners pertain to construction, maintenance or operation of public areas and roadways, not investigating law enforcement officers.

Petitioners next contend that public policy favors the existence of a duty of care owed by Respondents to Petitioners. Petitioners claim that they will, otherwise, have no remedy for their injuries, apparently forgetting the driver of the third vehicle who was the proximate cause of the accident.

Petitioners argue that §30.07, Florida Statutes (1979) evidences a legislative intent to create such a duty. §30.07 only provides that the Sheriff is vicariously liable for the actionable conduct of his deputies; a statute enacted "for the benefit of the general public (does) not automatically create an independent duty to either individual citizens or a specific class of citizens." Trianon Park, at 917, citing Restatement (Second) of Torts §288, comment b (1964).

Petitioners then contend that this Court has held a Sheriff and his deputies are bound by the same rules

of negligence applicable to a civilian under like circumstances, citing Holland v. Mayes, 19 So2d 709 (Fla. 1944). In Holland, a law enforcement officer hunting with a posse shot one of the members in his search party, an activity (handling of firearms) clearly actionable under the common law as recognized in Trianon Park, supra.

Petitioners suggest that a finding of a duty in this case will send a "clear mandate to police officers" and an incentive for political subdivisions to protect the public during traffic stops. The real message that will be sent, however, is that a police officer should never pull over a suspected traffic violator because the officer will be held liable for any injury caused by third parties during the course of the traffic stop. Public policy, contrary to Petitioners' position, favors an independent executive branch which can effectively enforce the laws without fear of judicial interference. Advancement of any such public policy is more properly delegated to the legislature, as recognized in Everton v. Willard, supra. It is important to note that as of the present time, the legislature has failed to impose such a duty on law enforcement officers as that urged by Petitioners.

Petitioners cite cases from four foreign jurisdictions, apparently ignoring the several foreign jurisdictions cited to the contrary in Commercial Carrier, supra, and suggest a trend toward the imposition of a duty of care to individuals upon investigating law

enforcement officers. Two of the cases did not even involve the question of whether a duty existed, but rather whether a state statute was violated by the investigating officer. Ryan v. State, 656 P2d 597 (1982), abrogated Arizona's "no-duty rule", but Petitioners fail to note that Ryan was expressly rejected by this Court three years later in Everton v. Willard, supra.

THE INDIVIDUAL RESPONDENT DEPUTIES ARE NOT SUBJECT TO SUIT FOR THEIR DISCRETIONARY ACTIONS IN CONDUCTING AN INVESTIGATORY TRAFFIC STOP.

Petitioners contend that the Respondent deputies were properly named as parties citing Rupp v. Bryant, supra. Rupp held that the enactment of §768.28(9), Florida Statutes (1980), after the plaintiff's cause of action had accrued prohibited the application of that statute to prevent the plaintiff from executing his judgment against an employee of the defendant school board. The Court held that retroactive application of the statute would deny that plaintiff a substantive right which was vested prior to enactment of the statute. Justice Overton's special concurrence makes clear that

> for all actions commenced after June 30, 1980, §768.28(9), as amended, provides that the employee or official is personally immune from suit for ordinary negligence in the performance of governmental employment and that the action may be maintained only against governmental entity.

Rupp, at 671. Because the instant action was commenced on August 6, 1980, and Petitioner's complaint never alleged anything more than ordinary negligence on the part of the Respondent deputies, KOLB and JONES should not have been sued individually.

The amendment to which Justice Overton referred in his special concurrence, §768.28(9)(a), Florida Statutes (Supp. 1980), did not affect any of Petitioners' vested substantive rights. When the Petitioners' cause of action accrued they only had the right to sue the individual deputies, (assuming the existence of a duty),

not to execute any judgment against the deputies. Because no substantive right was affected by enactment of §768.28(9)(a), retroactive application of the statute to this cause is constitutionally permissible. Village of El Portal v. City of Miami Shores, 362 So2d 275 (Fla. 1978).

It should also be noted that in rejecting the legal standards set forth in Modlin v. City of Miami Beach, 201 So2d 70 (Fla. 1967), Commercial Carrier, supra, did not deal with personal liability and immunity of officers and employees. Those standards "thus survive Commercial Carrier and are the standards by which (individual officers and employees') rights are to be measured." Rupp v. Bryant, at 662 and 663. According to the Modlin doctrine, because the Respondent deputies did not owe a "special duty" to the Petitioners, but rather a general duty solely to the public, the Respondent deputies cannot be held accountable to Petitioners. Rupp v. Bryant, supra.

THE FLORIDA LEGISLATURE HAS ESSENTIALLY OVERRULED AVALLONE v. BOARD OF COUNTY COMMISSIONERS, 493 So2d 1002 (Fla. 1986) BY THE ENACTMENT OF 87-137, LAWS OF FLORIDA.

Petitioners finally contend, citing Avallone v. Board of County Commissioners, 493 So2d 1002 (Fla. 1986), that because the Respondent Sheriff's Department had insurance coverage, the sovereign immunity defense is void. As indicated above, however, because the Respondents never owed a duty to Petitioners, no cause of action is stated and the affirmative defense of sovereign immunity never becomes applicable. Furthermore, the recent enactment of 87-137, Laws of Florida, essentially overrules Avallone. 87-137, which by its own terms applies to the instant case, repeals Sections 286.28 and 30.55, Florida Statutes, a development apparently overlooked by Petitioners.

Petitioners also cite in support of this proposition Jozwiak v. Leonard, 504 So2d 1260 (Fla. 1st DCA 1986). Petitioners apparently did not realize that the issue in Jozwiak is totally irrelevant to the issues in the instant case and that this Court has more recently rendered an opinion in that case. Jozwiak v. Leonard, 12 FLW 513, (____ So2d ____) (Fla. 1987).

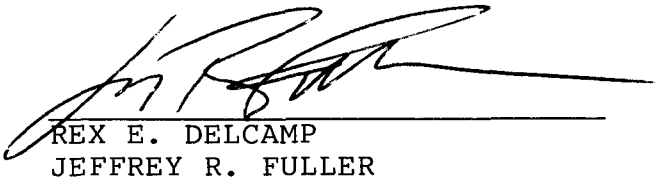
The Legislature's repeal of Sections 286.28 and 30.55, Florida Statutes, should provide evidence that the intent of the Legislature in enacting §768.28, Florida Statutes, was not to subject all governmental functions to tort liability. The repeal is further illustration

that if the Legislature wishes to impose the duty of care urged by Petitioners upon law enforcement officers, it has the will and the means to do so.

CONCLUSION

The Respondent Sheriff's Department and deputies owed no duty of care to Petitioners for their discretionary actions in conducting an investigatory traffic stop. Respondents, therefore, respectfully request this Honorable Court to affirm the decisions of the trial Court and Second District Court of Appeal in the instant case.

Respectfully submitted,



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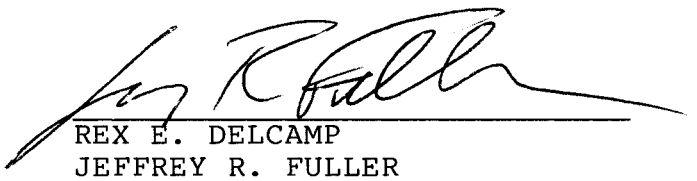
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 2nd day of February, 1988, to DANIEL C. KASARIS, Attorney for Petitioners/ Appellants, P.O. Box 4192, St. Petersburg, Florida 33731, ROBERT KING HIGH, JR. and ROBERT M. ERVIN, JR., Attorneys on behalf of the Academy of Florida Trial Lawyers, P.O. Drawer 1170, Tallahassee, Florida 32302 and to CHRIS W. ALTENBERND, Attorney for Amicus, Florida Sheriff's Self-Insurance Fund, P.O. Box 1438, Tampa, Florida 33601.



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