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IN THE SUPREME COURT OF THE STATE OF FLORIDA

DISTRICT COURT APPEAL NO. 85-2507

71,121

GLENN KAISNER and
BARBARA KAISNER, his wife,

Plaintiffs/Appellants,

vs.

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.



APPEAL FROM THE SECOND DISTRICT,
STATE OF FLORIDA

APPELLANTS GLENN KAISNER and BARBARA KAISNER, his wife

**INITIAL BRIEF OF APPELLANTS**

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## STATEMENT OF CASE AND FACTS

This is an action predicated upon the alleged negligence of two Pinellas County Sheriff's Deputies in their operation and use of a police vehicle, as well as their alleged negligent placement of a detainee in a perilous position during a non-emergency traffic stop. (R. 59-66) The Plaintiffs/Appellants, Mr. and Mrs. Glenn Kaisner, instituted appellate proceedings after the Honorable Trial Judge granted a Motion for Summary Judgment in favor of all Defendants, based upon the doctrine of sovereign immunity. (R. 116)

On Friday, June 29, 1979, at approximately 5:30 p.m., Glenn Kaisner was travelling south on 66th Street in St. Petersburg in the curb lane. He was operating a pickup truck with his wife, Barbara Kaisner, in the passenger seat, and five children in the back. (R. 153-154) At said time and place, he was stopped by two Pinellas County Sheriff's Deputies for an expired inspection sticker. (R 134)

The traffic stop was made in the curb lane of through traffic, and was effectuated through the use of the cruiser's overhead flashing lights, as well as the siren. (R. 134) The driver of the cruiser, Deputy Kolb, positioned the cruiser approximately one car length behind Mr. Kaisner's pickup truck. (R. 139) Upon being stopped, Mr. Kaisner exited his vehicle and walked between the two vehicles. At that time, Deputy Jones exited from the passenger side of the cruiser and instructed Mr.

Kaisner to "stay right there". (R. 153-154) Deputy Jones then got back into the passenger side of the police cruiser, where Deputy Kolb was performing a registration check with the cruiser's computer. (R. 141)

A couple of minutes later, Deputy Jones again exited from the passenger side of the cruiser and began moving toward Mr. Kaisner. Simultaneously, Mr. Kaisner began moving toward Deputy Jones to ask why he had been stopped. At that moment, the police cruiser was struck from the rear by a vehicle operated by Darla Jean Murray. (R. 154) The impact propelled the police cruiser forward, causing it to strike Mr. Kaisner, Deputy Jones, and the rear of the pickup truck.

The Kaisners brought action against Deputies Kolb and Jones, the Pinellas County Sheriff's Department, and American Druggist Insurance Company, insurer of the police cruiser. (R. 59-66)

The Second Amended Complaint alleges that the Deputies, while in the course and scope of their employment, were negligent in their use and operation of the police cruiser, as well as in their failure to use proper police procedure in conducting a non-emergency traffic stop. (R. 59-66) The Plaintiffs' allegations are supported in the record by the affidavit and deposition of Dr. George Kirkham, an expert in the field of police procedure. In Dr. Kirkham's opinion, the deputies' negligence proximately caused the Kaisners' losses because the deputies failed to effectuate the

stop at a safer location where the normal flow of traffic would not be impeded, they allowed Mr. Kaisner to stand between his pickup truck and the police cruiser, and the deputies were not properly trained to conduct non-emergency traffic stops. (R. 18-24, 174-194) Upon motion of the Defendants, the Honorable Trial Judge granted summary judgment in favor of all Defendants, based upon the doctrine of sovereign immunity, (R. 116) and the Plaintiffs instituted the instant appeal. (R. 118) The Second District Court of Appeal affirmed on the basis that the deputies owed no duty of care to Mr. Kaisner (A-1) and denied the Kaisners' Motion for Rehearing. (A-2,3) This Honorable Court then granted jurisdiction and the Kaisners now seek reversal of the decisions of the trial court and Second District Court of Appeal.

It should be noted that a declaratory action was also filed in connection with the instant case to determine whether coverage was provided for Plaintiffs' losses under either a police professional liability policy, a motor vehicle policy covering the police cruiser, or both. The second district affirmed the Trial Court's decision that coverage was provided by both policies. Kolb v. Kaisner, 437 So.2d 681 (Fla. 2d DCA 1983).

## QUESTIONS PRESENTED

I.

**DOES A POLICE OFFICER OWE A DUTY OF CARE TO HIS DETAINEE DURING NON-EMERGENCY TRAFFIC STOPS?**

II.

**ARE A POLICE OFFICER'S NEGLIGENT USE OF A POLICE CRUISER AND NEGLIGENT PLACEMENT OF A DETAINEE IN A KNOWN DANGEROUS POSITION OPERATIONAL FUNCTIONS?**

III.

**IS THE SOVEREIGN IMMUNITY DEFENSE VOID TO THE EXTENT OF APPLICABLE AUTOMOBILE AND PROFESSIONAL LIABILITY INSURANCE PURCHASED BY THE SHERIFF'S DEPARTMENT?**

## SUMMARY OF ARGUMENT

Deputies Kolb and Jones owed a common law duty to protect Mr. Kaisner from unreasonable risk of physical harm pursuant to the Restatement, Second, of Torts, Section 314A, because the circumstances were such that they deprived Mr. Kaisner of his normal opportunity for self-protection by ordering him to remain between the two vehicles.

After having made the decision to detain Mr. Kaisner, deputies Kolb and Jones owed a duty of reasonable care toward him. This is consistent with the well-settled principle that any action undertaken, even gratuitously, must be performed in accordance with an obligation to provide reasonable care.

The deputies created a dangerous condition by stopping Mr. Kaisner in a through lane of traffic on a busy highway at rush hour and by ordering him to remain between the two vehicles. Since the deputies were aware of this danger, they had a duty to warn Mr. Kaisner of same. The failure to so warn of a known danger is a negligent omission at the operational level of government.

Recognition of a duty of reasonable care owed by police officers to detainees during routine traffic stops is consistent with the public policy espoused by the legislature and will merely provide incentives for safer traffic stops. It will not interfere with the administration of justice, nor will it bankrupt governmental entities. Finding that a duty is owed will also be

consistent with decisions in other jurisdictions.

The deputies' negligent use of the police cruiser and negligent placement of a detainee in a known dangerous position are clearly operational functions. These acts do not involve any policy-making or quasi-judicial decisions. They merely implement the quasi-judicial decision to detain. As such, they cannot be anything but operational in nature.

Even if this Honorable Court finds the questioned acts to be planning level functions, the Pinellas County Sheriff's Department carried both automobile and professional liability insurance. Therefore, the sovereign immunity defense is void to the extent of such coverage.

For the foregoing reasons, the decisions of the trial judge and Second District Court of Appeal should be reversed. In the alternative, if the Court should find that the sovereign immunity defense applies, the decision of the Second District Court of Appeal should be reversed and this matter should be remanded to the trial court for further proceedings consistent with Avallone and Jozwiak.

## ARGUMENT

### I.

**A POLICE OFFICER ENGAGED IN A NON-EMERGENCY TRAFFIC STOP OWES A DUTY OF REASONABLE CARE TOWARD HIS DETAINEE.**

In Trianon Park Condominium Assn., Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985), this Court embraced its previous analysis of the law of sovereign immunity set forth in Commercial Carrier v. Indian River County, 371 So.2d 1010 (Fla. 1979), but emphasized that the legislature's waiver of sovereign immunity in Section 768.28 Fla. Stat. (1979) did not create any new duties where none previously existed. Therefore, as in any negligence action, the first inquiry herein must be whether some common law or statutory duty was owed to Mr. Kaisner by deputies Kolb and Jones.

The Restatement, Second, of Torts, Section 314A, is controlling as part of Florida's Common Law. s.2.01 et. seq., Fla. Stat. (1979). It provides as follows:

> **RESTATEMENT, SECOND, OF TORTS, SECTION 314A**
> **SPECIAL RELATIONS GIVING RISE TO A DUTY TO AID OR PROTECT**
>
> (1) A common carrier is under a duty to its passengers to take reasonable action
> (a) to protect them against unreasonable risk of physical harm, and
> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
> (2) An innkeeper is under a similar duty to his guests.
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his

> invitation.
> (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.

Deputies Kolb and Jones voluntarily took custody of Mr. Kaisner by conducting a routine traffic stop. In so doing, and further by ordering Mr. Kaisner to "stay right there" (R. 153-154) between his vehicle and the police cruiser, the deputies deprived Mr. Kaisner of his normal opportunity to protect himself. As a result, the deputies owed Mr. Kaisner a common law duty to protect him against unreasonable risk of physical harm.

The Fifth District Court of Appeal recognized that police officers owe a duty of care to their detainees in Walston v. Florida Highway Patrol, 429 So.2d 1322 (Fla. 5th DCA 1983). There the Plaintiffs were a driver and passenger of an automobile which had been stopped for suspicion of driving while intoxicated. Both the driver, Bartleman, and his passenger, Walston, had been drinking. The officers instructed Walston to leave the area, presumably on foot, and began field sobriety tests upon Bartleman. The officers required Bartleman to perform the tests between Bartleman's vehicle and the police cruiser, which were parked on a through lane of traffic. Instead of leaving, Walston followed Bartleman and the officers between the vehicles and both Walston and Bartleman were injured when the police cruiser was rearended. After a jury verdict favorable to the Plaintiffs, the trial court

entered a directed verdict in favor of the Highway Patrol, attributing the sole cause of the accident to the driver who rearended the police cruiser.

On appeal, the Highway Patrol conceded that the issue of foreseeability of an intervening cause presented a jury question. Gibson v. Avis Rent-A-Car Systems, Inc., 386 So.2d 520 (Fla. 1980). It argued, however, that no duty was owed by the officers to their detainees. The majority opinion, per Judge Cobb, was that the officers owed a duty to warn both Walston and Bartleman about the danger of standing between the two vehicles. In a concurring opinion, Judge Johnson stated that the officers owed a duty of reasonable care toward their detainees because the officers had stopped them, removed them from their vehicle, and proceeded to direct their movements.

In a concurring/dissenting opinion, Judge Cowart agreed with the majority opinion as it related to Bartleman, but not as to Walston. Judge Cowart concluded, in accordance with the Restatement, Second, of Torts, Section 314A, that the special relationship between the arresting officer and his arrestee gives rise to a duty to protect. In reaching this conclusion, Judge Cowart reasoned as follows:

> Every citizen normally has the right to make decisions about where he is and will remain and has the duty to look out for himself by apprehending danger and avoiding it. However, by virtue of an arrest, the citizen loses that right and duty and the officer gains it. The officer is to be obeyed: "Get out of the car;" "Stand over here;" "Get in the back of the

> police car;" "Get out and go into the police station." With the police officer's new right to direct and control the arrestee comes a concommitant duty to care for his safety. That duty varies with the situation and the need. If a situation is dangerous and the arrestee's ability to comprehend and react are impaired, the officer's duty is correspondingly increased. An officer who arrests and takes one into his custody, and under his direction and control, owes the arrestee a duty to use reasonable care for his safety and this duty reasonably includes the duty to not place the arrestee in, nor permit him to remain in, a place of foreseeable danger.

In reality, it makes no difference whether a suspect is actually arrested or is merely detained. He is still subject to the control of the investigating officer. Indeed, any detainee who refuses to obey an investigating officer's directives is subject to being charged with such crimes as obstructing an officer or fleeing and eluding. No citizen of this state with respect for the law would willfully disobey an officer's direct order, and the law should foster such conduct.

Deputies Kolb and Jones detained Mr. Kaisner and ordered him to "stay right there" (R. 153-154) between the two vehicles, thereby directing his movements. Deputy Kolb also admitted that he was aware of the danger of Mr. Kaisner standing between the two vehicles. (R. 143) Therefore, pursuant to all three theories of liability set forth in Walston, including the Restatement of Torts, s.314A, Deputies Kolb and Jones owed a duty of reasonable care toward Mr. Kaisner.

Other decisions in which courts have found a duty owed by

a police officer in the performance of his job are City of North Bay Village v. Braelow, 469 So.2d 870 (Fla. 3d DCA 1985) (negligence in conducting arrest); Overby v. Willie, 411 So.2d 1331 (Fla. 4th DCA 1982) (negligence in allowing prisoner to commit suicide); Sintros v. LaValle, 406 So.2d 483 (Fla. 5th DCA 1981) (negligent driving during police chase); and Weissberg v. City of Miami Beach, 383 So.2d 1158 (Fla. 3d DCA 1980) (negligent direction of traffic). These decisions demonstrate not only that officers owe a duty of care in the performance of their work, but also the applicability of the maxim which follows.

**A.**

**ANY ACTION UNDERTAKEN, EVEN GRATUITOUSLY, MUST BE PERFORMED WITH AN OBLIGATION TO PROVIDE REASONABLE CARE.**

It is well settled that an action undertaken, even gratuitously, must be performed in accordance with an obligation to provide reasonable care. State of Florida, Dept. of Highway Safety and Motor Vehicles, Division of Highway Patrol v. Kropff, 491 So.2d 1252 (Fla. 3d DCA 1986); Banfield v. Addington, 140 So. 893 (Fla. 1932); Kerfoot v. Waychoff, 469 So.2d 960 (Fla. 4th DCA 1985); Barfield v. Langley, 432 So.2d 748 (Fla. 2d DCA 1983); Kaufman v. A-1 Bus Lines, Inc., 416 So.2d 863 (Fla. 3d DCA 1982); Padgett v. School Board of Escambia County, 395 So.2d 584 (Fla. 1st DCA 1981); Restatement, Second, of Torts, ss. 323, 324.

In Kropff, supra, the Plaintiff was involved in an automobile accident in the westbound lanes of Kendall Drive. Ms.

Kropff and her witnesses flagged down a highway patrol officer who was travelling east on Kendall Drive. The trooper left his patrol car with its emergency lights flashing in the eastbound left turn lane of Kendall Drive, which was on the opposite side of the street from Kropff's vehicle. While accompanying the trooper to assist him in his investigation, Ms. Kropff was struck by a passing motorist. After the jury returned a verdict for Kropff, the State appealed on the basis of sovereign immunity and lack of any duty owed to Ms. Kropff.

The Third District Court of Appeal, per Judge Hendry, found that the trooper owed a duty of reasonable care to Ms. Kropff because an action undertaken, even gratuitously, must be performed in accordance with an obligation to provide reasonable care. Then, utilizing the test set forth in Commercial Carrier v. Indian River County, supra, the Court further held that the trooper's actions in securing the scene were operational in nature. Therefore, the State was not immune from suit for failure to properly secure the scene of an accident.

There is no discernible difference between an officer securing the scene of an accident, as opposed to securing the scene of a traffic stop. In both instances, the cost of carelessness can be the lives of innocent citizens and the officer is in the best position to minimize potential danger by utilizing his training and expertise in avoiding accidents. Therefore, once Deputies Kolb and Jones decided to detain Mr. Kaisner, they owed a duty to exercise

reasonable care toward him. According to Mr. Kaisner's expert, the deputies could have used reasonable care by choosing a safer location for the stop, by using the police cruiser's public address system to direct Mr. Kaisner to a safer area, by not ordering Mr. Kaisner to stand between the vehicles, and generally by being better trained in conducting non-emergency traffic stops. (R. 18-24, 174-194) All of these are operational level functions for which the sheriff's department is not immune.

**B.**

**DEPUTIES KOLB AND JONES OWED A DUTY TO WARN MR. KAISNER OF KNOWN DANGERS.**

Beginning with the Florida Supreme Court's decision in Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982), Florida courts have adhered to the principle that the doctrine of sovereign immunity does not shield a governmental entity from liability where its employees have created a known danger. Neilson involved allegations of negligence against the Florida Department of Transportation for the improper design and construction of a roadway and its traffic devices, as well as failure to warn motorists of the hazardous condition of the road. Although the Supreme Court upheld the Trial Judge's dismissal of the Complaint, it remanded to allow the Neilsons an opportunity to amend the Complaint by alleging that the Department of Transportation had created a known dangerous condition for which there was no proper warning. The Court, per Justice Overton, stated that the failure to so warn of a known danger is a negligent

omission at the operational level of government and cannot reasonably be argued within the judgmental, planning-level sphere. Id. at 1078.

Other Supreme Court decisions which have applied the known danger exception to sovereign immunity are Palm Beach County Board of Commissioners v. Salas, 12 FLW 388 (Fla. July 13, 1987); Ralph v. City of Daytona Beach, 471 So.2d 1 (Fla. 1983); and City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982). In Ralph, supra, the Court held that the City of Daytona Beach could be sued for allowing motorists to drive on a public beach and failing to warn sunbathers of the known danger created thereby. Likewise, in Collom, supra, this Court held that the City of St. Petersburg could be sued for failing to warn of the hazards created by the City's construction of a storm sewer without protective devices over its opening to prevent human beings from being swept into same during heavy rains. Most recently, in Salas, the government was found liable for failing to take reasonably necessary steps at a road maintenance work site to protect the safety of passing motorists.

The duties owed by deputies Kolb and Jones to Mr. Kaisner are no different from the duties found in Neilson, Salas, Ralph and Collom. By parking the police cruiser on a busy highway at rush hour within one car length of Mr. Kaisner's vehicle and by ordering him to remain between the two vehicles, the deputies exposed Mr. Kaisner to grave danger. Deputy Kolb admitted that he was aware of

this danger. (R. 143) Therefore, because the deputies created a known danger of which they failed to warn Mr. Kaisner, they breached a duty owed to Mr. Kaisner at the operational level of government.

C.

**PUBLIC POLICY FAVORS THE EXISTENCE OF A DUTY OWED BY DEPUTIES JONES AND KOLB TO MR. KAISNER.**

It has often been stated that there is a remedy for every wrong. Indeed, this maxim is one of the most fundamental principles in American jurisprudence. Unless this Court finds that the deputies owed a duty to Mr. Kaisner, he will have no remedy for the wrong committed by deputies Kolb and Jones.

The Florida legislature has stated its intent that the professional actions of deputy sheriffs be subject to judicial scrutiny by enacting s. 30.07 Fla. Stat. (1979). Said section provides that the sheriff shall be responsible for the neglect and default of deputies in the execution of their office. In Holland, for Use and Benefit of Williams, v. Mayes, 155 Fla. 129, 19 So.2d 709 (1944), the Florida Supreme Court held that a sheriff and his deputies are bound by the same rule of negligence that a civilian is bound by under like circumstances. Thus, deputies were held to the same standard as private persons even before the legislature waived sovereign immunity.

Recognition that a duty exists in this case will not only be a clear mandate to police officers, but will provide an

incentive for subdivisions of the state to make reasonable efforts to protect the public during traffic stops. Holding that police have a duty to use reasonable care toward detainees during traffic stops will place the burden on those best able to prevent such accidents from occurring in the first instance. The reasonable expectation of the community is that police will conduct routine, non-emergency traffic stops in a manner which will minimize the risk of injury to the detainee. Police are in a better position to prevent the occurrence of the kind of tragic loss suffered by the Kaisners, since they alone are in control of the persons and vehicles involved in a traffic stop. A police officer's order requiring a detainee to remain in a position of imminent peril leaves a detainee no means of protecting himself. Furthermore, police alone have both the expertise and power to recognize and alleviate the hazards involved in routine traffic stops. A "rational scheme of liability" that is "consistent with accepted tort principles and the reasonable expectations of the citizenry with respect to its government" calls for the finding of a duty in the circumstances of this case. Whitney v. City of Worchester, 373 Mass. 208, 366 N.E.2d 1210 (1977).

The legislative waiver of sovereign immunity has prompted the outcry of governmental entities which now perceive themselves as being vunerable targets of limitless claims and exorbitant jury damage awards. Such a rationalization is wholly unfounded. Its illogic was cogently expressed by Justice Keating of New York in

his dissenting opinion in Riss v. City of New York, 22 N.Y.2d at 583, 240 N.E.2d at 860, 293 N.Y.S.2d at 899. Legal principles such as proximate cause and foreseeability will operate to keep liability within reasonable bounds. Id. at 585, 240 N.E.2d at 863, 293 N.Y.S.2d at 901. Thus, the fear of financial disaster is a myth. No municipality has gone bankrupt because it had to respond in damages for the negligent conduct of its police officers. Id.

The legislature has also provided for ceilings which limit the amount a plaintiff may recover from a governmental entity. s. 768.28(5) Fla. Stat. (1979) provides a ceiling of $50,000 per person and $100,000 per accident. This paltry amount was raised to $100,000 per person and $200,000 per accident for claims which accrue after October 1, 1980, in order to more fairly balance the needs of persons injured through governmental negligence against the need for effective government. Another 1980 amendment provides that governmen employees may not be sued individually. s. 768.28(9) Fla. Stat. (1980) Since this cause of action accrued in 1979, the deputies were properly named as parties, contrary to the opinion of the court below. Rupp v. Bryant, 417 So.2d 658 (Fla. 1982) There is no reason to upset the delicate balance created by the legislature by holding that no duty exists herein.

The legislature has also authorized governmental entities to purchase liability insurance to further reduce their potential exposure. Liability insurance is readily available to governmental entities. Such coverage will reduce jury damage awards to costs

which are neither excessive nor burdensome. Note, Police Liability for Negligent Failure to Prevent Crime, 94 Harv. L. Rev. 821, 833 (1981). In any event, difficulty to pay has never been recognized to be a proper justification for denying compensation to innocent victims of negligent acts. To reach such a result would be a gross unfairness to the innocent plaintiff who would be forced to bear the entire burden of the costs of his losses.

A governmental entity generally possesses a loss bearing capacity superior to that of the victim. Since some mistakes in carrying out police procedures are certain to occur, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all taxpayers, than to allow its impact to be felt solely by those whose rights have been violated. Owen v. City of Independence, 445 U.S. 622 (1980). Thus, public policy strongly favors the existence of a duty owed by deputies Jones and Kolb to Mr. Kaisner.

**D.**

**THE COURTS OF OTHER JURISDICTIONS HAVE HELD THAT POLICE OFFICERS OWE A DUTY OF REASONABLE CARE TO PERSONS FORESEEABLY INJURED DUE TO THE OFFICER'S NEGLIGENCE IN CONDUCTING A TRAFFIC STOP.**

In Reed v. San Diego, 77 Cal.App.2d 860, 177 P.2d 21 (1947), police officers stopped the plaintiff for driving with bright lights in a dimout area. Although the plaintiff pulled his vehicle completely off the road, the police officers parked their cruiser with its rear portion protruding into the roadway. The plaintiff was injured while standing between the two vehicles

talking to the officers when the police cruiser was rearended. The Court held that whether the police officers negligently conducted the traffic stop was a question for the jury to determine.

In Kinsey v. Kenly, 263 N.C. 376, 139 S.E.2d 686 (1965), a passenger in a vehicle stopped by police was injured when a third vehicle struck the rear of the police cruiser, which then came into contact with the passenger, who had alighted from the stopped vehicle. As in Reed v. San Diego, supra, the Court found that whether the police officers negligently conducted the traffic stop was a question for the jury.

Other courts have gone even further than the holdings in Reed and Kinsey by finding that police officers have a duty of care to protect travelers on the highways. In Green v. Livermore, 117 Cal.App.3d 82, 172 Cal. Rptr. 461 (1981), a police officer left the keys in the vehicle of a drunk driver after arresting him. An intoxicated passenger then drove from the scene and collided with the plaintiff. The Court held that the police officer could be found negligent for leaving the keys in the drunk driver's vehicle.

The Arizona Supreme Court recently overruled its often-cited decision in Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969). Massengill involved claims arising out of a law enforcement officer's failure to take any action after following a weaving, erratically driven car for several miles. The intoxicated driver was involved in a fatal accident shortly thereafter. The Arizona court held that the officer had no duty to the dead and

injured. This holding was specifically overruled, and the no-duty rule abrogated, in Ryan v. State, 656 P.2d 597 (1982). See also Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984).

## II.

**THE NEGLIGENT USE OF A POLICE CRUISER AND THE NEGLIGENT PLACEMENT OF A DETAINEE IN A KNOWN DANGEROUS POSITION ARE OPERATIONAL FUNCTIONS FOR WHICH A GOVERNMENTAL ENTITY MAY BE HELD LIABLE IN TORT.**

In Commercial Carrier, supra, the Florida Supreme Court adopted the analysis of Johnson v. State, supra, which distinguishes between the "planning" and "operational" levels of decision-making by governmental agencies. In pursuance of this method of proceeding, the Court further commended utilization of the preliminary test developed in Evangelical United Brethren Church v. State, supra, as a "useful tool" for analysis. 371 So.2d at 1022. Under the Evangelical Church test, four preliminary questions must be clearly and unequivocally answered in the affirmative for the challenged act, omission or decision to be classified, with a reasonable degree of assurance, as a discretionary governmental process and non-tortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved. 407 P.2d at 445. The four preliminary questions are as follows:

> (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?

The two acts challenged herein are the Officers' negligent use of a police cruiser, as well as the Officers' negligence in ordering Mr. Kaisner to remain in a position of peril. The first Evangelical question can easily be answered in the negative with respect to these challenged acts because the use of a vehicle and the placement of detainees during a stop obviously do not involve any basic governmental policy, program or objective. However, assuming for purposes of argument that the challenged acts remotely involve the governmental policy of traffic control, requiring police officers to use due care in conducting traffic stops would have absolutely no effect upon the course or direction of the governmental policy of traffic control. This is so because traffic control can be accomplished by using safer methods than those employed herein, such as placing the police vehicle a greater distance behind the detainee's vehicle, admonishing the detainees not to stand between vehicles, or by simply requiring the detainee to stop in a parking lot or on a side street, rather than on a

major artery of traffic during a rush hour. Therefore, the second Evangelical question must be answered in the negative.

The third question may also be answered in the negative, because there is no basic policy evaluation or judgment required of a police officer when deciding whether to place his police cruiser in a particular location or in preventing a detainee from positioning himself between his vehicle and the police cruiser during a traffic stop on a busy highway. Appellants concede that the fourth Evangelical question may be answered in the affirmative because police officers obviously have authority to operate police cruisers and to direct detainees to remain in particular locations. However, simply because the police officers have such authority does not mean that their acts should not be subject to review.

As demonstrated above, three of the four Evangelical questions cannot be clearly and unequivocally answered in the affirmative. Therefore, pursuant to Commercial Carrier and Trianon, further inquiry is necessary under the standards set forth in Johnson v. State, supra.

The Johnson case distinguishes between planning and operational functions. The planning level functions are generally interpreted to be those requiring basic policy decisions, while operational level functions are those that implement policy. The Johnson Court developed three factors to assist in finding and isolating those areas of quasi-legislative policy making which are sufficiently sensitive to justify a blanket rule that courts will

not entertain a tort action alleging that careless conduct contributed to the governmental decision. 447 P.2d at 360-61. Those factors are the importance to the public of the function involved, the extent to which government liability may impair the free exercise of the function, and the availability of other remedies aside from tort suits. As applied to the facts herein, the Johnson factors reveal that the challenged acts of deputies Kolb and Jones were operational in nature, and hence are subject to judicial review. First of all, the Plaintiffs herein have no remedy aside from a tort suit against the governmental entity involved. Even a claims bill requires that a judgment be entered against the governmental entity before the legislature will consider same. Section 768.28(5), Fla. Stat. (1983). Further, the acts challenged herein are not important to the general public. This is so because although the public is interested in traffic control, it does not matter, except to passing motorists and to the person detained, how a police officer uses his cruiser during a stop and where he places the detainee.

Probably the most important of the Johnson factors is the extent to which governmental liability may impair free exercise of the governmental function involved. Trianon, supra. This is so because there is a strong public policy against hindering law enforcement by creating a chilling effect upon the officer's performance of his duty. It is this strong public policy which resulted in the Florida Supreme Court's decision granting immunity

to officers who are faced with a decision of whether or not to make an arrest or to take an individual into custody. Everton v. Willard, 468 So.2d 936 (Fla. 1985). The Everton decision is inapplicable herein, however, because it concerned the narrow question of whether or not a court may review a police officer's decision of whether to detain or arrest a suspect. The instant case concerns only the officers' negligent use of a police cruiser and negligent placement of a detainee, as opposed to a decision of whether or not to enforce the law. Allowing liability herein will not create a chilling effect upon the officer's performance of his duty because he will still be free to exercise his discretion in determining whether or not the laws have been broken and whether or not to detain a suspect in order to make such a determination. Allowing liability herein will merely require officers to exercise an appropriate degree of care when using motor vehicles or placing detainees in a particular location during traffic stops. Further, a finding of immunity for the acts complained of herein would produce absurd results. For instance, if a police officer, while conducting a field sobriety test, instructs the detainee to walk the line in the center of a roadway and the detainee is struck by a passing vehicle, the detainee would have no remedy if he is struck by a passing vehicle as a result. It is therefore clear that some review should be permitted of non-enforcement decisions of police officers. This would be consistent with the Florida Supreme Court's statement in Trianon, supra, that liability will attach for

an officer's negligence in such activities as the use of motor vehicles or the handling of firearms during the course of their employment to enforce compliance with the law. 468 So.2d at 920.

As demonstrated by the preceding argument, application of the test set forth in Trianon, supra, results in the inescapable conclusion that the acts complained of herein are operational functions for which the Plaintiffs should have a remedy. As such, judicial review of the acts complained of herein would not violate the separation of powers doctrine because the subject acts do not concern any basic policy making function of the executive branch of government. Therefore, the decisions of the Courts below should be reversed.

## III.

**TO THE EXTENT THAT INSURANCE COVERAGE APPLIES, THE SOVEREIGN IMMUNITY DEFENSE IS VOID.**

In a previous appeal, the Second District Court of Appeal upheld the Trial Court's declaratory judgment holding that both a police professional liability policy and a motor vehicle policy on the police cruiser provide coverage to the Kaisners. Kolb v. Kaisner, 437 So.2d 681 (Fla. 2d DCA 1983). In a recent decision, the Florida Supreme Court has held that the sovereign immunity defense is void to the extent that insurance coverage is provided by a policy purchased by the governmental entity pursuant to the authority granted in Section 286.28, Fla. Stat. Avallone v. Bd. of County Commissioners of Citrus County, et al., 493 So.2d 1002 (Fla. 1986). Said statute provides, inter alia, that political

subdivisions of the State, including counties, which own or lease and operate motor vehicles or perform operations in the state or elsewhere, are authorized to purchase insurance to cover liability for damages on account of bodily or personal injury or death.

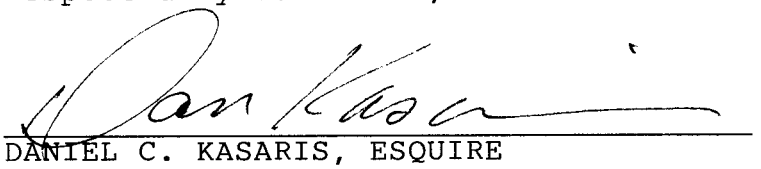
In another recent decision, the First District Court of Appeal has found that the reasoning set forth in Avallone, supra, is also inapplicable to insurance purchased by a sheriff pursuant to the authority granted in Section 30.55, Florida Statutes. Jozwiak v. Leonard, 504 So.2d 1260 (Fla. 1st DCA 1986). Said section provides, inter alia, that sheriffs are authorized to purchase insurance to cover damages for claims growing out of the performance of the duties of the sheriffs or their deputies and that the insured on such a policy shall not be entitled to the benefit of the defense of government immunity in any suit resulting against the sheriff or his deputies.

Since the insurance coverage applicable in the instant case was purchased pursuant to the authority granted by sections 286.28 and 30.55, Fla. Stat. (1979), the sovereign immunity defense is void to the extent of such coverage. Hence, even if the Honorable Trial Court's ruling is upheld, this matter should be remanded with instructions consistent with the opinions in Avallone, supra, and Jozwiak, supra.

## CONCLUSION

Police officers owe a duty of reasonable care at the operational level of government to their detainees during routine traffic stops. Therefore, the decisions of the trial judge and the district court of appeal should be reversed. In the alternative, if the Court finds the sovereign immunity defense applicable, the decision of the district court of appeal should be reversed and this cause should be remanded to the trial court for further proceedings consistent with Avallone and Jozwiak.

Respectfully submitted,



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