IN THE SUPREME COURT OF THE STATE OF FLORIDA

DISTRICT COURT APPEAL NO. 85-2507

GLENN KAISNER and
BARBARA KAISNER, his wife,

Appellee/Petitioner,

vs.

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

Appellants/Respondents.
_____/

APPEAL FROM THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, SECOND DISTRICT

PETITIONERS, GLENN KAISNER and BARBARA KAISNER, his wife

PETITIONERS' BRIEF ON JURISDICTION

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B.

DOES THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICT WITH AVALLONE AND ITS PROGENY, HOLDING THAT THE SOVEREIGN IMMUNITY DEFENSE IS INAPPLICABLE TO THE EXTENT THAT INSURANCE COVERAGE IS AVAILABLE?

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 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 George Kirkham, and expert in the field of police procedure. (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 (A-1) and denied the Kaisners' Motion for Rehearing. (A-2,3)

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).

SUMMARY OF ARGUMENT

When a person is detained by a police officer and ordered to remain in a perilous position, it should not matter whether the detainee is actually arrested or not. The fact that he feels compelled to obey the police officer is enough to place him under the officer's control and to deprive him of his normal opportunity for self-protection. The second district's creation of a distinction between a person who is arrested and one who is merely detained is in conflict with the fifth district's opinion in Walston v. Florida Highway Patrol, 429 So.2d 1322 (Fla. 5th DCA 1983) and with the third district's opinion in State of Florida, Department of Highway Safety v. Kropff, 491 So.2d 1252 (Fla. 3d DCA 1986), as well as numerous other cases holding that an action undertaken, even gratuitously, must be performed with an obligation to provide reasonable care.

Since the deputies herein did owe a duty to the Kaisners, the second district's opinion is also in conflict with Avallone v. Board of County Commissioners, 493 So.2d 1002 (Fla. 1986), and its progeny, holding that the sovereign immunity defense is void to the extent of any applicable insurance coverage. Therefore, this Honorable Court should accept jurisdiction of this matter in order to resolve the obvious conflicts with decisions of the Supreme Court and other district courts of appeal.

ARGUMENT

A. THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL WHICH HOLD THAT A POLICE OFFICER HAS A DUTY TO PROTECT PERSONS UNDER HIS CONTROL AT THE SCENE OF A TRAFFIC INVESTIGATION FROM UNREASONABLE RISK OF PHYSICAL HARM.

The decision of the Second District Court of Appeal is that a police officer owes no duty to a person who is under the officer's control as a result of having been detained for investigation of a traffic violation. As such, there is no doubt that the district court's decision is in conflict with the decision of the Fifth District Court of Appeal in Walston v. Florida Highway Patrol, 429 So.2d 1322 (Fla. 5th DCA 1983). In fact, Chief Judge Danahy's opinion even stated that..."We respectfully disagree with the result reached by the fifth district in Walston." (A-1 at 10)

The Plaintiffs in Walston brought action against the Highway Patrol for injuries sustained during the process of a police stop, when a third car struck the rear of the police cruiser, propelling it into Plaintiff's car, which was parked eight to ten feet in front of the cruiser while the officers and their detainees were standing between the cars. The Circuit Court granted a defense motion for judgment in accordance with its previous motion for directed verdict, and the Plaintiffs appealed. The Fifth District Court of Appeal, per Judge Cobb, reversed and remanded, for entry of a judgment in accordance with the jury

verdict, based upon its finding that the record contained sufficient information to submit the issue of foreseeability of intervening negligence of a third party to the jury. Thus, the majority found that a duty was owed by the officers to both the driver who was detained and the passenger who was asked to leave the area. In his concurring opinion, Judge Cowart determined that the true issue was what duty, if any, did the police officers owe to the Plaintiffs. He noted that it was necessary to approach the facts in this manner because the consideration of anything as an "intervening" cause presupposes or assumes negligence on the part of some other actor, which negligence must include the breach of some duty. Id. at 1325. Judge Cowart concluded, in accordance with the Restatement, Second, of Torts, Section 314A, (A-4) 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. Id. at 1326. 2dDCA Brief P. 10-11.

In the instant case, the Second District attempted to distinguish Walston, and s. 314A of the Restatement, Second, of Torts by its assertion that the mere stopping of the vehicle for a traffic law violation and further investigation does not constitute a "taking into custody". (A-1 at 9) Unfortunately, this resulted from the district court's failure to read the facts in the light most favorable to the Kaisners. At page 3 of its opinion, the district court stated that Deputy Jones told Mr. Kaisner "that he was not to approach any closer" when he was between his vehicle and the cruiser and attempting to approach the passenger side of the cruiser. At page 12, the court further stated that Mr. Kaisner "was not in any way required to stay between the vehicles by the instructions of Deputy Jones. The only direction from Deputy Jones was a cautionary one for Mr. Kaisner to come no closer to the officers..." The record, however, at page 153-154, reveals that Deputy Jones instructed Mr. Kaisner to "stay right there" when Mr. Kaisner was between the two vehicles. This fact is significant because it establishes that Mr. Kaisner was required to remain in a

perilous position and was deprived of his normal opportunity to protect himself. Were Mr. Kaisner told that he should not come any closer, he could have protected himself by moving to the sidewalk, so long as he did not go any closer to the cruiser. (This matter was raised on Motion for Rehearing, (A-2) which was denied by the district court, without comment. (A-3))

The decision below also conflicts with the opinion of the third district court of appeal in State of Florida, Dept. of Highway Safety and Motor Vehicles, Division of Highway Patrol v. Kropff, 11 FLW 1647 (3d DCA Aug. 8, 1986). In that case, the Plaintiff was injured as a result of being struck by a passing motorist due to the trooper's failure to properly secure the scene of an accident. After a substantial verdict in favor of Kropff, the State appealed on the grounds of sovereign immunity. Its first contention was that the State owed no duty to Kropff with respect to the trooper's conduct. The third district, per Judge Hendry, did not agree. The court reasoned that it was well-settled that an action undertaken, even gratuitously, must be performed in accordance with an obligation to provide reasonable care. The decision of the second district in the instant case conflicts with Kropff because the second district did not impose upon deputies Kolb and Jones a duty to act with reasonable care once they made the decision to secure the scene of the traffic stop.

Eder v. Dept. of Highway Safety and Motor Vehicles, 463 So.2d 443 (Fla. 4th DCA), review denied, 475 So.2d 694 (Fla. 1985)

also demonstrates that the fourth district would find a duty under facts similar to those herein. In Eder, the trooper came upon a non-functioning traffic light at an intersection and saw that motorists were not treating the light as a stop sign, as required by law. The trooper decided to issue citations, rather than direct traffic, and an accident occurred at the intersection while he was doing so. Although the court held the State immune, it added that an action for negligence would seem appropriate if the trooper had decided to direct traffic and had done so in a negligent manner. 463 So.2d at 444.

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). The decision of the second district court of appeal herein is in conflict with these decisions and should be reviewed and reversed in order to resolve said conflict.

B. THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH AVALLONE AND ITS PROGENY, HOLDING THAT THE SOVEREIGN IMMUNITY DEFENSE IS INAPPLICABLE TO THE EXTENT THAT INSURANCE COVERAGE IS AVAILABLE.

In Avallone v. Board of County Commissioners, 493 So.2d 1002 (Fla. 1986), the Florida Supreme Court held that the sovereign immunity defense is void to the extent of any applicable insurance coverage, regardless of whether such defense would be otherwise applicable. This decision was applied to the negligence of sheriff's deputies in Jozwiak v. Leonard, 504 So.2d 1260 (Fla. 1st DCA 1986).

In the instant case, the second district court of appeal held that Avallone and its progeny were inapplicable because the court found that no duty was owed and, as a result, the sovereign immunity defense was never reached. However, pursuant to the arguments set forth hereinabove, the Kaisners have shown that a common law duty was owed to them, pursuant to the Restatement, Second, of Torts, s. 314A. This common law duty is the same duty owed to a detainee by a store security guard. Hence, since a duty was owed to the Kaisners, Avallone and its progeny are applicable, contrary to the decision of the second district. Therefore, the decision below is in conflict with Avallone and its progeny and this Honorable Court should accept jurisdiction of this matter to resolve said conflict by reversing the decision of the court below.

CONCLUSION

The second district's decision obviously conflicts with decisions of the Supreme Court and other district courts of appeal. Therefore, this Honorable Court should accept jurisdiction of this matter in order to resolve said conflicts.

PAGE(S) MISSING

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was forwarded by U.S. Mail to JEFFREY R. FULLER, ESQUIRE, Attorney at Law, Post Office Box 12349, St. Petersburg, FL, 33733, counsel for Defendants/Respondents, this 18th day of September, 1987.

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