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

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

As stated in the Second District Court of Appeal's decision:

> Mr. and Mrs. Kaisner were driving their pickup truck along a major street in St. Petersburg in clear weather at approximately 5:30 p.m. on June 29, 1979. The two deputies were following the Kaisners. The deputies pulled the Kaisners over and stopped them in the curb lane of the street because the deputies suspected them of violating a traffic law. Deputy Kolb, the driver of the sheriff's patrol car, stopped his vehicle in the curb lane, approximately one to one-and-a-half car lengths behind appellants' vehicle. The deputy, who had used his siren and flashing lights to indicate to Mr. Kaisner to pull over, left the lights on top of his vehicle flashing throughout the stop and ensuing investigation. When he was stopped, Mr. Kaisner, without an order to do so, exited his truck and walked between the two vehicles. At the same time, the other officer in the patrol car, Deputy Jones, exited from the passenger side and after receiving the registration and license from Mr. Kaisner, indicated to him that he was not to approach any closer. Deputy Jones got back into the passenger side of the patrol car and handed the license and vehicle registration to Deputy Kolb who started to check them on his onboard computer. At that point, Deputy Jones again exited the patrol car moving toward Mr. Kaisner as Mr. Kaisner began again moving toward the deputy to ask why he had been stopped. At that moment, no more than three minutes after the stop, the patrol car was struck from the rear by another vehicle. The force of the crash propelled the patrol car forward, causing it to strike Mr. Kaisner and Deputy Jones, who were between the two vehicles.
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> In their complaint Mr. and Mrs. Kaisner alleged that the deputies were negligent while acting within the course and scope of their employment in their use and operation of the police patrol car, as well as in their failure to use proper police procedure in conducting a nonemergency traffic stop. The trial court granted summary judgment in favor of all defendants based upon the doctrine of sovereign immunity.

The Second District Court of Appeal affirmed the summary judgment in the opinion presently under consideration.

SUMMARY OF ARGUMENT

While the decision of the Second District Court of Appeal appears to 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), any such conflict does not warrant resolution by the Supreme Court because the majority opinion in this case and Judge Cowart's perceptive concurring/dissenting opinion in Walston are in agreement regarding the law applicable to the issue in this matter. As a practical matter, therefore, no confusion will result among the District Courts of Appeal in the State of Florida if the Supreme Court declines to exercise jurisdiction.

Furthermore, the decision of the Second District Court of Appeal in this matter does not expressly and directly conflict with any other decision of another District Court of Appeal, or the Supreme Court's decision in Avallone v. Board of County Commissioners, 493 So.2d 1002 (Fla. 1986), as asserted by the Petitioners.

ARGUMENT

POINT ON APPEAL

ALTHOUGH THE SECOND DISTRICT COURT OF APPEALS DECISION APPEARS TO CONFLICT WITH ANOTHER DECISION OF THE FIFTH DISTRICT COURT OF APPEAL (BUT NO OTHER), ANY SUCH CONFLICT DOES NOT WARRANT THE EXERCISE OF THE SUPREME COURT'S DISCRETIONARY JURISDICTION.

Petitioners urge this Honorable Court to exercise jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution, which provides that this Court has discretionary jurisdiction to review "any decision of a District Court of Appeal . . . that expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law."

Chief Judge Danahy's opinion in the instant case, without question, appears to expressly and directly conflict with the decision of the Fifth District Court of Appeal as noted on page 2 of the Petitioners' jurisdictional brief. Walston is distinguishable from the instant case inasmuch as Mr. Walston was led by the State Trooper to the area between the two cars where he was injured. The respondent Sheriff Deputies in the instant case were sitting in their patrol car when Mr. Kaisner voluntarily exited his vehicle and walked to the area between the two vehicles where he was injured. Despite the apparent express and direct conflict between the decisions of the two District Courts of Appeal, the Supreme Court need not exercise its discretionary jurisdiction to resolve the apparent conflict. While the decision in Walston must generally assume the existence of

a duty to decide that the State Trooper's negligence was a jury question, the instant decision and Judge Cowart's concurring/dissenting opinion in Walston specifically and persuasively determine that no such duty was owed by the law enforcement officers to the respective plaintiffs on the facts presented. The Kaisner Court is the only District Court of Appeal which has decided the narrow question regarding the duty owed to a person by a law enforcement officer conducting a traffic investigation. As a practical matter, the Supreme Court's discretionary decision not to review the apparent conflict will not result in confusion among the Florida District Courts of Appeal on that narrow issue because the decision of the Second District Court of Appeal in the instant case is the only precedent on that narrow question.

Beyond Walston, the petitioner asserts that several other decisions of the District Courts of Appeal, and the Supreme Court, are in conflict with the instant decision. The respondents would initially point out that none of the remaining decisions cited by the petitioners expressly and directly conflict with the instant decision as required by Article V, Section 3(b)(3), Florida Constitution. Furthermore, respondents submit that none of the remaining decisions cited by petitioners conflict with the instant decision at all; all are easily distinguishable from the instant case and many, in fact, were distinguished by the Kaisner Court.

Perhaps the most important assertion of express

and direct conflict by petitioners is that of conflict between the instant case and this Court's decision in Avallone v. Board of County Commissioners, 493 So.2d 1002 (Fla. 1986). Chief Judge Danahy, however, makes it clear that the Kaisner decision merely reconciles Avallone with this Court's previous decisions relating to sovereign immunity. Kaisner does not disprove or conflict with Avallone, but rather merely construes Avallone in light of the previous decisional framework established by this Court in the area of sovereign immunity.

Chief Judge Danahy distinguishes State of Florida, Department of Highway Safety v. Kropff, 491 So.2d 1252 (Fla. 3rd DCA 1986) by, inter alia, the fact that the officer in Kropff had already taken charge of securing the accident scene and had begun preparing his accident report, while the respondent deputies were still investigating a possible traffic infraction.

Eder v. Department of Highway Safety and Motor Vehicles, 463 So.2d 443 (Fla. 4th DCA 1985), rev. den. 475 So.2d 694 (Fla. 1985) does not even conflict with the instant case, and certainly does not "expressly and directly" conflict with the instant case. In Eder, the Court analyzed the decision of a State Trooper to issue citations rather than direct traffic and concluded that the Trooper's actions were subject to sovereign immunity. Eder, is so distinguishable from the instant case that the Fourth District Court of Appeals' comment that had the Trooper acted differently "an action for negligence would seem appropriate" could not

possibly be construed to be the basis of a conflict with Kaisner.

As for the remaining decisions cited by the petitioner in "shot gun" fashion, each is easily distinguishable from the instant case. In City of North Bay Village v. Braelow, 469 So.2d 870 (Fla. 3rd DCA 1985), the Third District Court of Appeal determined that a police officer could be held personally liable for negligence in the course of an arrest. In Kaisner, it was the absence of an arrest, the fact that the respondent deputies were still deciding whether an arrest was warranted, that formed the basis of the Court's opinion.

In Overby v. Wille, 411 So.2d 1331 (Fla. 4th DCA 1982) the question was the foreseeability of an arrestee's suicide; the instant decision makes clear the distinction between the duty owed to one who has been arrested and one who has not.

In Sintros v. LaValle, 406 So.2d 483 (Fla. 5th DCA 1981) the Court found that the operation of a motor vehicle by a police officer was an "operational level" activity which, if done negligently, would give rise to a cause of action. The Kaisner Court expressly agrees that the operation of motor vehicle gives rise to a duty, the breach of which is actionable by one damaged. This does not, however, remotely resemble the facts in the instant case.

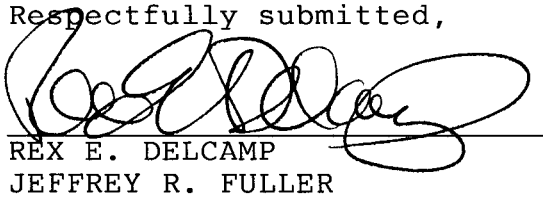
In Weissberg v. City of Miami Beach, 383 So.2d 1158 (Fla. 3rd DCA 1980) is also distinguishable from the case at bar. The off duty police officer in Weissberg was on the scene for the sole purpose of directing traffic which

he negligently failed to do. No discretionary, law enforcement decision was made; the off duty officer was obligated to direct traffic and negligently failed to do so.

CONCLUSION

Despite the multiple citations by the petitioner to decisions in conflict with the instant case, it would appear that one decision of the Fifth District Court of Appeal appears to conflict with the Kaisner decision. Even so, this Honorable Court need not exercise its discretionary jurisdiction because, for all practical purposes, no confusion will result from the apparent conflict among the Florida District Courts of Appeal.

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 13th day of October, 1987, to DANIEL C. KASARIS, Attorney for Petitioners, P.O. Box 4192, St. Petersburg, Florida 33731.

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