26
17 regarding

IN THE SUPREME COURT

STATE OF FLORIDA

Supreme Court No. 71,121

District Court of Appeal No. 85-2507

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.

REPLY BRIEF OF PETITIONERS

DANIEL C. KASARIS, ESQUIRE
YANCHUCK, THOMPSON, YOUNG, BERMAN & LATOUR, P.A.
500 First Avenue North
Post Office Box 4192
St. Petersburg, FL 33731
(813) 822-6313

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER

I. FACTS

Both Respondents and Amicus, Florida Sheriff's Self-Insurance Fund, have relied upon the statement of facts set forth by the Second District Court of Appeal. That court's rendition of the facts states that Mr. Kaisner was told by Deputy Jones not to come any closer to the police cruiser. The important fact which the District Court overlooked is that Mr. Kaisner was ordered by Deputy Jones to "stay right there" (R. 153-154) between his vehicle and the police cruiser. This difference is significant because, under the District Court's rendition of facts, Mr. Kaisner could have continued on his way to a safer location without disobeying the deputies, who were in control of the scene. Unfortunately, the Second District's opinion turned on this point. In fact, the deputy's order to "stay right there" left Mr. Kaisner with no choice but to remain between the two vehicles, lest he were to disobey the deputy, which the law should never encourage.

It is well settled that, for summary judgment purposes, the facts must be viewed in the light most favorable to the non-moving party. Holl v. Talcott, 191 So.2d 40 (Fla. 1966). Therefore, the fact that Deputy Jones ordered Mr. Kaisner to remain between his vehicle and the police cruiser must be accepted as true for purposes of this appeal.

II. REPLY

A. THE KAISNERS ARE NOT COMPLAINING OF THE DEPUTIES' DECISION OF WHETHER TO DETAIN OR ARREST. RATHER, THEY ARE COMPLAINING OF THE DEPUTIES' NEGLIGENT PLACEMENT OF PERSONS AND VEHICLES OVER WHICH THE DEPUTIES EXERCISED CONTROL DURING A ROUTINE TRAFFIC STOP.

This appeal has absolutely nothing to do with the decisions by Deputies Kolb and Jones of whether or not to detain or arrest Mr. Kaisner. This matter concerns only the deputies' alleged negligence in the placement of persons and vehicles over which the deputies exercised control after deciding to detain a motorist suspected of violating a traffic law. Therefore, this case does not involve the enforcement of police power functions for which this Court has previously held that no duty is owed. Everton v. Willard, 468 So.2d 936 (Fla. 1985); Trianon Park Condominium Assn. v. City of Hialeah, 468 So.2d 912 (Fla. 1985).

Throughout their Answer Briefs, the Respondents (and Amicus Florida Sheriff's Self-Insurance Fund) have desperately attempted to bring this case within the rule of Everton by characterizing the Kaisners' claims as involving enforcement of police powers. In doing so, the Respondents have completely ignored the fact that Justice Overton's opinion in Everton merely held that

> the decision of whether to enforce the law by making an arrest is a basic judgmental or discretionary governmental function that is immune from suit,... 468 So.2d at 937

Since the Kaisners are not questioning the wisdom of the deputies' decision of whether or not to detain or arrest, this case does not involve any quasi-judicial or basic judgmental decisions which remained immune after the legislature waived sovereign immunity. See Goldstein, Police Discretion not to Invoke the Criminal Process: Low-visibility Decisions in the Administration of Justice, 69 Yale Law Journal 543 (March 1960). Furthermore, judicial review of a police officer's activities, aside from enforcement decisions, does not constitute "judicial interference" as suggested by Respondents. To the contrary, judicial review of the type of activities complained of herein is essential to maintaining the checks and balances which our state and national constitutions provide. Without meaningful judicial review, the rights of the people will be downtrodden and Florida will become a police state. It is therefore ludicrous to argue that this Court's decision in Everton prevents judicial review of a police officer's negligent placement of detainees and vehicles over which he exercises control during a routine, non-emergency traffic stop.

B. THE DISTRICT COURT DECISIONS IN WALSTON AND KROPFF MERELY RECOGNIZE THE REALITY THAT POLICE OFFICERS CONTROL THE PERSONS AND VEHICLES INVOLVED IN TRAFFIC STOPS AND ACCIDENTS AND THAT IT IS REASONABLY FORESEEABLE THAT NEGLIGENT PLACEMENT OF SAID PERSONS OR VEHICLES MAY RESULT IN INJURY.

In Walston v. Florida Highway Patrol, 429 So.2d 1322 (Fla. 5th DCA 1983), the Fifth District Court of Appeal held that police officers owe a duty of care toward both a detained driver and his passenger during a traffic stop. In State of Florida, Dept. of

Highway Safety and Motor Vehicles v. Kropff, 491 So.2d 1252 (Fla. 3d DCA 1986), the Third District held that a police officer owes a duty of care toward persons involved in the officer's investigation of a motor vehicle accident. Both of these decisions simply recognize the pivotal fact that it is the investigating officer who controls the scene of an accident or traffic stop. Therefore, the officer is in the best position to place the involved individuals and vehicles in locations which minimize the risk of injury from oncoming traffic.

Duty is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff. In negligence cases, the duty is to conform to the legal standard of reasonable conduct in the light of the apparent risk. Keeton, Prosser and Keeton on Torts, s. 53; West: 5th Ed. 1984. As such, the concept of duty is always inextricably intertwined with the question of reasonable foreseeability. Id. Thus, if the apparent risk is reasonably foreseeable, a duty of care arises. Changing social situations lead constantly to the recognition of new duties, and courts will generally find such duties where reasonable men would recognize them and agree that they exist. Id. Thus, the recognition of duties by the courts cannot be considered "judicial fiat", as Respondents have suggested. It is the responsibility of the courts, and not of the legislature, to determine when duties exist.

The Third and Fifth District Courts of Appeal recognized

that duties existed in Kropff and Walston because the apparent risks created by the officers' conduct were reasonably foreseeable. Any reasonable person would reach the same conclusion. Likewise, a reasonable person would also conclude that the apparent risks created by Deputy Jones' order directing Mr. Kaisner to "stay right there" between two vehicles on a busy highway were reasonably foreseeable. To hold otherwise requires a complete distortion of reality and would encourage detainees in traffic stops to disobey the investigating officer when the detainee claims he is in some sort of danger. The law should not encourage such conduct.

While Amicus Florida Self-Insurance Fund contends that the Restatement of Torts does not establish Florida Common Law, the Respondents have taken the inconsistent position that Judge Cowart's concurring/dissenting opinion in Walston is the law which should be applied herein. Judge Cowart's opinion turned on the duty set forth in the Restatement, Second, of Torts, s. 314A. That opinion held that the officers in Walston owed a duty only to the arrested driver and not his passenger, who was ordered by the officers to leave the scene. Judge Cowart's opinion was based on the fact that the driver was in custody and the passenger was free to leave the area.

Judge Cowart's opinion turned on the fact that the arrested driver was deprived of his opportunity for self-protection, while the passenger was not. This is so because the arrestee is obliged to obey the officer's commands regarding where

to position himself. Petitioners submit that an arrestee's obligation to respect the investigating officer's commands is no different from a detainee's obligation to do so. Therefore, even if Judge Cowart's reasoning is applied, deputies Kolb and Jones owed a duty of care toward Mr. Kaisner. Any other result will be detrimental to a police officer's ability to investigate and control the scene of an accident or traffic stop by allowing detainees to ignore the officer's orders.

C. BY WAIVING SOVEREIGN IMMUNITY, THE LEGISLATURE IMPOSED LIMITED LIABILITY UPON THE GOVERNMENT, EVEN FOR ACTS WHICH PRIVATE CITIZENS DO NOT ORDINARILY PERFORM.

The language of s. 768.28, Fla. Stat., was basically borrowed from the Federal Tort Claims Act, with one exception. The Federal Tort Claims Act exempts from its waiver of sovereign immunity those acts which are "discretionary" in nature. 28 U.S.C. s. 2680. The Florida Statute has never contained such an exception, although the courts have attempted to fashion one in order to maintain a separation of powers. Commercial Carrier v. Indian River County, 371 So.2d 1010 (Fla. 1979). Therefore, although the Florida legislature was aware that it could have limited the scope of Florida's waiver of sovereign immunity, as was done in the Federal Act, it chose not to do so. This clearly indicates that the legislature intended for the scope of its waiver of sovereign immunity to be broadly interpreted. See also Trianon Park, 468 So.2d at 921.

Amicus Florida Sheriffs' Self-Insurance Fund argues that

the government owes no duty for acts which private citizens do not ordinarily perform. For this proposition, they rely upon the language of s. 768.28(1), Fla. Stat., which provides that the government may be sued for negligence "...under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state,..." This interpretation constitutes a narrowing of the scope of the waiver of sovereign immunity which the legislature never intended.

If the legislature had intended for the above-quoted language to restrict its waiver of sovereign immunity, it could have easily done so in clear and concise language. For instance, the legislature could have provided that the waiver of sovereign immunity shall not apply to governmental acts which are not ordinarily performed by private citizens. Therefore, it is obvious that the legislature intended for the aforementioned language to emphasize the breadth of its waiver of sovereign immunity, rather than to narrow the scope of that waiver. Clearly, the quoted language means the government will be held liable for its negligence, just as private citizens are so held.

The fact that the legislature mentioned the general laws of the state in the language quoted above is also instructive. According to the general laws of Florida regarding negligence, duties are imposed upon various persons in accordance with surrounding circumstances such as the standards of their particular

trade or profession. Thus, doctors are under a duty to use that degree of care and skill utilized by other doctors in the same or a similar community. Attorneys and other professionals are also charged with duties of care consistent with community standards for their particular profession. This is the "general law of the state" to which the legislature referred. It merely provides for standards against which the allegedly negligent conduct of defendants may be compared. The legislature's reference to the general laws of the state in s. 768.28(1) reflects an intent to provide a broad waiver of sovereign immunity by requiring that alleged negligence of government employees be measured against standards of conduct applicable to their particular profession. Therefore, in the instant case, the alleged negligence of deputies Kolb and Jones should be measured against a "reasonable police officer" standard in order to give full effect to the language of s. 768.28(1).

Because the legislature intended a broad, rather than narrow, waiver of sovereign immunity, the inquiry should be whether a jury of reasonable persons could possibly find a private person negligent if he had committed the allegedly negligent acts. Courts need not consider the question of whether private persons actually engage in such conduct.

The fact that the "no duty for acts which private citizens do not perform" test is of no analytical value is easily shown by the fact that many governmental acts for which the courts have

found no duty is owed are sometimes performed by private citizens. For instance, in Everton, this Court found that no duty is owed for the decision of whether or not to arrest. However, private citizens can make citizens' arrests. Likewise, in Trianon, this Court found that no duty is owed in building inspections, but anyone can hire a contractor or architect to independently inspect a building under construction. Therefore, private citizens do perform acts which this Court has already held the government owes no duty.

Even if the "no duty for acts which private citizens do not perform" test is followed herein, the decisions below should still be reversed because there are instances in which private persons perform acts similar to those negligently performed by deputies Kolb and Jones. One example involves a department store security guard who pursues a suspected shoplifter into the street and stops him at gunpoint. If the guard requires the suspect to lie down in the street until police arrive, and the suspect is struck by a passing motorist, there is no doubt that a negligence claim will lie against the security guard. Therefore, private persons do perform acts similar to the challenged acts herein. As a result, deputies Kolb and Jones owed a duty to the Kaisners.

D. SPECIAL DUTIES HAVE NO PLACE IN FLORIDA LAW AFTER COMMERCIAL CARRIER.

Petitioners agree with Amicus Florida Sheriff's Self-Insurance Fund on the proposition that a simple solution to the question of governmental immunity does not exist and that this

Court should avoid the temptation to create new "touchstones" in an effort to provide an easy solution for the bench and bar. The current problem is that there are too many touchstones, making it always possible to find language which supports a party's position, regardless of what that position may be. The district court decisions are in such conflict that unless an identical set of facts has previously been ruled upon by the Supreme Court, appellate litigation is certain. The court's attempt to protect the government from the legislature's apparently unlimited waiver of sovereign immunity has resulted in the judicial system being overloaded with litigation. The only logical solution to this problem is to reaffirm the vitality of those decisions which best analyze the competing interests of the people and of the state, and to follow them on a consistent basis, without adding more to the analysis. Those decisions are Commercial Carrier and Trianon Park. When read together, these decisions provide the most useful and consistent means of determining the sovereign immunity question.

Any analysis of a sovereign immunity case must first begin with the question of whether all elements of the alleged tort are present so that a jury of reasonable persons could possibly find liability. In negligence cases, the Courts should then look to the four categories of governmental functions and activities set forth in Trianon Park. 468 So.2d at 919. These four categories should be used as a rule of thumb in answering the ultimate question of whether a jury of reasonable persons could possibly find that a

private person would owe a duty if he had committed the same acts or omissions forming the basis of the complaint against the government. If it is determined that all elements of negligence are present, the Commercial Carrier analysis should be utilized to determine whether the subject negligent acts remain protected by sovereign immunity after the legislature's limited waiver of same.

With all due respect to the authors of other opinions, Justice Sundberg's decision in Commercial Carrier is the best reasoned opinion ever written concerning Florida's law of sovereign immunity. It should be followed without deviation or clarification in order to lend consistency and predictability to Florida law. In doing so, the courts should completely avoid the use of antiquated and confusing terminology such as discretionary, non-discretionary, governmental, proprietary, special duty, general duty and public duty. Justice Sundberg's opinion clearly sought to absolutely eliminate the use of these terms and to replace them with the planning vs. operational dichotomy. In the case at bar, this Honorable Court has the opportunity to revitalize Commercial Carrier and clarify the law by proclaiming that all sovereign immunity terminology, aside from planning and operational, is dead and gone forever.

Common law sovereign immunity developed along two separate and distinct avenues. One of these is the concept of judicial immunity and the other is the idea that the King can do no wrong. Klein and Chalker, Developments in Florida's Doctrine of Sovereign

Immunity, 35 Miami Law Review 999 (1981). The limited waiver of sovereign immunity by the legislature had no effect whatsoever upon judicial immunity. Therefore, no planning vs. operational analysis is necessary when a court is considering alleged negligence of a judge in rendering decisions, a police officer when deciding whether or not to arrest, a prosecutor in deciding whether or not to prosecute, and a building inspector in deciding whether or not to red-tag a particular structure. These decisions all involve judicial and quasi-judicial functions. Many courts have had difficulty in analyzing these activities pursuant to Commercial Carrier because that analysis was not intended to apply to judicial and quasi-judicial activities. This confusion has resulted from the fact that these activities are neither planning nor operational in nature; they are judicial in nature. Recognizing this fact in the decision rendered herein will go a long way toward clarifying the law of sovereign immunity without changing it. It will also simplify the law of sovereign immunity because courts will no longer need to justify immunity for judicial and quasi-judicial acts through the Commercial Carrier planning vs. operational analysis.

After determining that all elements of negligence are present and that the acts under review are not judicial or quasi-judicial, courts should proceed with the Commercial Carrier analysis to determine whether said acts are either planning or operational in nature. This analysis sufficiently preserves the

separation of powers doctrine and the government's right to govern. It also balances the interests of the government fairly against those of citizens injured due to governmental negligence. In those cases where the negligent acts are found to be operational, statutory limitations, including the cap on damages, protect the governmental entity from bankruptcy while still providing limited recourse to the injured plaintiff.

In Commercial Carrier, Justice Sundberg correctly labeled the special duty/general duty dichotomy as "circuitous reasoning" which results in a duty to none where there is a duty to all. This doctrine, sometimes known as the public duty rule or official responsibility rule, has also been severely criticized by legal scholars. See, e.g., Glannon, The Scope of Public Liability under the Tort Claims Act: Beyond the Public Duty Rule, Mass. Law Review 160 (Winter, 1982); Note, The Official Responsibility Rule and Its Implications for Municipal Liability in Connecticut: Shore v. Town of Stonington, 15 Connecticut Law Review 641 (1983).

In situations where a special relationship exists between the government and a plaintiff, courts can find that a duty exists without resurrecting Modlin, supra, and its special duty/general duty test. This can be done by simply stating that the circumstances of the relationship between the government and the plaintiff give rise to a duty of care. This is consistent with the general Law of Florida because duties are always dependent upon the circumstances surrounding the parties. Hence, a duty can be found

to exist without use of the antiquated term "special duty". After all, there is nothing special about the duty owed; it is the relationship between the parties which may be considered special.

Such a special relationship existed between Mr. Kaisner and deputies Kolb and Jones at the time of the subject accident. This is so because Mr. Kaisner was deprived of his normal opportunity for self-protection when deputy Jones ordered him to "stay right there" between the two vehicles. Section 314A of the Restatement, Second, of Torts correctly recognizes that such a relationship gives rise to a duty of care.

All of the elements of negligence, including a duty owed to the Kaisners, are present herein. The acts of placing detainees and motor vehicles in particular locations during traffic stops is not a judicial or quasi-judicial function. Pursuant to the Commercial Carrier analysis set forth in the Kaisners' Initial Brief, the acts of deputies Kolb and Jones were operational in nature. Therefore, the decisions of the courts below should be reversed and this cause should be remanded so that a jury may determine whether deputies Kolb and Jones were negligent and whether such negligence proximately caused the Kaisners' losses.

E. THE QUESTION OF WHETHER A GOVERNMENTAL ENTITY'S NEGLIGENCE IS PROTECTED BY SOVEREIGN IMMUNITY SHOULD BE LEFT TO THE LEGISLATURE.

By waiving sovereign immunity on an apparently unlimited basis, the legislature has left the judiciary with the formidable task of determining which acts of governmental negligence, if any, remain immune from suit. After dealing with the same frustrating

problem for many years, the Ohio Supreme Court finally decided to allow the legislature to define the limits of its waiver of sovereign immunity.

Perplexed and overburdened with the necessity of deciding whether immunity applies on a case-by-case basis, the Ohio Supreme Court, in Haverlack v. Portage Homes, Inc., 442 N.E.2d 749 (Ohio, 1982), abolished sovereign immunity for municipalities in accordance with the Ohio legislature's broad waiver of sovereign immunity. In doing so, the court held that the defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in an action for damages allegedly caused by the city's negligence.

If this Honorable Court feels that it is the legislature's obligation to define the limits of its waiver of sovereign immunity, a ruling similar to that of the Ohio Supreme Court in Haverlack would force the Florida legislature to act on the issue. Unless the legislature is so challenged to act, the Florida courts will continue to be flooded with sovereign immunity questions. This problem was created by the legislature and by ruling that no sovereign immunity exists absent specific legislation to the contrary, this Court will be merely literally interpreting the language the legislature chose to use. Thus, it will be up to the legislature to rectify the problem it created.

F. AVALLONE STILL APPLIES HEREIN, DESPITE THE LEGISLATURE'S RECENT ENACTMENT OF LAWS OF FLORIDA 87-134 (H.B. 285).

The Respondents have argued that the legislature's recent

enactment of Laws of Florida 87-134 (House Bill 285) negates the Kaisners' claim that the Pinellas County Sheriff's Department has waived sovereign immunity up to the amount of any applicable liability insurance pursuant to this Court's opinion in Avallone v. Board of County Commissioners of Citrus County, et al., 493 So.2d 1002 (Fla.. 1986). This argument is without merit because H.B. 285 is unconstitutional if retroactively applied to the instant case. Further, H.B. 285 merely limits the sheriff's department's waiver of sovereign immunity by purchase of insurance to the statutory limit of $100,000 per person and $200,000 per occurrence.

In Avallone, this Court held that a governmental entity's purchase of liability insurance pursuant to statutes authorizing same constitutes a waiver of sovereign immunity up to the amount of such coverage. Thus, if this Court decides the deputies Kolb and Jones owed a duty to Mr. Kaisner but the challenged acts were quasi-judicial or planning functions normally protected by sovereign immunity, the Sheriff's Department will still be deemed to have waived sovereign immunity up to the amount of any liability coverage purchased pursuant to ss. 30.55 and 286.28, Florida Statutes. (See also Jozwiak v. Leonard, 504 So.2d 1260 (Fla. 1st DCA 1986), applying Avallone to a Sheriff's Department.) By enacting H.B. 285, the legislature sought to limit the government's waiver of sovereign immunity by purchase of insurance to the $100,000/$200,000 statutory limit, regardless of whether the amount of insurance purchased exceeds those limits.

G. LAWS OF FLORIDA 87-134 (H.B. 285) CANNOT BE RETROACTIVELY APPLIED TO THE INSTANT CASE.

The entire text of H.B. 285 is reprinted in the Appendix hereof. Sections 3, 4 and 5 of said bill pertain to changes in s. 768.28, and are the only portions of H.B. 285 which are relevant to this appeal. Section 5 of H.B. 285 sets forth the law's effective date as follows:

> This act shall take effect upon becoming a 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 reversed.

When H.B. 285 became effective as Laws of Florida 87-134 on June 30, 1987, the Kaisners already had vested rights as third party beneficiaries under the Pinellas County Sheriff's Department's liability insurance policies. Based on due process considerations expressed in Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978), and McCord v. Smith, 43 So.2d 704 (Fla. 1949), which prohibit retroactive abolition of vested rights, this Honorable Court has previously held that other amendments to s. 768.28 were unconstitutional if applied retroactively. State Dept. of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981); Rupp v. Bryant, 417 So.2d 658 (Fla. 1982). The same result should be reached herein.

Prior to the enactment of 87-134, the Kaisners had a vested right to sue Ambassador Insurance Company as the liability carrier for the Pinellas County Sheriff's Department. The

Respondents argue that the Kaisners' right to sue Ambassador is now abolished completely, although the language of 87-134 merely limits the Kaisners' right to sue Ambassador to the sum of $100,000/$200,000. In either case, the statutory change effects an abrogation of the Kaisners' right to full tort recovery, not merely a procedural adjustment of remedies. The Kaisners' interest in their vested rights to full recovery clearly outweighs the public's interest in 87-134. See Knowles, 402 So.2d at 1158. Therefore, 87-134 cannot be applied to the instant case without violating the Kaisners' right to due process.

Retroactive application of 87-134 will also impair existing contractual obligations between Ambassador Insurance Company and the Kaisners. When their cause of action accrued, the Kaisners became entitled to collect damages from Ambassador and Ambassador was obligated to pay same. Unfortunately, this litigation ensued and the legislature later passed 87-134, which purports to affect the vested rights and duties of the parties to an existing contract. It is well-settled that legislative enactments may not affect existing contractual obligations, and this Court has applied this principle to insurance contracts. Fireman's Fund Ins. Co. v. Pohlman, 485 So.2d 418 (Fla. 1986). Therefore, application of 87-134 to the instant case constitutes an impermissible impairment of existing contractual obligations owed by Ambassador to the Kaisners.

87-134 also unconstitutionally interferes with the

perogative of the executive branch to enter into insurance contracts providing citizens with the benefit of governmental liability insurance with limits exceeding $100,000/$200,000. As such, 87-134 impairs the ability of the executive branch to enter into lawful contracts providing valuable benefits to the citizens. 87-134 thus violates the separation of powers doctrine as well.

Section 3 of H.B. 285 adds the following language to subsection (5) of s. 768.28 Fla. Stat. (1986 Supp.):

> Notwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $100,000 or $200,000 waiver provided above.

In the instant case, the Second District Court of Appeal has previously held that the Pinellas County Sheriff's Department had purchased liability insurance policies in the total amount of $550,000 covering the acts under review herein. The language of H.B. 285 quoted above first provides that the Sheriff's Department may agree to settle a claim or judgment by the Kaisners, up to the $550,000 limit, without action by the legislature. The quoted language next provides that the Sheriff's purchase of insurance does not increase the limits of the Sheriff's liability beyond $100,000/$200,000 for operational activities, nor does it waive

sovereign immunity (for quasi-judicial or planning activities) beyond $100,000/$200,000. Thus, if this Court chooses to apply H.B. 285 to the instant case, the Sheriff's purchase of insurance still constitutes a waiver of sovereign immunity, but only up to the $100,000/$200,000 limits set by the legislature. The title of H.B. 285 confirms this interpretation of said bill by providing that H.B. 285 is merely "clarifying the extent of waiver of sovereign immunity by the state or an agency or subdivision thereof which purchases liability insurance". Any other interpretation of H.B. 285 renders it unconstitutionally vague and ambiguous.

Section 4 of H.B. 285 repealed sections 30.55 and 286.28, Florida Statutes, as of June 30, 1987. These are the statutes which authorized the Sheriff to purchase the liability insurance coverage and provided for a waiver of sovereign immunity up to the limits of any such coverage purchased. Although Section 5 of H.B. 285 purports to apply H.B. 285 to pending cases, it does not alter the fact that the Pinellas County Sheriff's Department purchased its $550,000 in liability coverage pursuant to sections 30.55 and 286.28, which were in effect at the time of said purchase. Furthermore, the premium for said insurance was calculated by Ambassador and paid by the taxpayers on the basis of $550,000 limits. Cutting those limits will provide a windfall to insurance companies (in the form of unearned premiums) at the taxpayers' expense.

Retroactive application of 87-134 also contravenes the

Kaisners' Florida Constitutional guarantee of access to the appellate courts and denies the Kaisners procedural due process. Since the trial court granted a summary judgment in favor of the Respondents, the Kaisners were entitled to appeal the trial court's ruling based on existing substantive law. Access to the courts and appellate review are constitutionally recognized rights and any restrictions thereon should be liberally construed in favor of the right. Lehmann v. Cloniger, 294 So.2d 344 (Fla. 1st DCA 1974). Therefore, 87-134 should not be interpreted as applying retroactively to the instant case. Otherwise, the Kaisners will be denied procedural due process and access to the appellate courts.

CONCLUSION

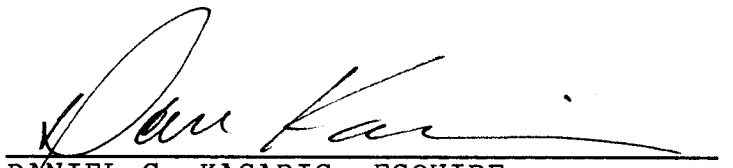
The summary judgment rendered herein and the District Court decision affirming same should be reversed and this cause should be remanded to the Trial Court for further proceedings.

Respectfully Submitted,

DANIEL C. KASARIS, ESQUIRE
YANCHUCK, THOMPSON, YOUNG,
BERMAN & LATOUR, P.A.
Post Office Box 4192
St. Petersburg, FL 33731
(813) 822-6313
Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Reply Brief of Petitioners has been furnished by U.S. Mail this 26th day of February, 1988, to: REX E. DELCAMP and JEFFREY R. FULLER, ESQUIRES, 2553 First Avenue North, St. Petersburg, FL, 33713, counsel for Respondents, CHRIS W. ALTERBERND, ESQUIRE, Post Office Box 1438, Tampa, FL, 33601, counsel for Amicus, Florida Sheriff's Self-Insurance Fund, and to ROBERT KING HIGH, JR. and ROBERT M. ERVIN, JR., ESQUIRES, Post Office Drawer 1170, Tallahassee, FL 32302, counsel for the Academy of Florida Trial Lawyers.



DANIEL C. KASARIS, ESQUIRE
YANCHUCK, THOMPSON, YOUNG,
BERMAN & LATOUR, P.A.
Post Office Box 4192
St. Petersburg, FL 33731
(813) 822-6313
Counsel for Petitioners