1-13-89

IN THE SUPREME COURT OF FLORIDA

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CASE NO. 73,344

4TH DCA CASE NO. 85-1818

FILED
SID J. WHITE
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STATE OF FLORIDA DEPARTMENT OF
HEALTH & REHABILITATIVE SERVICES,

Petitioner,

v.

DAVID WHALEY, individually, and as
guardian of his son, MICHAEL WHALEY,
a minor,

Respondent.

---

ON PETITION TO INVOKE DISCRETIONARY REVIEW OF A
DECISION OF THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

---

PETITIONER'S BRIEF ON ~~JURISDICTION~~ Merits
WITH APPENDIX

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## STATEMENT OF THE CASE

This cause is presented for review upon certification of the following question as a matter of great public importance:

> IS THE ASSIGNMENT OR PLACEMENT OF ALLEGED JUVENILE DELINQUENTS IN A PARTICULAR ROOM OR LOCATION IN AN HRS DETENTION FACILITY AN INHERENTLY GOVERNMENTAL FUNCTION (ENFORCEMENT OF LAWS AND PUBLIC SAFETY PROTECTION) OR A DISCRETIONARY GOVERNMENTAL FUNCTION, WHICH IS PROTECTED BY SOVEREIGN IMMUNITY?

The Plaintiffs, DAVID WHALEY, individually and as guardian of MICHAEL WHALEY, brought suit in the Circuit Court, Fifteenth Judicial Circuit, against the STATE OF FLORIDA DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES (HRS) and six employees of HRS, alleging claims under 42 USC Section 1983 and common law tort pursuant to the waiver of Section 768.28, *Florida Statutes* (1981), for injuries to MICHAEL WHALEY, arising out of a sexual assault committed in the juvenile detention center by fellow detainees.

Prior to trial, the Trial Court struck all claims against HRS arising under 42 USC Section 1983, and the Plaintiffs dropped all employee/defendants as parties. The cause proceeded to trial before a jury on June 3, 1985, against HRS for tort claims asserted pursuant to the waiver of Section 768.28, *Florida Statutes* (1981). On June 12, 1985, the jury returned a special interrogatory verdict in which it found that there was negligence which was a legal cause of injury to the Plaintiffs in respect to three charges:

1) placement of two other youths in the same holding cell with WHALEY,

2) allowing WHALEY to remain in the holding cell for an extended period of time,

3) failing to furnish immediate medical and psychiatric care to WHALEY,

and no negligence legally causing injury to the Plaintiffs in respect to two charges:

1) supervision of the youths in the holding cell;

2) operation of the audio and television monitors in the intake unit.



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It assessed damages at $100,000 for the claim of MICHAEL WHALEY, and $10,000 for DAVID WHALEY, individually. The Trial Court entered judgement thereon on June 18, 1985.

On June 20, 1985, HRS moved for Judgement in Accordance with Motion for Directed Verdict, for New Trial or Remittitur, and for New Trial. On July 15, 1985, the Trial Court denied the Motion for Judgement in Accordance with Motion for Directed Verdict and Motion for New Trial. It granted in part the Motion for New Trial or Remittitur, reducing the individual claim of DAVID WHALEY to $5,575.00, and denied the remainder of said Motion. On the same date, the Trial Court entered a Final Judgement for costs in favor of the Plaintiffs and against HRS in the sum of $3,727.93. On July 17, 1985, the Plaintiff, DAVID WHALEY, accepted the remittitur.

On July 31, 1985, the Defendant, HRS, filed its Notice of Appeal to the District Court of Appeal, Fourth District. After extensive briefing and argument, that Court affirmed the Judgements below in a decision dated June 29, 1988, and certified the above stated question to this Court. On October 26, 1988, the District Court denied timely filed Motions for Rehearing, and, on November 16, 1988, the Defendant, HRS, filed its Notice invoking discretionary review in this Court.

## STATEMENT OF THE FACTS

The STATE OF FLORIDA DEPARTMENT OF HEALTH & REHABILITATIVE SERVICES operates the Juvenile Detention Center facility in West Palm Beach. A portion of that facility, physically separated from the Detention Center proper, is the Intake Unit where all juveniles who are brought into HRS jurisdiction for possible detention are initially taken (Plaintiffs' Ex. 15; Composite Ex. 2 A-E). There the Intake Counselors examine the charges against the youth, if he (or she) is charged with delinquency, and determine if he is to be detained at the facility -- usually after consultation with parents and the State Attorney as well as the arresting officer (R: 75, 167, 169). If a youth is to be detained, he is assigned to one of two holding cells in the Intake Unit while the necessary contacts and paper work are completed, pending his being taken into the Detention Center proper for admission and orientation procedures (R: 54, 128; Pl.'s Ex. 15)[1/] After 5 p.m., the Intake Unit also serves as the holding facility for dependant youths (those not charged with a crime) pending the location of an available residential facility (R: 53). Under normal circumstances, the intake procedures take about half an hour to forty-five minutes; the detention admission and orientation can take from half an hour to an hour and includes a strip search, shower, second search, providing of detention facility clothing and linen, assignment to a dormitory facility and room, instruction as to facility rules and regulations and completion of paperwork (R: 137, 824-827). Admissions and orientation into the Detention Center proper is handled by the staff of the Detention Center known as Child Care Workers; it is not conducted by the Intake Counselors of the Intake Unit (T: 824-827).

The Intake Unit consisted of a suite of rooms, flanking a hallway, including the two small holding cells, a waiting area, file room and several offices including the Intake Counselors' office (Comp. Ex. 2E). The distance from the Counselors' office to the furthermost holding cell (cell #2) was about 15-20 feet (R: 166). Each holding cell was

1/ Youths being released from the Detention Center are also processed through the Intake Unit.

equipped with a small bench and two mattresses (Comp. Ex. 2F); each had a light operated by a switch in the hallway and a door, with a narrow window, which locked from the inside upon closure (R: 272, 278).

There was a microphone inside each cell which was monitored at the master control booth of the Detention Center (along with all other monitoring microphones in the facility), and a television monitor in the hallway outside the cells (which did not have a view into the cells). On the night of the incident, the TV monitor was not operational (R: 61-65; 257).

On March 15, 1982, MICHAEL WHALEY was arrested in the course of burglarizing a home along with two companions, John Ahrens and Thomas Parker (Pl Ex. 4). He was charged with the commission of several burglaries on that date and with several other burglaries which had occurred during the preceding months ( Pl.'s Ex. 4; R: 647). The Sheriff's Department deputy brought all three boys to the Detention Center at 6 p.m., accompanied by a juvenile referral report (Pl.'s Ex. 4).

The Intake Counselor on duty from 4 p.m. to 12 p.m. that day was Lloyd McCray. Since the youths were charged with acts that would be felonies if they were adults, McCray was required to check with the State Attorney's office for authorization for detention; he was finally able to make contact at about 7:30 p.m. when detention was authorized (R: 167-8). He also attempted to contact the parents of each youth. He made contact with the parents of Ahrens at 7:20 p.m.; with MICHAEL WHALEY's stepmother at 7:50 p.m. and with Parker's parents at 8:15 p.m. (Pl.'s Ex. 4). At this point, these three youths were ready for admission and orientation to the Detention Center, proper.

During McCray's shift, there was an unusually large number of youths brought through the Intake Unit (R: 137-8). As a consequence, completing the processing of each youth took longer than usual. In the Detention Center proper, the late afternoon and evening shift was short-handed due to the absence of several Child Care Workers who were out that day; there was a total of eight staff members on duty which permitted the

supervisor, Roosevelt Turner, to staff each of the two boys and one girls dormitory with the minimum needed of two workers and to staff the master control booth with one worker (R: 816-822; Pl.'s Ex. 11). This permitted one free worker to process the youths being admitted into the center and released from the center -- until mid-evening when one of the staff serving in the girl's dormitory was summoned to the hospital (R: 822). At that point, Turner, had no free staff to handle the admissions (R: 823). The late night shift which assumed duty in the Detention Center proper at 11:00 p.m., had only five Child Care Workers (Pl's. Ex. 11).

After WHALEY, Parker and Ahrens were ready for admission at approximately 8:00 p.m., McCray notified master control of this fact; Parker and Ahrens, together with other youths who had been ready for processing earlier were each individually processed. WHALEY, however, was not yet reached by 11:00 p.m. when the Intake Unit population consisted of WHALEY, who was 14 years old, 5'4" tall and weighed about 98 pounds, Donnie Williams, a 13 year old youth charged with burglary, and Timothy Fanning, a 16 year old dependant youth. Williams and Fanning were occupying holding cell #1 and WHALEY was alone in holding cell #2 (T: 146, Pl.'s Ex. 4).

At about 11:00 p.m., Glen Moore, a 15 year old black youth, who was about 6'2" tall and weighed about 160 pounds, was brought into the intake unit pursuant to a court order for having failed to appear at a hearing; his prior charge was for burglary (R: 145). Moore was placed in the holding cell #2 with WHALEY, who was asleep on the bench, shortly after 11:00 p.m. At some point shortly after 11:30 p.m., Willie Jones, a black youth of 16, who was about 6' tall and who weighed about 190 -- described as fat rather than muscular -- was brought to the Intake Unit from Belle Glade (R: 79-80, 237). Jones had been processed for intake in Belle Glade and the deputy brought with him a Referral Report and the Interim Placement Report (the form filled out in Intake for each youth) (R: 77-79; Pl's. Ex. 5&8). Jones was charged with having committed an armed robbery three days earlier. According to the Interim Placement Report, which had been completed



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by a Glade's Counselor, Kathleen Cole, Jones had previously been charged with several crimes of violence, most of which had been nolle prossed (Pl's. Ex. 5). The only additional information available to McCray on Jones was an index master card and, possibly, a computer index, each of which would list prior charges, dates and dispositions, but neither of which would include any details on the charges (R: 87-89).

At the time of his admission to Intake at the Detention Center, Jones, like Moore, was polite, respectful and non-aggressive (R: 181, 189). McCray assigned him to the holding cell with WHALEY and Moore.

At about this time -- between 11:30 and 11:45, William Mallett arrived at the Intake Unit where he was scheduled to replace McCray at 12:00 p.m. McCray advised him of the status of the youths in the unit and Mallett checked on the boys a couple of times before and as McCray went off duty at midnight; he also called to remind the new shift in the Detention Center proper that WHALEY had been ready for admission for several hours (R: 230, 232, 255). The doors to both cells were kept open to give the Counselor a better opportunity to monitor any noise coming from either room (R: 175). After McCray left, Mallett walked to the washroom on the Detention Center side of the locked door between the units to get water for coffee; on the way back to his office, he passed the holding cells where Jones asked if he could use the phone to call home (R: 274-5). Mallett allowed him to do so; the call took about 5 minutes (R: 275). About fifteen minutes after this -- at 12:20 a.m. -- Mallett heard a strange sound; he looked out his door and observed the door to cell #2 nearly closed. He walked quietly down the hall and pushed the door open. There he saw WHALEY on his knees in front of Moore with Jones standing to the side. Moore had his hands on WHALEY around his neck and his pants were unzipped. When Mallett pushed the door open, the boys moved apart and Mallett took WHALEY out to the sitting area where he inquired if he had been hurt. Jones and Moore both informed Mallett that WHALEY had offered to perform oral sex on both of them (R: 276, Pl.'s Ex. 1, 8). Mallett kept the boys separated and again called the Detention Center master



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control operator to inform her that WHALEY had to be processed as well as the other boys. WHALEY was processed into the center shortly afterward.

Mallett prepared a written report that morning to his supervisor. As a result, an investigation -- one of several -- was conducted by Robert Reiss, another Intake Counselor (Pl.'s Ex. 1, T: 267). WHALEY's parents first learned of the incident from Reiss. WHALEY denied voluntarily being involved and informed his stepmother -- he would not talk to his father -- that he had been forced to perform fellatio; according to the statement he gave police shortly thereafter, WHALEY stated that he had just begun to have contact with Jones when Mallett interrupted the situation(R: 406-9; Def.'s Ex. 9). WHALEY was adjudicated guilty of the burglaries and served his community service at the animal shelter where his stepmother worked (R: 486).

Several months after the incident, WHALEY's father took him to see McKinley Cheshire, M.D., a psychiatrist, since he had complained of nightmares and some fear of blacks in groups. Cheshire proceeded to see WHALEY off and on until the date of trial (R: 364).

In addition, at Trial, Dr. Cheshire and Dr. Lee Bukstel, a psychologist, testified that WHALEY suffered from post-traumatic stress syndrome related to the incident at the detention center (R: 350, 424). Dr. Bukstel conceded that he also suffered in part from an adolescent conduct disorder which preceded the incident. Dr. Harvey Klein, another psychologist, testified that WHALEY's primary psychological problem was that of an adolescent conduct disorder (R: 463, 644).

The jury returned its verdict finding negligence on behalf of the Defendant in respect to the placement of MICHAEL WHALEY in the same cell with Jones and Moore, in allowing WHALEY to remain in the cell for an extended period of time and in not obtaining immediate medical and psychiatric care for WHALEY. It found no negligence in the supervision of the cells and in respect to the audiovisual monitoring of the cells.

## SUMMARY OF ARGUMENT

1. The classification and assignment function in respect to delinquent youths in an HRS detention center by an Intake Counsellor is a planning/discretionary function for which there has been no waiver under Section 768.28 whether the strict rule in *Trianon* or the four-part test in *Commercial Carrier* is applied. In respect to the former, it is a category II function relating to police power and public safety; in respect to the latter, each question of the tests merits an affirmative response.

2. The Trial Court erroneously failed to direct a verdict upon the Plaintiff's claim that his injury was proximately caused by delay in his transfer to the Detention Center proper. The delay did not set in motion a train of events leading to the injury and under the circumstances, it was not foreseeable that such a delay would be likely to produce the injury.

3. The Trial Court erroneously failed to direct a verdict upon the Plaintiff's claim that he suffered damage due to the failure of HRS to provide him with immediate medical and psychiatric care. There was no evidence that delay in providing care caused any injury and the jury could only speculate as to this.

4. The Trial Court erred in admitting Plaintiff's exhibit 18 into evidence to show notice of the assailant's dangerous character to HRS when it was established that the counsellors involved with the Plaintiff had no knowledge of the document. Admitting it was prejudicial error.



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I.

## CERTIFIED QUESTION ISSUE

**IS THE ASSIGNMENT OR PLACEMENT OF ALLEGED JUVENILE DELINQUENTS IN A PARTICULAR ROOM OR LOCATION IN AN HRS DETENTION FACILITY AN INHERENTLY GOVERNMENTAL FUNCTION (ENFORCEMENT OF LAWS AND PUBLIC SAFETY PROTECTION) OR A DISCRETIONARY GOVERNMENTAL FUNCTION, WHICH IS PROTECTED BY SOVEREIGN IMMUNITY?**

The Petitioner contends that both aspects of this question should be answered in the affirmative.

In *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979), this Court determined that certain functions of government were not intended to be subject to the waiver of sovereign immunity effected by Section 768.28, *Florida Statutes*. It recognized that certain discretionary functions inherent in the concept of governing were excepted from the waiver. In characterizing these excepted functions, this Court resorted to the distinction between "planning" level functions and "operational" level functions set out in the opinion in *Johnson v. State*, 447 P.2d 352 (Cal. 1968). To assist in determining whether a particular function should be deemed "planning" as opposed to "operational", it recommended the four-part test in *Evangelical United Breth. Church of Adna v. State*, 407 P.2d 440 (Wash. 1966):

> 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, judgement 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?

An affirmative answer to each of these questions would, it was suggested, indicate a discretionary, planning level function immune from liability. A negative answer to one or more might necessitate further inquiry.

Subsequently, this Court attempted a further and more searching analysis of this issue. In a series of cases together with *Trianon Park Condominium v. City of Hialeah*, 468 So.2d 912 (Fla. 1985), this Court divided governmental functions into four categories:

1. Legislative, permitting, licensing and executive officer functions,
2. Enforcement of laws and protection of the public safety,
3. Capital improvement and property control functions,
4. Providing professional, educational and general services.

Functions falling into the first two categories, it held, were inherently discretionary functions of a planning nature not subject to waiver of immunity. Functions falling into the latter two categories might be "planning" or "operational" dependent upon application of the four part test derived from *Evangelical United Brethren.*

In the more recent case of *Dept. of Health & Rehab. Serv. v. Yamuni*, 529 So.2d 258 (Fla. 1988), this Court indicated that the four categories set forth in *Trianon* were not absolute rules for distinguishing between functions but only "rough guides" for such a purpose.

The precise issue here is whether the classification and cell assignment function, in respect to delinquent youths, of an HRS Intake Counselor is of a planning/discretionary nature or whether it is operational. What is not in issue is a question of the supervisory function of a counselor over the delinquent or dependent youths in his charge.[2/]

The delinquent youths committed to the Juvenile Detention Center and processed into the Center through the Intake Unit are predominantly those who have committed acts which if committed by an adult would be a felony. The Detention Center thus serves as an alternative placement to the County Jail for those youths charged with violations of a

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2/ This question is mooted by the jury's having found no negligence in the supervision.



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serious nature. As with all facilities designed for detention of suspects or criminals, the juvenile detention centers serve the purpose of isolating persons of deviant behavior from society both for the protection of society and the assurance of their availability for appearance in the justice system. While such a facility may serve additional functions in respect to its charges, what distinguishes it from alternative placements or release into the community is the fact that it is secure. Functions regarding assignment and classification within the centers -- and particularly their intake units where the decisions are made to detain or release -- pertain to the enforcement of laws and the protection of the public safety. Thus placement of a youth in a cell has implications for the safety of himself, other youths in the facility, staff and (should the placement be non-secure) the outside world in the event of his escape. Under the *Trianon* classification, this function would be a class II function and is precisely analagous to the same functions in an adult prison or jail: *Reddish v. Smith*, 468 So.2d 929 (Fla. 1985) (classification of a prisoner and assignment to a minimum security position from which he escaped; *Ursin v. Law Enforcement Ins. Co. Ltd.*, 450 So.2d 1282 (Fla. 2d DCA, 1984) aff'd. 469 So.2d 1382 (Fla. 1985) (inmate assignment to kitchen detail held discretionary); *Davis v. State, Dept. of Corrections*, 460 So.2d 452 (Fla. 1st DCA 1984) (classification and assignment of inmates to a particular dormitory and assignment to a particular bed held discretionary as a police power and public safety function). Thus the weight of authority in this State agrees that the classification and assignment function, including assignment to particular locations, buildings, jobs and beds, of those who are detained and removed from open society are properly categorized as category II functions under the *Trianon* analysis. Assuming the continued viability of the strict *Trianon* rule, this function, as inherently governmental and discretionary, would be regarded as beyond the waiver of immunity without further analysis.

Even assuming that this Court does not continue to accept the strict rule in Trianon, an analysis of the classification and assignment function involved herein, when



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viewed in the light of the *Evangelical United* analysis, must still be regarded as a planning/discretionary function for which no waiver has been made.

If the function of a detention center is to provide for the secure retention of those assigned to it, then the classification and the assignment function involve a basic governmental policy an objective: the placement of youths within the facility (and specifically here, within the Intake Unit) involves a very basic policy of providing security to those within and those without the facility. Secure detention is the *raison d'etre* of the center established by law.[3/] Question one is clearly answered in the affirmative.

That classification and placement of youths within the center -- and within the unit -- is essential to the realization of this function is clear. Without proper placement, the hazard of escape or injury to another is increased and the security of detention is lessened. Question two is clearly answered in the affirmative.

The guidelines provided to the Intake Counselors set forth general criteria for assignment of youths to intake cells (App. 6-7); they also note that the ultimate decision is one involving the sound judgement and discretion of the counselor. Although the *Trianon* classification may presently be regarded as less than rigid or automatic, it must nonetheless be noted that the functions distinguished in its category II have been treated with a different focus than those in categories III and IV by this Court and other appellate courts in this state. Thus while the type of functions in categories III and IV that are held to be planning/discretionary functions are those with a broad sweep and effect, going beyond an immediate situation, the functions involving police power or public safety which have been held to be planning/discretionary functions are often ones without a broad policy sweep on application and which involve application of discretionary decisions to a particularized situation: *Everton v. Willard*, 468 So.2d 936 (Fla. 1985); *Duvall v. City of Cape Coral*, 468 So.2d 961 (Fla. 1985); *Rodriguez v. City of*

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3/ Section 39.01 (31), Florida Statutes.



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*Cape Coral*, 468 So.2d 963 (Fla. 1985); *Rosenberg v. G. M. Kriminger*, 469 So.2d 879 (Fla. 3d DCA 1985); *Bob's Pawn Shop, Inc. v. City of Largo*, 488 So.2d 922 (Fla. 2d DCA 1986); *Rhodes v. Lamar*, 490 So.2d 1061 (Fla. 5th DCA 1986); *Kaisner v. Kolb*, 509 So.2d 1213 (Fla. 2d DCA 1987) all involve questioned decisions made by police officers in respect to particular situations; *Reddish v. Smith*, supra, *Ursin v. Law Enforcement Ins. Co.*, supra, and *Parker v. Murphy*, 510 So.2d 990 (Fla. 1st DCA 1987) all involve questioned decisions made by those in custodial care of prisoners in respect to particular prisoners or situations; *Carter v. Stuart*, 468 So.2d 955 (Fla. 1985) involved a decision by a dogcatcher not to impound a dog in a specific instance. As with most of these cases, the Intake Counselors here had a decision to make which required weighing of a number of alternatives -- youths could be arranged in various groupings within the limits presented by the available 2 cells -- based upon a number of relevant factors, none of which was itself pre-emting and mandatory (see *Erlich, J.*, concurrence in *Carter v. Stuart*, supra). The decision for placement involved the exercise of judgement and discretion by the counselors. Question three must be answered in the affirmative.

Beyond question, the counselors had authority to make the placement. There was no mandatory rule, statute or ordinance which proscribed their exercise of discretion. Question four must be answered in the affirmative.

Thus, whether the rule in *Trianon* survives in the strictness announced therein, it is clear that under the analysis prescribed in *Commercial Carrier*, the placement of the youths in a cell together was a planning level discretionary function for which there has been no waiver of immunity.

The certified question should be answered in the affirmative and the decision below quashed.



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## II.

## ADDITIONAL ISSUES PRESENTED FOR REVIEW UNDER THIS COURT'S PLENARY REVIEW POWER.

### A.
### The Trial Court Erred In Failing to Direct a Verdict Upon the Plaintiff's Claim of Delay In Processing.

The Plaintiffs contended at trial that the delay by the Child Care Workers in processing WHALEY into the Detention Center proper was negligent, and a proximate cause of the injuries claimed. The Defendant moved for a directed verdict on this claim upon the grounds that it was not foreseeable that the processing delay would result in a sexual assault in the Intake Unit. The denial of this motion and the subsequent motion for judgement in accordance therewith were erroneous.

No sexual or physical assault had previously occurred in the Intake Unit, although disturbances and even assaults were not infrequent in the Detention Center proper (R: 219, 819). In the Intake Unit, one Intake Counselor supervised from three to five youths from 8:00 p.m. until the incident occurred at 12:20 a.m.; in the Detention Center, 76 youths were supervised by 7-8 Child Care Workers prior to 11:00 p.m., and by 5 Child Care Workers thereafter (R: 817; Pl.'s Ex. 11). Thus the ratio of supervised to supervisors was substantially lower in the Intake Unit. The Intake Unit cells were visually inspected by the Counselors on a regular basis who otherwise remained within 15-20 feet of the open cells (indeed the jury found no negligence in supervision). Although the TV monitor was not operable in the Intake Unit, the audio microphone immediately outside the two Intake detention cells provided additional monitoring. While WHALEY remained in the detention cell just over four hours after he was cleared for processing, during three of those hours he was alone in the cell, and occupied the cell with Moore for just over one hour, and with Jones for about 45 minutes. While Jones' background, as known to the Intake Counselors, indicated that he had previously been charged with several violent crimes in the outside world (including the armed robbery charge under which he was then



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incarcerated), the evidence was unchallenged that he appeared calm, non-aggressive, respectful and obedient that evening during the short time he was in the Intake Unit prior to the incident. The Intake Counselors had no knowledge of Jones' ever committing an assault or other violent act while in custody on these prior occasions. There was no evidence that the Child Care Workers, whose duty it was to process youths into the Detention Center proper, had knowledge of particular cell assignments in the Intake Unit or of Jones' background. Moore's criminal background was not dissimilar from WHALEY's. He was, like Jones, cooperative and non-aggressive in the Intake Unit. Prior to the discovery of the incident by Mallett, there was no indication of violent or hostile intention by either Moore or Jones directed at anyone in the Intake Unit. There was no evidence that either Jones or Moore had ever previously committed a sexual or homosexual assault on any occasion at any place.

Several conclusions can be drawn from these facts: 1) the Intake Unit was clearly a safer and less risky environment for a youth than was the Detention Center proper; 2) the Intake Unit had no prior history of violent assaults of the nature found herein; 3) the Intake Unit was a secure, well-monitored environment; 4) neither the counselors of the Intake Unit nor the Child Care Workers of the Detention Center proper had any notice of a present threat posed by Jones or Moore to WHALEY or anyone else in the Intake Unit; 5) while the processing delay meant that WHALEY was not processed for slightly over 4 hours after he was ready for this procedure, during 3 of those hours he occupied his cell alone, and the time that he occupied it jointly with Moore and Jones was a time period roughly equal to the normal interval between the readiness of a youth for processing and the actual processing itself.

It is in view of this factual situation that the issue of proximate cause -- and, more specifically, the foreseeability component of proximate cause -- must be considered. The question to be asked is whether the HRS employees could have foreseen that, by reason of the processing delay, WHALEY would be subject to an unreasonable risk of injury.

In analyzing these facts, it should be initially noted that the processing delay did not set into motion a chain of causally related events leading up to the assault; rather, the cause-in-fact relationship of the delay to the assault is simply that it provided an occasion for the independent action of Moore and Jones. see *Department of Transp. v. Anglin*, 502 So.2d 896, 898 (Fla. 1987).

Foreseeability of the intervening tortious acts of third parties is measured not by what might be foreseen as possibly occurring, but by what might be foreseen as likely to happen. *Spann v. State, Dept. of Corrections*, 421 So.2d 1090 (Fla. 4th DCA 1982). In respect to criminal acts of third parties, an event can be seen as likely to happen if past experience shows similar criminal acts in the relevant location, *Relyea v. State*, 385 So.2d 1378 (Fla. 4th DCA 1980); or if the perpetrator is seen to evidence an imminent threat of violence, *Guice v. Enfinger*, 389 So.2d 270 (Fla. 1st DCA 1980); or if an assailant and his victim are known to have animosity for each other, *Spann*, supra. In the present cause, the evidence indicated that there had not been similar criminal acts (fights, assaults or sexual assaults) within the Intake Unit; neither Moore nor Jones exhibited any aggressive tendencies while in custody and there was no reason to believe that there would be any motive by Jones and Moore to assault WHALEY. see also *Clark v. Merritt*, 480 So.2d 649 (Fla. 5th DCA 1985); *Warner v. Florida Jai Alai, Inc.*, 221 So.2d 777 (Fla. 4th DCA 1969) and *Nance v. James Archer Smith Hospital, Inc.*, 329 So.2d 377 (Fla. 3d DCA 1976).

Clearly, as a matter of law, neither the Intake Counselors nor the Child Care Workers could have foreseen that an assault upon WHALEY was likely to occur given the knowledge available to them at the time.

There is a further factor in the foreseeability question in respect to the claim arising out of the processing delay which further buttresses this conclusion. The delay meant only that WHALEY was not transferred for several hours from the Intake Unit, where there was a history of no violent assaults, to the Detention Center proper, where there was some history of assaultive behavior by youths upon each other. The Intake



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Unit was more secure and better staffed. Seen prospectively, under the laws of probability, there was a greater likelihood that a youth would be assaulted in the Detention Center proper than in the Intake Unit. The likelihood of an assault occurring, insofar as could be forecast in advance, cannot, therefore, be said to have been increased by WHALEY's delayed transfer.

The question of foreseeability in respect to the claim predicated on delayed processing was a proper one for determination by the Trial Judge as a matter of law. *Department of Transp. v. Anglin*, supra. The District Court's affirmance on this ground should be quashed.

**B.**

**The Trial Court Erred In Failing to Direct a Verdict Upon the Claim of Failure to Procure Medical and Psychiatric Care.**

The third claim of negligence asserted by the Plaintiffs was that WHALEY suffered damages because of negligent failure on behalf of the HRS personnel to procure immediate medical or psychiatric care. The Defendants moved for a directed verdict upon this claim since the Record was totally devoid of any evidence whatsoever that would tend to establish that WHALEY suffered any damages due to the failure to obtain immediate medical or psychiatric care. The failure of the Trial Court to grant this motion was prejudicial error.

The only signs of physical injury to WHALEY were some red marks on his neck. There was no evidence that these marks needed any treatment or that he suffered any damage by not receiving immediate medical care (he never received any medical treatment for these marks even after his release the following day). In respect to the psychiatric injury claims, there was no testimony by either of the Plaintiffs two expert witnesses that immediate psychiatric treatment that evening -- or even in the several days that elapsed prior to Mr. WHALEY's learning of the incident -- played any factor in his psychiatric condition. On the contrary, one of these witnesses attributed his psychiatric condition to the incident, itself, and the other attributed it to a combination of a pre-



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existing disorder and to the incident. Neither provided evidence to support any damage or loss attributable to delayed treatment.

Under these circumstances, in the absence of any evidence of damage causally related to this claimed negligence in failure to provide immediate medical and psychiatric care, it was improper to permit this claim to go to the jury. In the absence of such evidence, the jury could only speculate as to the existence of any damage causally related to the particular claim of negligence; such speculation is impermissible. *Collins v. Burns*, 160 So.2d 550 (Fla. 3d DCA 1964). see also *Westbrook v. Bacskai*, 103 So.2d 241 (Fla. 3d DCA 1958).

The District Court in this case held that expert testimony on whether delay in a sexual crime victim's receipt of mental health care can aggravate the psychological effects of the attack was not essential. The Petitioner submits that this ruling erred in two respects: first, the issue was not whether such claims can be asserted without support of expert evidence, but whether they can be asserted without support of *any* evidence. Second, such injury claims are not of the type of medical conditions which are within the sphere of common knowledge for which expert testimony is not needed. see Sims v. Helms, 345 So.2d 721 (Fla. 1977).

Most instructive is the case of *Noor v. Continental Casualty Company*, 508 So.2d 363 (Fla. 5th DCA 1987). There a physician failed to diagnose promptly a patient's breast cancer. The evidence did not indicate whether the patient's life may have been shortened by the delay, nor did it indicate that treatment, if promptly given, would have been significantly different from that which the patient did receive. The District Court affirmed a summary judgement for the defendant:

> The fallacy in Mrs. Noor's claim is that her life expectancy would have been shortened even if Dr. Burdette had accurately diagnosed her condition on February 5, 1980, and performed the modified radical mastectomy at that time. The question of whether Mrs. Noor's life expectancy was further decreased by the delay from February to September can only involve pure speculation. Mrs. Noor's claim of negligence against Dr. Burdette is based on his alleged delay in diagnosis and not his actual treatment of Mrs. Noor's condition. Since any decrease in her life expectancy *because of the delay* is



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purely speculative, Dr. Burdette's alleged negligence cannot be demonstrated to have proximately caused Mrs. Noor's decreased life expectancy or resulting emotional trauma or mental distress.

The Respondent submits that the rule in *Noor* more accurately and properly represents the law in this State, and that the ruling of the District Court, herein, was error and should be quashed.

### C.
### The Trial Court Erred In Admitting Into Evidence Plaintiff's Exhibit 18. This Error Was Prejudicial.

The Plaintiffs offered into evidence the Pre-Disposition Report prepared by an HRS counselor (Tiffany Bonjai) on December 8, 1981 (App. 8-10). This Report, prepared by the counsellor for the juvenile court, was maintained in the permanent file of Willie Jones. The Report contained quotations and reports of statements made to Bonjai by police officers, teachers and Jones' mother. Although the Report itself, as a business record, was admissible over a hearsay objection as to any statements originating with the counselor that drafted it, the business record exception could not overcome the hearsay within hearsay objection in respect to statements contained therein and originating with the police, teachers and parent, *Ehrhardt, Florida Evidence*, 2d Ed., Section 805.1. The Trial Court, however, admitted the document into evidence to show "notice" of the information contained in the report to *HRS* (R: 120). In doing so, the Court committed reversible error.

Section 768.28 (1), *Florida Statutes* (1981) states:

> (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death *caused by the negligent or wrongful act or omission of any employee* of the agency of subdivision while acting within the scope of his office or employment 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, may be prosecuted subject to the limitations specified in this act.
>
> (emphasis added)

Thus the only predicate for liability allowed under Section 768.28 against a governmental entity is *respondeat superior*, whereby the entity would be liable for the negligent torts committed by its employees. No other basis of liability, vicarious or direct, is allowed against a governmental entity. This rule was recognized by this Court in *Rabideau v. State*, 409 So.2d 1045 (Fla. 1982) where it held that Section 768.28(1) did not allow a claim predicated on the dangerous instrumentality doctrine. Thus, while a non-governmental entity (corporation or partnership) or a private individual may be subject to other bases for liability than vicarious liability for an employee's discrete negligence or other wrongful acts, the governmental entity can be liable only when its employees have been negligent or otherwise have acted wrongfully.[4/] Consequently, if notice of a fact is a necessary component of a negligence liability equation, then that notice must be had by the employee alleged to be negligent. If notice of such essential element is not had by the employee charged with negligence or wrongful acts, then that employee cannot be negligent even if another employee does have such notice.[5/] Thus, since the governmental entity's liability is predicated upon vicarious responsibility for the negligent acts of its employees, then notice, if an essential element in that negligence, must be had by the employee claimed to be negligent before the entity can be vicarious liable. Put another way, the liability of the government entity which is predicated upon an action or failure to act by an employee -- whose conduct is claimed to be negligent in the face of notice of certain facts -- cannot be supported by evidence of notice of those facts to another employee not charged with acting or improperly failing to act.

This rule, which is fundamental to any analysis of the basis of governmental liability in Florida, is decisive on the evidentiary question raised on this point. The Pre-Disposition Report from 1980 (Pl.'s Ex. 18) was not known to Mallett or McCray and the

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4/ See Mercury Motors Exp. Inc. v. Smith, 393 So.2d 545 (Fla. 1981) and U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983) as illustrating the independent liability of a corporate entity for its own acts apart from the acts of its employees which form a discrete incidence of negligence.

5/ Significantly the Plaintiffs only alleged notice to Mallett and McCray.

facts on it were not known to them. The report was in the HRS file in a separate building at another location (R: 175, 187-188). It was established that it would have taken longer to have searched for and retrieved the Report than the time which elapsed between Jones' arrival at the Center and the incident. It would not have been possible for the counselors to have obtained the report -- even if they had reason to believe that there might be a relevant report in the Department's files -- before the incident. The facts in the report were known to its author, Tiffany Bonjai, but there was no evidence that she even knew that Jones had been arrested, and that the information in the report might be useful to an Intake Counsellor. There was no evidence that anyone else in HRS had knowledge of the information. Thus the knowledge of the information in the report has no relevance in establishing negligent conduct by any HRS employee. Consequently, its admission was clear error.

The District Court tacitly acknowledged the error in the admission of Plaintiff's Ex. 18 but held the error to be harmless since, it stated, there was other evidence of Jone's background in the Record. What the District Court seems to have omitted in its consideration of this point was that much of the information contained in Plaintiff's Exhibit 18 was found nowhere else in the Record. Specifically, this document contained the following "facts" not addressed elsewhere in the evidence:

a) Officer Ryan stated on interview "the boy [Jones] is too violent to remain in the community";

b) Detective Eberle stated "Willie needs to be committed before he kills someone";

c) While held in the Regional Detention Center, Jones was involved in several fights;

d) The consensus of 5 teachers at Lake Shore Middle School was "Willie does not belong in a normal school situation. He is a definite threat to his classmates and any authority figure. His attitudes are nasty and his actions volatile";

e) Jones and his natural mother "...do not get along at all. Mrs. Malone [the Mother] wants Willie put away for several years..."

f) In respect to the charges upon which the Pre-Disposition report was prepared it was concluded that "(d)ue to the serious and violent nature of the charges, it seems necessary to remove the youth from the community in order to protect it..."

None of these items is found in any of the other documentary evidence. Nor do the references to criminal charges made against him which are contained in the other references correspond to the particular hearsay comments and opinions found in Exhibit 18. While Exhibit 17 contains a list of bare and unelaborated charges made against Jones over a period of several years, it also indicates that almost none of the charges was sustained for one reason or another. The same conclusion is presented in Exhibits 4 and 5; Exhibit 8 does not refer to prior history. By contrast, Exhibit 18 contains what none of the other documents contain: the quoted opinions of police officers, teachers, social workers and even his own mother that he was something more than the subject of unsupported or unconvicted charges; these opinions clearly assert that Jones is an imminent threat and a danger to all around him.

The issue upon which these hearsay statements were admitted was whether the HRS counsellors involved knew or should have known of a threat presented by Jones to other inmates, including Whaley. The information set forth in the other Exhibits is, at best, ambiguous as to his propensity for violence -- indeed, since the State must by constitutional mandate presume Jones' innocence of all charges for which he was not convicted, these other exhibits convey little more information than that Jones has been accused of a range of crimes (a prerequisite for his being in the detention center to begin with). The hearsay statements of Exhibit 18, on the other hand, purport to convey the opinions of those who are intimately familiar with Jones quite apart from any specific alleged crime. The weight which a jury might feel that this information should have been accorded in the counsellor's decision process is of a different order than that which they might feel should have accorded the unsustained and unconvicted criminal charges.

Since McCray and Mallett had no knowledge of any prior problems encountered by authority figures in controlling Jones and since there was no knowledge to them of any

threat by Jones to other juveniles in an institutional setting, these points were critical on the issue of foreseeability under the *Spann* standard. The Court's instruction limiting consideration of this exhibit to the issue of notice exacerbated rather than reduced the prejudicial effect since it was precisely on the issue of notice that this report was prejudicial.

It is clear also that the unique information contained in Exhibit 18 was heavily relied upon by the Plaintiffs' counsel in his concluding argument to the jury: nearly 2/3 of his discussion of knowledge of Jones' past conduct and propensities that he argued should be attributed to the employees of HRS was devoted to the information found solely in Exhibit 18 (R: 876-880).

That admission of prejudicial evidence is reversible error even when, in part, cumulative, has been recognized by several opinions of the District Courts: *Kane Furniture Corp. v. Miranda*, 506 So.2d 1061, 1067 (Fla. 2d DCA 1987); *Francis v. State*, 512 So.2d 280, 281 (Fla. 2d DCA 1987); *Aetna Cas. & Sur. Co. v. Cooper*, 485 So.2d 1364, 1366 (Fla. 2d DCA 1986). See also *Huhn v. State*, 511 So.2d 583, 589 (Fla. 4th DCA 1987). Of particular significance is the decision of this Court in *Kight v. American Eagle Fire Ins. Co. of New York*, 170 So.664, 670 (Fla. 1936). There an abstract evidencing title ownership to real property was erroneously admitted into evidence in a suit upon a fire policy. Title and beneficial ownership of the property was an essential element in the suit. This Court recognized that the error of improperly admitting the abstract was not harmless where the other evidence cumulative on the issue of ownership was somewhat vague in details and likely to have much less impact than the written abstract document. So, too, here the other evidence of Jones' background was vague -- a bare listing of charges against him and a note that they had generally been nolle prossed and a record in detail only of his most recent crime. Detailed and highly-impacting accounts of his background and propensity to violence, especially in respect to institutional settings, was found only in

Exhibit 18. It cannot be properly contended that the admission of this Exhibit was harmless. The District Court's ruling in this respect should be quashed.



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## CONCLUSION

The Petitioner submits that the question certified by the District Court should be answered in the affirmative. It also urges this Court to review the issues raised in the remainder of its argument, to find that the Trial Court erred in failing to direct a verdict on the claims involving delayed processing and failure to obtain immediate medical care and to quash the decision of the District Court affirming these rulings. Finally, it urges this Court to review the evidentiary ruling of the Trial Court in respect to Plaintiff's Exhibit 18, to determine that the exhibit was erroneously admitted into evidence and that said error was prejudicial and to quash the decision of the District Court affirming the admission.



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief and Appendix have been furnished to RICHARD A. KUPFER, ESQUIRE, Post Office Box 3466, West Palm Beach, FL 33402; CAROLE SHAUFFER and JANET HELSON, Youth Law Center, 1663 Mission Street, Fifth Floor, San Francisco, CA 94103 and FRED A. HAZOURI, ESQUIRE, Post Office Box 024426, West Palm Beach, FL 33402, by U. S. Mail, this 19th day of December, 1988.

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