IN THE SUPREME COURT OF FLORIDA
CASE NO. 73,344

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Petitioner,

v.

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

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

On Petition to Review Question Certified
By The Fourth District Court of Appeal

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QUESTION CERTIFIED

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?

PRELIMINARY STATEMENT

The Fourth DCA has certified to this court a single question (involving sovereign immunity) which it considered to be of great public importance. Other issues that were raised by HRS were mentioned very briefly by the Fourth DCA in the last two pages of the slip opinion. This court is now exercising discretionary jurisdiction to review the certified question.

In HRS' Brief on the Merits,[1] five pages of argument are spent on the sovereign immunity question certified to this court by the Fourth DCA, and the remaining ten pages of argument are spent discussing "additional issues" (including proximate cause, sufficiency of damages evidence, and whether a document was hearsay) which HRS raised before the Fourth DCA but which have nothing to do with the question certified

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1. HRS' brief on the merits is incorrectly titled as "Petitioner's Brief on Jurisdiction." There are no jurisdictional briefs in certified question proceedings. Fla.R.App.P. 9.120 (d).

to this court.

Although this court unquestionably has the power to reach beyond a question certified by a DCA and has infrequently exercised that discretion in the past, this court has never (to our knowledge) invited litigants to spend two-thirds of their merits briefs arguing collateral issues that have nothing to do with the certified question. If, in a particular case, this court desires to exercise its extraordinary perogative to offer a second tier of de novo plenary review over all issues that were considered by a District Court of Appeal, then we assume this court would make that decision in the first instance and direct the parties to address other specific issues besides the issues relating to the question (or questions) certified by the DCA.

Therefore, instead of responding to collateral issues that are not related to the certified question, we believe it is probably more appropriate to wait for this court to advise the parties that it wishes to hear argument on such additional issues. We will address in this brief the portion of Petitioner's brief that relates to the certified question.

If we were to respond to the other issues raised it would be the same response we filed with the Fourth DCA. As Appendix "B" to this brief we are filing a copy of our Fourth DCA brief in order to show what our response was to these other points. (HRS' proximate cause argument is answered at pp. 19-22 of our Fourth DCA brief. HRS' argument concerning the sufficiency of the damages evidence is answered at

pp. 22-26 of our Fourth DCA brief. HRS' hearsay argument, addressed to Plaintiff's Exhibit #18, is answered at pp. 27-32 of our Fourth DCA brief.)

STATEMENT OF THE CASE

Petitioner's Statement of the Case is accepted with the following additions.

In the Amended Complaint (R. 1010-1020), plaintiff alleged that Whaley was a small, young white male placed with two older and much larger black males, at least one of whom had known propensities for assault, violence and racist behavior (R. 1013, 1017); and HRS workers failed to periodically check the holding cell or respond promptly to noises emanating from it (R. 1013, 1017). It was further alleged that HRS workers failed to furnish Michael Whaley with immediate medical and psychiatric care after the sexual battery but instead tried to conceal what had happened. (R. 1013-1014, 1018). It was alleged that as a result of HRS' failure to protect young Whaley from unnecessary harm while he was under HRS care and custody (R. 1017), Whaley suffered psychological damage, emotional distress and humiliation, mental and physical pain and suffering and medical expenses. (R. 1014, 1019).

HRS admitted in its pleadings that it knew, through its employee William Mallett, that one of the black youths, Willie

Jones, had a prior history of having engaged in prior violent criminal acts. (R. 1053).

The jury returned a verdict finding that HRS was negligent in placing these particular two older and larger black youths in the same holding cell as young Whaley and allowing Whaley to remain there for an extended period of time, and in failing to furnish immediate medical and psychiatric care, all of which resulted in injury to Whaley. (R. 1171-1172). Final judgment was entered pursuant to the jury's verdict (R. 1182-1183), except the trial court remitted a portion of the damages to the father, David Whaley (R. 1195-1196), which was accepted by the plaintiff. (R. 1198).

STATEMENT OF THE FACTS

Petitioner's (HRS') Statement of the Facts is insufficient in that it omits numerous important facts, and is also inaccurate in a few respects. We restate and present the facts, as they should be presented at this stage, in a light most favorable to support the jury's verdict which was upheld by the District Court of Appeal.

On March 15, 1982, Michael Whaley was arrested with two companions on suspicion of breaking and entering. He was not then charged with any burglaries during preceding months as HRS incorrectly states at page 4 of its brief. In fact, Michael was a first time offender, he had never before been arrested or charged with anything, and HRS was admittedly

aware of that when Michael was held at the HRS detention center on March 15, 1982. (R. 88, 149, 402).

Michael was brought to the intake facility at about 6:00 p.m. (R. 134, 136). It was admitted by HRS intake screeners that it should normally take about 30 to 45 minutes to screen a juvenile who is brought in and get the juvenile delivered to the dormitory section. (R. 136, 137, 251). It was admitted that HRS wants to get a child out of the holding cell and into the supervised detention area as soon as possible (R. 137). The two companions who were brought in with Michael were promptly processed and brought to the dormitory section. (R. 139-140, 938). However, Michael was left to remain in the holding cell from 6:00 p.m. until well after 12:00 midnight, when the assault occurred. (R. 153).

Michael was screened by intake counselors at about 7:00 p.m. and Master Control was called to pick him up and deliver him to the dormitory section at about 8:00 p.m., and they were repeatedly called throughout the evening by the intake counselor to come pick up Michael, but they never came for him until after he was raped in his holding cell (well after midnight). (R. 138, 142, 169-170). The HRS intake counselor admitted Michael was left in the cell for much longer than he should have been (R. 153). From 8:00 to 11:00 p.m., no new children were delivered to intake and there was no other activity, but still nobody came to transfer Michael out of his cell. (R. 134-135).

At about 11:00 p.m., HRS intake counselors put Glenn

Moore into the same cell with Michael Whaley and at about 11:20 p.m. Willie Jones was also put into the same cell. (R. 134-135, 181). Michael Whaley was a very young (14 years old) white youth of small stature, weighing only 98 pounds and standing only 5 feet 4 inches tall. (R. 145-146, 149, 626, 628). This was his first offense and HRS was aware of that. (R. 88, 149). Glenn Moore was a 15 year old black male who stood 6 feet 2 inches and weighed 160 pounds. (R. 144-145, 180). According to the records which arrived with Moore, and which the HRS intake screeners had available, Moore had a prior criminal history involving an assault and was now rearrested for burglary. (R. 144-145, 210). But even Moore was docile compared to Willie Jones who had an incredible past record of extreme violence which was available to the intake screeners when he arrived at 11:20 p.m. that night.

Willie Jones was a 16 year old black male who stood 6 feet 2 inches and weighed 195 pounds. (R. 79-80). According to reports which arrived with Jones and which were given to the HRS intake personnel (R. 79-80, 82), Jones had just been arrested for four violent felonies (R. 80) including aggravated assault with a gun, battery and resisting arrest with violence. (R. 81). Three days before his arrest Jones held up a liquor store and threatened a lady with a deadly weapon. (R. 83).

The HRS intake personnel had a master card listing all of Jones' prior crimes and the disposition. (R. 87-88, 89).

A chronological record listed all of Jones' violations including an aggravated battery in November, 1979;[2] an assault with a deadly weapon in June, 1980; attempted battery and resisting arrest with violence in December, 1980; another assault and resisting arrest with violence in December, 1980; an armed robbery in January, 1981; an aggravated assault with a gun in April, 1981; an aggravated assault in July, 1981; and now in March, 1982, another armed robbery and aggravated assault. (R. 93-94, Plaintiff's Ex. 17).

HRS intake screener, William Mallett, who came on shift at midnight, testified that he knew Willie Jones from a prior time Jones was at the facility (R. 235). He knew Jones was a violent individual (R. 236) and he was already aware of the information contained in the reports. (R. 283).

At 11:00 p.m. when Moore and Jones were brought to the HRS intake facility, the only other youths then being detained in a holding cell, besides Michael Whaley, was a boy named Fanning and a boy named Williams. (R. 146). Fanning and Williams were in holding cell #1 and Michael Whaley was in holding cell #2. (R. 146, 147-148). Neither youth had any violent background, just as Whaley had no violent background. Fanning was not even charged with an offense; he was a dependent child. (R. 146, 195-196, 210). Williams had just been arrested for breaking and entering, similar to Whaley. (R.

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2. In the November, 1979, episode Jones attacked another person with a pool cue, a hammer and a soda bottle. (R. 129).

211, Plaintiff's Ex. 4). He was 13 years old; younger than Michael Whaley. (Petitioner's Brief, p. 5). Neither Fanning nor Williams had any known propensity for violence. (R. 149).

HRS intake screener, Lloyd McCray, admitted he could have put Whaley in the same holding cell with Fanning and Williams and separated him from Jones and Moore. (R. 149). He admitted he just did not think about Jones' history of violence. (R. 151). The other HRS intake screener, William Mallett, admitted that in retrospect it would have been much safer to put Whaley in with Fanning and Williams than to leave him in with Jones and Moore. (R. 263). The HRS Intake Screening Unit Manual provides that when putting children in holding cells the age and potential violence of the youth must be considered. (R. 68-69). The holding cells are also supposed to be monitored by the screener every fifteen minutes (R. 69-70), but there was no way for intake screeners to monitor the cell from their offices without getting up and walking down the hall and over to the cells. (R. 66).

After Whaley was held for about an hour in the same cell with Jones and Moore the sexual assault occurred. Jones asked Whaley if he "wanted to be his boy" (R. 598) and if he would like to get raped. (R. 599). Whaley tried to get away (R. 599) but then Moore came over and held Whaley's arm and shoulder (R. 603) while Jones unzipped his pants and squeezed Whaley's throat. (R. 603-604). Moore forced Whaley down on his knees (R. 605) and Whaley tried to yell

but he couldn't breathe while being choked (R. 607). His life was threatened. (R. 348). Jones and Moore forced Whaley's mouth open and forced him to perform oral sex upon Jones until the intake screener walked into the room. (R. 348-349, 610).

Instead of acting to counsel and console a rape victim, HRS tried to conceal what happened. When the intake screener, Mr. Mallett, took Whaley out of the holding cell to speak to him separately and Whaley told him he had been assaulted, Mallett told Whaley not to let any of this news leak out and no charges would be filed against Whaley. (R. 609). Michael Whaley's father was allowed to pick up Michael the next day. (R. 404). While at the HRS facility waiting for the paperwork to be completed, nobody told Michael's father about the assault. (R. 404-405). Michael's father then noticed black and blue marks all around Michael's throat and when he inquired about it, none of the HRS personnel told him what really happened. (R. 405). Michael, who had been threatened by HRS the day before not to say anything and who was extremely embarrassed told his father he had a fight with another boy at the detention center. (R. 405). No one else in the room spoke up.

About three days later Mr. Reiss, from the HRS facility, called Michael's father at work and told him that HRS was going to file charges against Michael because "your son had been giving blow jobs out in the Detention Center." (R. 407, 400). None of this evidence of concealment by HRS was con-

tradicted at trial, nor was HRS' attempt to extort Michael's silence about the whole affair contradicted.

Later, the matter was investigated by the Inspector General's Department for HRS and a final report was issued. (R. 339). HRS' own investigative team concluded that Whaley was sexually assaulted under threat of bodily harm (R. 341); that the initial handling and investigation was not adequate (R. 340), that there was no acceptable explanation why Whaley was held in the cell for six hours (R. 340) and it was uncovered that the intake holding cells were improperly being utilized for dependent children and children who could be released and were just waiting on their parents to pick them up. (R. 340-341).

Another independent HRS investigation was later performed by Gary Jones, who monitors HRS intake procedures for the entire district encompassing five counties. (R. 307, 309). He also concluded that there was no acceptable explanation for the delay in processing Michael Whaley (R. 314); that the intake screener's (Mr. Mallett's) handling of the incident and performance of his duties was "certainly negligent" (R. 315); and that Mr. Mallett should be disciplined. (R. 269).

SUMMARY OF ARGUMENT

The question certified to this court is largely academic for purposes of this litigation because, no matter how this court may answer the question, it would not affect the jury's verdict. The jury's verdict in this case was based on multiple theories of liability in addition to the "negligent cell assignment" theory. It is debatable whether this court should exercise its discretion to review such a nondispositive question.

On the merits, HRS' analogy to cases involving convicted prisoners in adult prisons does not withstand close examination, especially when this court recently (in another H.R.S. case) receded from some of the dicta expressed in those earlier cases. The "inherently governmental function" test was recently disapproved by this court in favor of an inquiry directed solely to whether the challenged act was a "basic policy-making decision at the planning level."

This court recently held that even an HRS caseworker who investigates reports of child abuse and decides the delicate question of whether to seek to remove the child from the parent is not performing a "basic policy making decision at the planning level." That is so even though there is some exercise of discretion involved. Practically all governmental functions can embrace the exercise of some discretion, but that is not the dispositive issue.

The intake counselor's function at HRS is not even remotely

a "basic policy-making" function. Certainly it is less "policy-making" than a caseworker who may be making decisions that will permanently affect the child. The intake screeners are supposed to follow internal policy (in the HRS Intake Screening Manual) that has already been created by the policy-making authorities in HRS, and which requires intake counselors to take age and potential violence of a youth into consideration when putting children into holding cells with other children.

Even if "analogous private liability" was still a relevant consideration, in this case there is analogous private liability involving private facilities that house delinquent and ungovernable children. A juvenile detention center is defined by statute as a facility for the temporary care of children, pending delinquency adjudication.

The Fourth DCA's opinion is faithful to the precedent that has been set by this court.

ARGUMENT

(Jurisdiction)

It should initially be noted that the question certified to this court is largely academic for purposes of this case because, no matter which way this court may answer the question, it would not affect the outcome of the litigation. It is debatable, therefore, whether it is the type of question over which this court should exercise its discretionary jurisdiction.

There were several bases of liability on which the case was tried including negligent cell assignment, negligent failure to process the minor out of the holding cell for over six hours, negligent supervision and negligent failure to render medical care soon after the assault. The jury returned a verdict for the plaintiff on three separate counts and the Fourth DCA, in affirming that verdict, noted that there was sufficient evidence presented on any one of the several theories of liability to support the jury's verdict. (See pp. 4 and 17 of the slip opinion, App. A.) Failing to process the minor out of the holding cell for over six hours is unquestionably an operational level activity, as is the failure to render emergency medical or psychiatric treatment. Inadequate supervision would also be a shortcoming at the operational level.

However in the question certified to this court, the Fourth DCA only focused on one of these theories of liability

(the negligent cell assignment theory) and questioned whether this falls within the classification of a "planning-level" activity or an "operational-level" activity. For purposes of this litigation it does not matter because there are several independent bases of liability found by the jury which are unquestionably operational in nature and were not even challenged by HRS as being planning-level in nature.

Before this court accepts jurisdiction to answer a certified question, it should not just be one of great public importance but it should also (at least usually) be a pivotal issue in the litigation itself and dispositive of the appeal. There are analogous situations where a certified question must be dispositive of the case. For example, under Fla.R. App.P. 9.150 (a), a Federal court can only certify a question to this court when "the answer is determinative of the cause." While that precise language does not appear in the rule governing certified questions from a DCA, it still makes practical sense to consider this as an important factor before this court exercises its discretion to entertain a certified question from a DCA.

Another example of this principle can be found in criminal cases when a defendant wishes to plead nolo contendere and still reserve a legal issue for appeal. That can only be done if the issue is "dispositive" of the case. Brown v State, 376 So.2d 382 (Fla. 1979). The principle underlying both of these examples is that an appellate court (especially one with state-wide jurisdiction) does not

generally have the time or resources to render advisory opinions in civil litigation (except perhaps under very compelling circumstances).

We are not suggesting this court could never exercise its discretion to entertain a certified question from a district court of appeal that is not dispositive of the case. However, to do so should be the exception rather than the rule. Since there are no "jurisdictional briefs" filed in this type of supreme court proceeding, we raise this question of jurisdiction as an initial matter in this brief because we believe it is the first question that should be considered.

(Merits)

On the merits, HRS argues that the function of assigning an alleged delinquent youth to a particular holding area in a state run detention center is a purely discretionary "planning-level" function for which HRS enjoys total immunity.[3] HRS analogizes cases involving adult prisons such as Reddish v Smith, 468 So.2d 929 (Fla. 1985), which contained certain dicta from which this court later receded in Dept. of HRS v Yamuni, 529 So.2d 258 (Fla. 1988).

Before this court's recent decision in Yamuni, HRS argued in the present case that the decision where to place a

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3. Before the Fourth DCA below, HRS argued that the immunity issue might differ with respect to its assignment of a dependent youth (rather than a delinquent youth) to a particular area. The Fourth DCA rejected that distinction. (See slip op., p. 14). That entire discussion is not contained in HRS' brief to this court.

prisoner is an "inherently governmental function" for which there was no analogous private liability (citing this court's language in Reddish, supra.) However, the Fourth DCA noted that in Yamuni, supra, this court receded from the dicta in Reddish and held that the waiver of sovereign immunity statute does not apply only in circumstances where there might be analogous liability in the private sector. (Slip op., p. 11-12). Rather, after Yamuni, sovereign immunity continues only for "basic policy-making decisions at the planning level." (Slip op., p. 12).

In Yamuni, this court noted that even though an HRS caseworker, who investigates child abuse referrals and decides the delicate question of whether or not to seek the removal of a child from its parent, is performing a traditional police power function and is necessarily exercising discretion, it still does not constitute the type of "basic policy making decision at the planning level" which would be immune from judicial scrutiny. This court noted that practically all governmental functions can embrace the exercise of some discretion, but that is not the dispositive issue.

If an HRS caseworker who exercises the discretion whether to seek a child's removal from a parent is not performing a basic planning-level function, it is hard to understand why an HRS intake counselor's seemingly less sensitive decision where to temporarily place a suspected delinquent child should warrant greater immunity protection. If any-

thing, one would think it should be the other way around. This court has held that the State has waived sovereign immunity for the negligence of an HRS caseworker, and it would be inconsistent to now find the state has not done so for the negligence of an HRS intake counselor.

Contrary to HRS' reliance on cases involving adult prisons, this court stated in the Yamuni case that, "HRS is not merely a police agency." This court noted that the categories set out in the Trianon Park case[4] are only a rough guide and that it is ultimately still the Commercial Carrier case[5] that sets out the dispositive test, consisting of the four-part inquiry borrowed from the Evangelical United Brethren case from Washington state.[6] HRS has set out that four-part inquiry in its brief at p. 9.

Addressing the four-part Evangelical Brethren test, the only question that can definitely be answered in the affirmative is question number 4.

1. The act of assigning a suspected delinquent youth to a particular temporary holding area does not "necessarily involve a basic governmental policy or program." Although there is some degree of subjective thought process that

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4. Trianon Park Condo Assoc. v City of Hialeah, 468 So.2d 912 (Fla. 1985).

5. Commercial Carrier Corp. v Indian River County, 371 So.2d 1010 (Fla. 1979).

6. Evangelical United Brethren v State, 407 P.2d 440 (Wash. 1966).

should go into the decision (which was lacking in this case), it is an essentially ministerial activity. It is not "basic policy-making at the planning level;" in fact, the intake screeners are supposed to follow internal policy that has already been created by the policy-level authorities in HRS.

2. The decision where to place Michael Whaley was not "essential to the realization of a basic governmental policy." Rather, it was "one which would not change the course" of such policy. The Fourth DCA below noted that this question would be answered in the negative. (Slip op., p. 13).

3. The decision where to place Michael Whaley may have called for the exercise of some degree of elementary judgment, but it did not "require the exercise of basic policy evaluation or expertise." The Fourth DCA below noted this question would be answered in the negative. (Slip op., p. 13).

4. Admittedly the answer to this question is "yes," since HRS does have statutory authority to detain suspected juvenile delinquents.

According to Dept. of HRS v Yamuni, supra, "If the answer to any of the [four] questions is no, the activity is probably operational level which is not immune." In this case, the answer to three of the four questions is "no."

HRS is in error when it says in its brief (at p. 13) there was no mandatory rule that defined the parameters of the intake counselors' discretion when deciding where to temporarily place a suspected delinquent or dependent youth. The HRS Intake Screening Manual provides that the age and

potential violence of a youth must be considered when intake screeners put children into holding cells with other children (R. 68-69). The Fourth DCA below took special notice of this. (Slip op., p. 17). However, HRS intake screener, Lloyd McCray, admitted at trial that he just did not think about Jones' size and propensity for violence when he put Jones in the same cell with Whaley. (R. 150-151). See also App. A. slip op., p. 17). That negligent omission was at the operational level.

It has been held that, while the setting of policy and procedures for classifying and maintaining inmates is a discretionary function which is immune from liability, any negligence in the failure to follow policies and procedures which have previously been established to prevent acts of violence among prisoners (even adult prisoners) is an operational level function for which there is no immunity. Dunagan v Seeley, 13 F.L.W. 2413 (Fla. 1st DCA, Oct. 28, 1988). See also Sanders v City of Belle Glade, 510 So.2d 962 (Fla. 4th DCA 1987) and City of North Bay Village v Braelow, 469 So.2d 869 (Fla. 3d DCA 1985), rev'd. on other grounds 498 So.2d 417 (Fla. 1986).

In the present case the Fourth DCA also noted in its opinion (see slip op., p. 13, App. A) that even if the language in Reddish v Smith, supra, had not later been disapproved so that "analogous private liability" was still necessary for a plaintiff to show, in this case there is analogous private liability. A private facility housing

ungovernable children (and receiving assistance from HRS) stands in "loco parentis" and may be liable for intentional torts of a resident child when there is knowledge of the child's prior violence and the facility fails to exercise control to avoid foreseeable injuries to others. Nova University, Inc. v Wagner, 491 So.2d 1116 (Fla. 1986). See also §314A (4), 319 and 320 of the Restatement (Second) of Torts (1979). Compare Miller v State of Fla., Dept. of HRS, 474 So.2d 1228 (Fla. 1st DCA 1985); McCall v HRS, 13 F.L.W. 2573 (Fla. 1st DCA, Nov. 23, 1988); Collins v The School Bd. of Broward County, Fla., 471 So.2d 560 (Fla. 4th DCA 1985); and Rupp v Bryant, 417 So.2d 658 (Fla. 1982). Since there is analogous private liability, the Fourth DCA below noted (at slip op., p. 13) that this case would fall within category IV of the Trianon Park test, even if that test was still viable after this court's more recent Yamuni opinion.

Unlike the cases involving adult prisons, Michael Whaley was not an incarcerated prisoner. He was in the protective custody of HRS and, while in that status, HRS failed to protect him. A "secure detention facility" is defined by statute as a "facility for the temporary care of children, pending delinquency adjudication or court disposition." §39.01 (45), Fla. Stat. (1987). Such a facility is not analogous to a prison. It is analogous to a private facility that houses ungovernable and delinquent children. See Nova University, Inc. v Wagner, supra. None of the cases relied on by HRS involve juveniles at a temporary

detention center. These children are wards of the state; not incarcerated prisoners. See In the Interest of K.P., a child v State, 327 So.2d 820, 821, ¶5 (Fla. 1st DCA 1976); §39.002, Fla. Stat. (1987).

The Fourth DCA below held that, although HRS cannot be expected to completely insure the safety of a child in its temporary care who is charged with delinquency, it would be "ludicrous" to conclude there is no duty of care to protect the child from potential harm by third persons where the risk of such harm is foreseeable, or that HRS is immune from liability for breach of such duty. (Slip op., pp. 13-14, 15, 16). The duty was found to arise under common-law principles (citing to the Restatement (Second) of Torts, §320) and pursuant to statute (citing provisions in the Juvenile Justice Act). (Slip op., pp. 14, 16).

The Fourth DCA's analysis of the sovereign immunity issue was comprehensively stated in the opinion. It traces the law that has developed from this court and faithfully follows that precedent right on up to the most recent pertinent decision from this court; HRS v Yamuni, supra. The statement in HRS' brief about the weight of authority in this State being at odds with the Fourth DCA's opinion is incorrect. The Fourth DCA's opinion is faithful to the precedent that has been set by this court, and that has been followed by other District Courts of Appeal in recent years. Although the Fourth DCA did not recite all of the relevant facts involved in the case (some of which are rather indelicate),

its analysis of the law is flawless.

The only deficiency to be found in the opinion is in the phrase "inherently governmental function" used in the certified question. That terminology was disapproved in the Yamuni case. Rather, the issue is whether the questioned act is a planning-level (basic policy-making) act or an operational-level act. The Fourth DCA was correct in finding that, in this case, it was not a "basic policy-making decision at the planning level," and is therefore not protected by sovereign immunity.

If the certified question is to be answered by this court (even though it does not affect the outcome of the litigation), it should be answered in the negative.

Additional Issues Raised in Petitioner's Brief

See Preliminary Statement, supra at pp. 1-3.

CONCLUSION

If the certified question is to be answered by this court, it should be answered in the negative. If this court should decide to reach beyond the certified question and grant de novo review to other issues that were also considered by the Fourth DCA, there has been no showing that the Fourth DCA's determination should be quashed on the basis of any other reason unconnected with the certified question.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, this 5th day of January, 1989, to: MICHAEL DAVIS, ESQ., P. O. Box 3797, West Palm Beach, FL 33402; FRED HAZOURI, ESQ., P. O. Box 024426, West Palm Beach, FL 33402; and YOUTH LAW CENTER (Attention Carole Shauffer and Janet Helson), 1663 Mission Street, Fifth Floor, San Francisco, CA 94103.

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