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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 75,579

4TH DCA CASE NO. 88-1204

JAMES LANZA and BARBARA LANZA,
his wife,

Petitioners,

vs.

GARY PAUL POLANIN,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the substance of petitioners' statement of the case and facts but submits the following as supplemental information.

In responding to the call to investigate the automobile accident on December 13, 1986, Officer JAMES LANZA was performing two functions. For part of the time, he was actively investigating the automobile accident while at other times he was performing his duties as a criminal investigator. This criminal investigation was necessary because of Officer LANZA's suspicion that the drivers of the two vehicles and one of the passengers, respondent, were intoxicated. LANZA became a criminal investigator when he first observed Monica Harmon, the driver of the vehicle in which POLANIN was riding, and determined that she might be impaired (R 136; 153; 180). While involved in this criminal investigation of Harmon, LANZA made the decision to arrest POLANIN because of his behavior which was impeding the investigation (R 181).

POLANIN's behavior on the scene included advising Monica Harmon that she did not need to respond to Officer LANZA's inquiries about her intoxication without the presence of an attorney. Based on this behavior, LANZA isolated POLANIN from the accident scene so that he could continue investigating Harmon (R 155). Because the behavior continued, LANZA arrested POLANIN for obstruction of justice and the incident occurred when LANZA

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was putting POLANIN into his police cruiser (R 156; 159-60; 165-66; 181).

In his deposition in this case, LANZA admitted that he had been trained to expect the possibility that someone would physically resist an arrest. He described his training in the police academy as far as maintaining control of the situation when there is the expected resistance. He admitted that during an arrest a police officer must be on guard or alert to almost anything a person placed under arrest might do. LANZA also acknowledged that resistance is one of the known risks he was aware of in attempting to arrest anyone and further stated that injury and death is something that can be expected on most arrests. LANZA agreed that every time he arrests someone, he takes precautions to prevent bodily harm either to the arrestee or himself (R 165).

In their complaint seeking damages for the personal injuries allegedly received during the arrest, LANZA and his wife did not claim willful misconduct or wanton negligence (R 1-2). Further, they stipulated that the existence of wanton and willful misconduct was not an issue in this case on the appeal (Appellants' initial and reply brief, Fourth District Court of Appeal).

The Fourth District Court of Appeal reversed the summary judgment on the basis that the fireman's rule could not apply where the police officer had not entered on any premises

and where POLANIN's acts were not the reason the officer was called to the scene. Despite the concession at oral argument that willful and wanton misconduct did not apply, the court stated in their opinion that the conduct surely constituted wanton negligence and willful misconduct, allowing recovery.

POLANIN filed a combined motion for rehearing and motion to certify on the basis of this court's recent decisions in Kilpatrick v. Sklar, 548 So.2d 215 (Fla. 1989) and Sanderson v. Freedom Savings & Loan Association, 548 So.2d 221 (Fla. 1989), and the factual errors in the opinion. The Fourth District Court of Appeal granted the motion for rehearing, withdrew their opinion and affirmed the lower court's summary judgment. The court acknowledged that the complaint alleged simple negligence only and did not include a claim for willful misconduct; additionally, the court recognized that LANZA's counsel conceded at oral argument that if willful misconduct had been included, then POLANIN's homeowner's policy would not have provided coverage. Finally, the court noted that an accident investigation includes the possibility of an arrest with accompanying resistance and injury. Based on this analysis, the court concluded that the fireman's rule applied.

Because the court was unhappy with the application of the fireman's rule to the facts of this case, it certified the question as one of great public importance. Explaining its conclusion, the court stated: "[T]he policeman could have

precluded the entry of a summary judgment by alleging willful misconduct. That he deliberately chose not to do so as a matter of strategy can hardly be blamed on the state of the law." Lanza v. Polanin, 15 FLW D346, D347 (Fla. 4th DCA February 19, 1990). LANZA's choice not to allege willful misconduct was based on a recognition there would be no deep pocket to recover against because any homeowner's insurance policy would negate coverage for intentional acts. Judge Anstead dissented from the opinion on rehearing on the basis that the fireman's rule should not be applied to bar the police officer from recovery because he was negligently injured by a bystander.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal's opinion can be limited to the facts of this case. Although the court certified the question as one of great public importance, when the opinion and the facts of this case are examined it is apparent that the opinion will have little far-reaching effect. This court should discharge the writ of certiorari thus affirming the opinion on rehearing.

If this court determines that review is appropriate, the opinion on rehearing should still be affirmed. The fireman's rule is favored in Florida as it is in the majority of other states. The cases in Florida recognize an exception for willful and wanton misconduct and allow recovery where those allegations

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exist. In the instant case, petitioners chose not to claim willful and wanton misconduct thus preventing application of the exception and mandating affirmance.

Although the fireman's rule does not bar recovery for damages resulting from acts unrelated to the reason for the officer's presence, in this case the officer was injured as a direct result of the reason he was at the scene. Petitioner, Officer LANZA, was investigating a traffic accident and in the course of that investigation, determined that respondent was obstructing justice and most likely intoxicated. He made the determination to arrest respondent during the course of his automobile accident investigation. The investigation led to the arrest and in the course of the arrest injuries occurred. Where the injuries resulted from the activities for which the officer was called to the scene, the officer cannot recover. This court should affirm the Fourth District Court of Appeal's opinion on rehearing.

ARGUMENT

I. THIS COURT SHOULD REFUSE TO REVIEW THE CERTIFIED QUESTION ON THE BASIS THAT IT IS NOT ONE OF GREAT PUBLIC INTEREST

This court has discretionary jurisdiction to review questions certified by the district courts as being of great public interest. §3(b)(4), FLA. CONST., art. V, states that this court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public

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importance, ..." The word "may" should not be construed as compelling this court to decide the merits of the question. Stein v. Darby, 134 So.2d 232 (Fla. 1961).

The Fourth District Court of Appeal acknowledged in its opinion that petitioners created the situation which led to application of the fireman's rule by choosing to sue respondent for simple negligence. Lanza v. Polanin, 15 FLW D346, D347 (Fla. 4th DCA February 19, 1990). The obvious reason for this strategic choice was to ensure the availability of a deep pocket as a source of funds through respondent's homeowner's insurance company. If petitioners had claimed that respondent's actions were willful and wanton, then the fireman's rule would not have barred recovery but the homeowner's insurance policy would not have been available as a fund. Additionally, the facts of this case compel the limited conclusion reached by the Fourth District. This case does not present an opportunity to clarify the law in a manner that will have an impact beyond this case. Any rulings should be limited to the unusual facts presented of an injury during the course of an arrest with a refusal to claim willful and wanton misconduct so as to create a scenario where insurance coverage may be available for the resulting award. This court should discharge the writ of certiorari and decline to review this case because of the specific factual circumstances presented. The Fourth District Court of Appeal's opinion is

limited to the specific facts of this case. The conclusion is not one that will be of great impact in the future due to the limited nature of the opinion and the facts presented.

II. THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY RULED THAT THE OFFICER'S CLAIM OF INJURY IS BARRED BY THE FIREMAN'S RULE WHERE THE INJURIES WERE RECEIVED IN THE COURSE OF THE CRIMINAL INVESTIGATION AND ARREST AT THE SCENE OF THE ACCIDENT

In July, 1989, this court addressed two cases involving the fireman's rule. Sanderson v. Freedom Savings & Loan Association, 548 So.2d 221 (Fla. 1989), came before this court as a certification of conflict with Whitlock v. Elich, 409 So.2d 110 (Fla. 5th DCA 1982). Kilpatrick v. Sklar, 548 So.2d 215 (Fla. 1989), presented on the basis of conflict with Sanderson v. Freedom Savings & Loan Association, 496 So.2d 954 (Fla. 1st DCA 1986). In Kilpatrick, this court approved the application of the fireman's rule by the various district courts of appeal and specifically cited Rishel v. Eastern Airlines, Inc., 466 So.2d 1136 (Fla. 3d DCA 1985), for Judge Baskin's statement that the fireman's rule is not limited to cases involving a negligent condition on the premises.

The per curiam opinion in Sanderson approved the district court of appeal's ruling which specifically rejected a plaintiff's position that the fireman's rule applies only where the injury occurs due to a defective condition on the premises and noted the Third District's reliance on Rishel v. Eastern

Airlines, and its own quotation with approval of the Rishel case in Kilpatrick. Where the plaintiff had failed to allege wanton or willful misconduct in Sanderson, the action was properly dismissed despite the lack of connection between the injury and a defective condition on the premises. It is clear from these recent opinions the fireman's rule remains a bar to recovery in the appropriate circumstances.

Petitioners' argument in their brief is based on the assumption that the injuries in this case occurred due to conduct unrelated to the reason for the officer's presence at the scene. Although this court did not address that distinction in either Kilpatrick or Sanderson's majority opinion, Chief Judge Ehrlich in his dissenting and concurring opinions advised barring recovery for acts of negligence which occur after the officer's arrival on the scene and result from a different risk than that to which the officer was responding. Even assuming this court accepts the position advocated by Chief Judge Ehrlich, the facts in this case still lead to the conclusion that the claim should be barred.

Officer LANZA admitted that when he was at the scene of the accident he was performing two of his normal functions as a police officer, that is, he was investigating an automobile accident and also investigating possible criminal acts. This criminal investigation arose out of suspicions of intoxication by both drivers and their passengers.

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During his education at the police academy, LANZA admittedly had been trained to expect resistance during an arrest and also had been taught how to maintain control of situations where there is resistance (R 163-64). He knew and admitted that resistance is the known risk during any arrest attempt and that injury may result during the arrest. In this case, there is no dispute that during the discharge of his duties as an automobile accident investigator, Officer LANZA arrested POLANIN and was injured during the arrest. LANZA does not argue that criminal investigations, investigations regarding sobriety and subsequent arrests are not part of automobile accident investigations. LANZA's injury was a direct result of his performance of the duties for which he was summoned to the scene, that is, to investigate the accident and to take the necessary steps to control the situation.

In an early case applying the fireman's rule, the court rejected an attempt to make a distinction in the types of duties which a police officer was performing at the scene of an incident to allow an exception to the fireman's rule. In Adair v. The Island Club, 225 So.2d 541 (Fla. 2d DCA 1969), the officer argued that the premises owner should have been responsible for his injuries from inhaling chlorine gas where he had completed his duties as a policeman by securing the area and was acting as a business invitee by removing the chlorine gas containers. The

court indicated that his duties as a policeman were not completed until "the emergency was over and the premises rendered 'safe or more safe.'" Adair, 225 So.2d at 543. As the officer on the scene completing his duties, therefore, the fireman's rule applied and barred recovery.

The Third District Court of Appeal in Whitten v. Miami-Dade Water and Sewer Authority, 357 So.2d 438 (Fla. 3d DCA 1978), cert. denied, 364 So.2d 894 (Fla. 1978), examined the basis for the Adair opinion and extended it to officers suffering inhalation injuries both on and off the premises in response to a call for assistance. Because the officers were acting in discharge of their professional duties when the injury occurred, the court determined the fireman's rule appropriately applied. The court also noted that its conclusion was sustainable under the invitee versus licensee distinction set forth in Adair. In Wilson v. Florida Processing Company, 368 So.2d 609 (Fla. 3d DCA 1979), the court rejected an attempt to recover for injuries allegedly suffered at a point where the officer was acting beyond the scope of his normal duties as a policeman. Noting that the evacuation duties were "a part of precisely what policemen are hired to do and falls directly under the ordinary course of the duties of that occupation," the court affirmed a defense directed verdict. Wilson, 368 So.2d at 611.

In the instant case, LANZA was acting within the scope of his duties as an accident investigator on the scene. To

sustain his cause of action in this appeal, petitioner argues that this duties as an accident investigator were somehow separate from his duties in arresting respondent. Based on the officer's deposition testimony, however, there clearly was no distinction. This could should reject petitioners' attempt to manipulate the facts in order to avoid the fireman's rule, as the Fourth District Court of Appeal in its opinion on rehearing did.

Approving of Rishel v. Eastern Airines, Inc., 466 So.2d 1146 (Fla 3d DCA 1985), this court in Kilpatrick v. Sklar, 548 So.2d 215 (Fla. 1989), noted that policemen and firemen are entitled to benefit from special funds and programs which have been established to provide compensation for injuries suffered in the course of their employment. Kilpatrick, 548 So.2d at 218.

For example, these public officers receive special salaries, retirement or disability benefits. In the legislative declaration of §185.01, Fla. Stat., the legislature stated: "It is hereby found and declared by the Legislature that police officers . . . perform both state and municipal functions; that they make arrests for violation of state traffic laws on public highways; . . . ." Based on this function which is particularly applicable to the instant case, the legislature deemed it appropriate to provide a uniform retirement system for the sole benefit of police officers and organize that system so as to "maximize the protection of police officers' retirement trust

funds." The officers are allowed disability retirement after ten or more years of credited service.

§§112.19 and 112.1904, Fla. Stat., provides special death benefits for law enforcement officers; §§112.191 and 112.194, Fla. Stat., provide similar benefits for firefighters. All law enforcement officers are entitled to the workers' compensation benefits of Chapter 440 pursuant to §440.091, Fla. Stat. Further, pursuant to §440.15(11), Fla. Stat., law enforcement officers are entitled to special treatment when injured maliciously or intentionally in the course of their employment. See also, §§175.021, 321.15, Fla. Stat.

The district court of appeal in the instant case recognized that respondent's behavior could have been described as wanton or willful misconduct but that the policeman purposely failed to allege those elements in his complaint in order to implicate respondent's homeowner's insurance policy. The court also responded to petitioner's argument that his injury was as a result of an independent negligent act unrelated to the purpose of his presence at the scene. Acknowledging that the officer was called to respond to a traffic accident rather than a physical brawl, the court determined that any traffic accident investigation may result in arrest and any arrest may be accompanied by resistance leading to injury.

Following these conclusions, the court registered its unhappiness with the result. In a case such as this, where the

party being protected was inebriated, screamed obscenities at the officer and attempted to interfere with the officer performing his duties, it is certainly less compelling to apply a protective bar such as the fireman's rule. Respondent's unsavory presentation, however, is not a sufficient reason to create exceptions to the rule which do not exist. This court has recently affirmed its acceptance of the fireman's rule in Kilpatrick v. Sklar, 548 So.2d 215 (Fla. 1989), and Sanderson v. Freedom Savings & Loan Association, 548 So.2d 221 (Fla. 1989). In Kilpatrick, this court examined the fireman's rule and its application by the district courts of appeal and stated: "We find no reasonable justification to change this principle that has become well established in this state. The reasons justifying its existence are still viable." 548 So.2d at 218. By these statements, it is clear that this court still favors the fireman's rule.

In Romedy v. Johnston, 193 So.2d 487 (Fla. 1st DCA 1967), the court addressed an early challenge to the fireman's rule similar to that present in this case and responded to urgings that the rule be abolished. Because of the types of service rendered by public servants such as firemen, the court recognized the possibility that these officers should be entitled to special protection. Rejecting the efforts to convince the court to excise judicially the fireman's rule from the common law of Florida, the court stated: "We believe, however, that if such

change is to be made in the law, orderly processes of government dictate that it should be accomplished by the adoption of an appropriate statute by our legislature, and not by judicial legislation enacted by the courts." Romedy, 193 So.2d at 491. Twenty-three years later, the same reasoning should apply, as it has in other cases urging abolition of the fireman's rule. Smith v. Markowitz, 486 So.2d 11, 12 (Fla. 3d DCA 1986); Preferred Risk Mutual Insurance Company v. Saboda, 489 So.2d 768, 771 (Fla. 5th DCA 1986), rev. denied, Saboda v. Preferred Risk Mutual Insurance Company, 501 So.2d 1283 (Fla. 1986). But see, Evans v. J. Roberts Construction, Inc., 527 So.2d 918 (Fla. 4th DCA 1988), Glickstein, J., concurring specially.

The Fourth District Court of Appeal in its opinion on rehearing commended a recent law review article advocating a departure from application of the fireman's rule. Lanza v. Polanin, 15 FLW D346 (Fla. 4th DCA February 16, 1990), D347 n. 2. Many recent cases outside of Florida demonstrate that other states also are adhering to the rule despite its at times unfair results. For example, in Harvey v. Dominguez, ____ S.W. 2d ____ (Tenn. Ct. App. 1989), available in LEXIS as 1989 10 App. LEXIS 123, the Tennesesee Court of Appeal explained the genesis of the fireman's rule in its own decision adopting the doctrine for Tennessee. After noting that the rule began in an 1892 case, the court discussed the policy reasons which still exist for the rule and stated: "Almost all jurisdictions which have faced the issue

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have adopted the fireman's rule in one form or another . . . ." In Winn v. Frasher, 116 Idaho 500, 777 P.2d 722 (1989), the court adopted the fireman's rule for Idaho and commented that Oregon is the only state thus far that has considered the rule and rejected it. The court also stated: "We are impressed the great majority of states accept the rule."

Many out of state courts do accept the limitation on the rule which is applicable in Florida, allowing recovery where the injury results from willful or wanton misconduct. Young v. Sherwin-Williams Company, Inc., (D.C. 1990) available January 31, 1990 on LEXIS as 1990 D.C. App. LEXIS 20. Petitioners in the instant case declined to frame their pleadings to allow them the benefit of this limitation. Their only argument remains in their attempt to fit this case within the exception to the fireman's rule allowing recovery where the injury results from conduct unrelated to the purpose for the officer's presence at the scene. As the Fourth District Court of Appeal noted, however, the injury in this case resulted from an altercation during an arrest, which is not "too remote" from the reason for Officer LANZA's presence at the scene. He was called to investigate a traffic accident. Any traffic accident may result in arrests and any arrest may result in injuries. The conduct and resulting injury clearly are not remote from or unrelated to the purpose for the officer's presence. This exception cannot apply and this court should

answer the certified question in the affirmative, applying the fireman's rule to prevent recovery by a police officer negligently injured in the course of an arrest.

CONCLUSION

The fireman's rule applies to the facts of this case and bars recovery. It is respectfully submitted that this court should affirm the Fourth District Court of Appeal's opinion on rehearing.

Respectfully requested,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to DONALD S. HERSHMAN, P.A. (Florida Bar No. 269042), Attorney for Appellants, Squires Building, Suite 203, 1300 North Federal Highway, Boca Raton, Florida 33432, by mail, this 4th day of April, 1990.

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