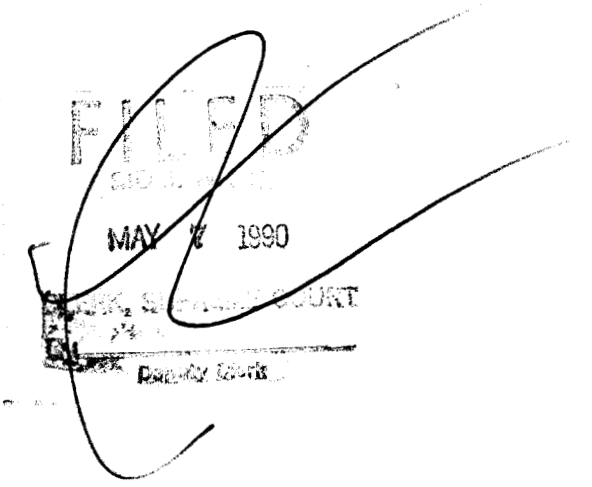
5-29

IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA



CITY OF PINELLAS PARK, a municipal corporation, CITY OF KENNETH CITY, a municipal corporation, and GERALD A. COLEMAN, as Sheriff of Pinellas County, Florida,

Petitioners/Defendants,

vs.

CASE NO. 89-1342

LAWRENCE P. BROWN and ADA L. BROWN, as Personal Representative of the Estates of Judith A. Brown, deceased, and Susan A. Brown, deceased and on behalf of survivors, Lawrence P. Brown and Ada L. Brown, individually, as parents of Judith A. Brown, deceased, and Susan A. Brown, deceased,

Respondents/Plaintiffs.
_____/

75,721

INITIAL BRIEF OF PETITIONER
CITY OF PINELLAS PARK

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Statutory Authority

STATEMENT OF THE CASE AND OF THE FACTS

The Plaintiffs, Lawrence P. Brown and Ada L. Brown, as Personal Representatives of the Estates of Judith A. Brown and Susan A. Brown and, individually, as parents of Judith A. Brown and Susan A. Brown, instituted this action against the Defendants, City of Pinellas Park, City of Kenneth City, and Sheriff Everett S. Rice, by ultimately filing a Second Amended Complaint for wrongful death. (R.123-141). The trial court dismissed the Second Amended Complaint with prejudice. (R.143). The Plaintiffs/Respondents, Mr. and Mrs. Brown will be referred to as "Mr. and Mrs. Brown." The Defendant/Petitioner, City of Pinellas Park, will be referred to as "Pinellas Park." Other Petitioners will be referred to by name. All references to the record on appeal will be referred to by the symbol "R." followed by the appropriate page number.

In the light most favorable to Mr. and Mrs. Brown, the Second Amended Complaint alleged that on June 24, 1984, shortly after 1:00 a.m., John Deady drove through a red light at the intersection of Pasadena Avenue and Park Street in Pasadena, Florida, and a deputy witnessed the offense and gave chase northbound past the merger of Pasadena Avenue and 66th Street. As the pursuit continued, various other deputies, Pinellas Park police officers, and Kenneth City police officers joined in the pursuit at speeds varying from 80 to 100 miles per hour. (R. 126-128).

The pursuing law enforcement officers continued after Deady north on U.S. 19 toward its intersection with State Road 584,

where the daughters of Mr. and Mrs. Brown were waiting for the light to turn green. By that time, the pursuit allegedly had covered a distance in excess of 25 miles through a densely populated urban area on highways generally frequented by heavy vehicular traffic through more than 34 traffic control devices in disregard of the signals. In their vehicle, the daughters of Mr. and Mrs. Brown proceeded to cross the intersection, whereupon Deady's vehicle ran the red light and broadsided their vehicle at about 90 miles per hour. Deady and both of the Browns' daughters died as the result of this collision. (R. 128,129).

Mr. and Mrs. Brown alleged that Pinellas Park was liable to them for damages resulting from the wrongful death of their daughters. Specifically, in Counts I and V of the Second Amended Complaint, the parents, as Personal Representatives of the decedents and individually as parents, asserted that:

> Defendant, City of Pinellas Park through its employees Trevena and Cook negligently and carelessly engaged in a high speed pursuit in contravention of its written policy concerning vehicular pursuits and failed to terminate the pursuit once it became apparent Deady was not going to stop, thereby causing the pursuit to continue until its ultimate termination caused by the collision between the Deady and Brown vehicle. (R. 131, 134).

Similar claims were made against Kenneth City and the Sheriff in the Second Amended Complaint.

Pinellas Park moved to dismiss and the lower court granted the motion with prejudice. (R.143).

Mr. and Mrs. Brown appealed the lower court ruling to the Second District Court of Appeal. (R.148). The Second District

reversed and remanded the cause for proceedings on the merits. Brown v. City of Pinellas Park, et al., 557 So. 2d 161 (Fla. 2d DCA 1990). (See Appendix, Pages 2-20). In so doing, the Second District held that Mr. and Mrs. Brown had properly pled a duty and breach thereof, to which the Doctrine of Sovereign Immunity did not apply. Although recognizing that the decision to pursue was discretionary and therefore not actionable, the Second District found that failure to terminate the pursuit was operational. The Second District further ruled that proximate cause was a jury question.

The Second District certified the following question to this Court:

> Is the continuation by law enforcement officers of a high speed vehicular pursuit of a traffic law violator which results in deaths of innocent bystanders an actionable breach of duty involving an operational level governmental function which is not immune from liability when it is alleged that under the circumstances the officers should have known that continuing the pursuit would create an unreasonably dangerous hazard to innocent bystanders, including those who were killed when the traffic law violator's vehicle collided with their vehicle?

Pinellas Park and the other Defendants then filed a timely notice to invoke the discretionary jurisdiction of this Court.

POINTS ON APPEAL

I.

THE SECOND AMENDED COMPLAINT FAILS TO ALLEGE A DUTY OWED BY PINELLAS PARK TO THE DAUGHTERS OF MR. AND MRS. BROWN, NOR A BREACH OF ANY SUCH DUTY.

II.

THE DEATHS OF THE BROWNS' DAUGHTERS WERE PROXIMATELY CAUSED BY THE INDEPENDENT ACT OF A THIRD PARTY.

III.

CONTINUING POLICE PURSUIT OF A FLEEING OFFENDER IS AN IMMUNE DISCRETIONARY DECISION UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY, AND NO EXCEPTION TO THE DOCTRINE IS CREATED BY PURHCASE OF LIABILITY INSURANCE.

SUMMARY OF THE ARGUMENT

To state a cause of action for negligence, the Second Amended Complaint must allege four essential elements: duty, breach of duty, proximate cause, and damages. The trial court ruled that the absence of ultimate facts alleging these elements was fatal to claims of Mr. and Mrs. Brown. Reversal of this ruling by the Second District was based upon an erroneous interpretation of the law.

The Second District's determination that a duty existed between Pinellas Park's officers and the daughters of Mr. and Mrs. Brown was incorrectly predicated upon Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989), wherein this court held that taking a motorist into custody and restricting his freedom of movement created a duty between the officer and the motorist. Here, there was no such relationship. Mr. and Mrs. Brown's daughters were members of the public at large, to whom the officers owed no duty. The officers did not take them into custody or know of their existence. The Second District also erred in its creation of a duty partially based on departmental policy rather than state law.

This second error was further compounded by determination that the Second Amended Complaint, in alleging violation of a departmental policy, properly alleged a breach of duty and proximate cause. Although alleging officers had engaged in high speed pursuit of a fleeing offender, the Second Amended Complaint failed to allege that the manner in which the pursuit was conducted was improper nor was there any allegation that the

decision to engage in and continue the pursuit caused the deaths. Instead, actions of the fleeing offender caused the deaths.

Also, the acts alleged were immune discretionary governmental functions per the Doctrine of Sovereign Immunity. This Court and other District Courts of Appeal have held that the decision to pursue and to continue to pursue a fleeing offender is discretionary and immune from liability. The Second District attempted to distinguish other cases on the basis that the underlying facts in this case were "more egregious," but merely because the pursuit was longer and involved more officers does not cause a discretionary governmental function to become operational.

Finally, Mr. and Mrs. Brown asserted that the purchase of liability insurance by Pinellas Park constituted a waiver of sovereign immunity and created a cause of action, but regardless of waiver of sovereign immunity, the presence of insurance does not supply essential allegations to a defective negligence claim. The issue of sovereign immunity is not even reached absent a duty between the officers and the decedents.

For the above reasons, this Court should reverse the decision of the Second District, and require that judgment be entered in favor of Pinellas Park.

ARGUMENT

I

THE SECOND AMENDED COMPLAINT FAILS TO ALLEGE A DUTY OWED BY PINELLAS PARK TO THE DAUGHTERS OF MR. AND MRS. BROWN, NOR A BREACH OF ANY SUCH DUTY.

Government tort liability must be grounded upon an underlying common law or statutory duty of care as to the alleged negligent conduct. Trianon Park Condominium Assoc., Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985); and discretionary versus operational issues of sovereign immunity are not reached unless a duty is first established. Kaisner v. Kolb, 543 So. 2d 732, 734 (Fla. 1989). To determine whether the Second Amended Complaint stated a cause of action in negligence, the Second District had to decide whether Pinellas Park owed a duty to the daughters of Mr. and Mrs. Brown. Pinellas Park officers joined in the pursuit of Deady, a fleeing offender, that pursuit ultimately ending in a collision between the vehicle occupied by the daughters of Mr. and Mrs. Brown, and the vehicle operated by Deady. Based on these allegations, the Second District determined Pinellas Park owed the daughters a duty. However, the premise that police officers owe any duty to the public as a whole has been rejected by Everton v. Willard, 468 So. 2d 936 (Fla 1985).

In Kaisner, the facts were that a vehicle was stopped by deputies because it had an expired inspection sticker. The driver of the offending vehicle stepped outside of his vehicle and stood behind it, placing him between his vehicle and the

deputies' vehicle, whereupon some other vehicle struck the deputies' vehicle, propelling it forward, whereupon it struck the motorist who had been stopped for the violation. That motorist's complaint alleged the deputies had breached a duty of care in the procedures that were used in the stop. This Court found in Kaisner that a duty was created to the motorist because the motorist had been directed to stop and deprived of his normal opportunity for protection. This Court stated:

> Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.

id. at 735.

The obvious distinction between Kaisner and this case is that the daughters of Mr. and Mrs. Brown were never taken into custody and had no contact or dealings of any kind with the police officers. The daughters of Mr. and Mrs. Brown were merely members of the public. No control over their movement was exercised by the Pinellas Park officers, and no foreseeable zone of risk surrounding them was created.

The duty recognized in Kaisner was not owed to the public as a whole, but rather was based upon the special relationship which evolved between the deputies and the motorist when the motorist was stopped by the deputy. In concluding that a foreseeable zone of risk was created, this Court noted:

> In this case, we find that petitioner was owed a

> a duty of care by the police officers when he was directed to stop and thus was deprived of his normal opportunity for protection. Under our case law, our courts have found liability or entertained suits after law enforcement officers took persons into custody, otherwise detained them, deprived them of liberty or placed them in danger (citations omitted.) ...
>
> It is apparent that the district court took too restrictive a view of the term "custody" in this instance. Petitioner and his family unquestionably were restrained of their liberty... not free to leave the place where the officers had ordered them to stop. Petitioner effectively had lost his ability to protect himself...petitioner clearly was sufficiently restrained of liberty to be in the "custody" or control of the police. The officers owed him...a duty of care...

Kaisner at 734 (emphasis added).

This Court noted that the facts in Kaisner did not present any countervailing interests, such as the safety of others. If the deputy had been confronted with an emergency requiring swift action to prevent harm to others, that emergency would have been entitled to great deference and may be of a level of urgency as to be considered discretionary. Kaisner, Page 738, note 3. Here, Pinellas Park officers were confronted with a fleeing offender, driving at high speed through numerous intersections. The presence of such an emergency also demonstrates that the Second District's application of Kaisner to the facts of this case is factually unsupportable.

The Second District attempted to distinguish this Court's decision in City of Miami v. Horne, 198 So. 2d 10 (Fla. 1967). In Horne, this Court held that an officer may pursue a fleeing offender without creating liability to a third party injured by the fleeing offender. No duty is owed not to pursue the

offender. Rather, this Court held only the manner of the pursuit must be done in a non-negligent manner. Horne, P. 13.

To avoid the holding of Horne, the Second District seized upon the fact that in Horne, the Plaintiff criticized only the decision to pursue, not continuation of pursuit. The Second District further attempted a distinction by claiming the pursuit in this case was more egregious than the chase in Horne. Neither of these facts, however, create a duty. In initiating or discontinuing a pursuit, the police officer's thought process is the same. The length or speed of a pursuit cannot create a duty.

The unfortunate result that would apply if the Second District is correct in its position is that the more dangerous the conduct of a fleeing offender, the more probable it would be that law enforcement officers would be under an obligation to let the offender escape. In performing his or her duty for the protection of the public, the officer would be required to speculate as to why the offender is fleeing, whether the offender will stop, at what point (3 blocks, 5 miles, 10 miles, 30 miles?) the chase has proceeded so far that it is obvious the offender is not going to stop. In an age where a lawsuit lies around every corner, it is highly probable that the reaction of most officers in any case where the conduct of a fleeing offender creates a danger to the public will simply be not to pursue at all.

The Legislature in Florida has created Chapter 316 of the Florida Statutes, governing the conduct of operators of motor vehicles, and touching upon the rights of and regulation of emergency vehicles, including those in pursuit of an actual or

suspected violators of the law. Specifically, under Section 316.072 (5), Fla. Stat. (1983), a pursuing police officer in pursuit of an actual or suspected violator of the law may run red lights and stop signs, speed, and disregard regulations as to direction of movement or turning, so long as that officer takes the precautions specified by the statute to avoid dangers of impact of his or her vehicle with members of the general public, as opposed to the possibility of an impact of the fleeing offender's vehicle with a member of the general public.

This Court, in City of Miami v. Horne, 190 So. 2d 10 (Fla. 1967), elaborated on the meaning of this Statute,, rejecting an argument that basically boiled down to a position that pursuit at high speed in urban areas was too dangerous to allow.

In this case, no allegation was made that the Pinellas Park officers drove negligently. There was an allegation that the officers violated a written departmental policy (found in Appendix, Page 1) against high speed pursuit, but failure to follow departmental policy will not establish a breach of duty. This is so because Pinellas Park's written departmental policy regarding vehicular pusuit is more restrictive than the state law set forth in Section 316.072(5), Fla. Stat. (1983), and in that situation, statewide standards control over narrower departmental orders. City of St. Petersburg v. Reed, 330 So. 2d 256 (Fla. 2d DCA 1976).

As tragic as the deaths of the daughters of Mr. and Mrs. Brown are (and all parties to this case surely agree that tragedy

is the appropriate word to describe the event), the fact remains that John Joseph Deady, from the time he first ran a red light on Pasadena Avenue, continued an unceasing series of violations of Chapter 316 of the Florida Statutes, risking life and limb as to everyone in his path, and the officers had a right and duty to pursue him in an attempt to apprehend him, and nothing in the way of improper driving by any of the officers caused any of their vehicles to collide with the public, and to debate whether Deady would have slowed down or stopped if pursuit had stopped is an exercise in total speculation. To carry the argument of the Second District to its logical conclusion would even compel law enforcement officers to debate whether they should attempt to set up vehicles with flashing lights at intersections lying in Deady's path, since on the one hand, that might alert members of the general public to the dangers of an approaching Deady, but at the same time cause Deady to continue fleeing with even greater energy as he happened upon a series of emergency vehicles with flashing lights, or perhaps cause Deady to violently alter his course to the left or the right, with attendant possibilities of disaster for members of the public in his path on those avenues of escape.

If a law is to be created to give the most dangerous fleeing offenders a permit to disregard the provisions of Chapter 316 of the Florida Statutes with immunity, and to further restrict the rights of pursuing officers than is the current situation under Section 316.072(5), Fla. Stat. (1983), the author of these changes should be the Legislature as opposed to the Appellate

Court system. It is the good of the public as a whole, not merely the good of unfortunate particular members of the public who find themselves in the path of a fleeing offender, that must be addressed in the issue of creation of and enforcement of a motor vehicle code.

ARGUMENT

II

THE DEATHS OF THE BROWNS' DAUGHTERS WERE PROXIMATELY CAUSED BY THE INDEPENDENT ACT OF A THIRD PARTY.

The Second District Court of Appeal held that the actions of Deady were foreseeable. Although a tortfeasor is responsible for the foreseeable results of his actions, this Court has held that an officer engaged in pursuit is not responsible for acts committed by the offender in his attempt to escape. City of Miami v. Horne, 198 So. 2d 10 (Fla. 1967), even though the very act of pursuit may contribute to reckless driving on the part of the pursued. Deady admittedly drove recklessly while being pursued. The District Court of Appeal has held that if Pinellas Park's officers hadn't pursued Deady, he wouldn't have been driving recklessly, that the reckless driving was forseeable, and thus the officers are liable. This Court in Horne (and courts in the majority of other jurisdictions) disagree. The Fifth District followed Horne in Rhodes v. Lamar, 490 So. 2d 1061 (Fla. 5th DCA 1986).

Based upon the facts virtually identical to those alleged in the Second Amended Complaint, the Fifth District found:

> Appellant does not question the right of the deputies to appehend Grosse; only that they were negligent in attempting to apprehend him through high speed pursuit on busy streets... There is no allegation nor showing here that the injury to appellant was proximately caused or contributed to by the negligent acts of the deputies in the operation of their motor vehicles.

In disagreement totally or partially with Rhodes are other Fifth District cases. Miller v. Department of Highway Safety and Motor Vehicles, 548 So. 2d 880 (Fla. 5th DCA 1989); Putnam v. Eaton Construction Co., 535 So. 2d 615 (Fla. 5th DCA 1988); Sintros v. LaValle, 406 So. 2d 483 (Fla. 5th DCA 1981). To the extent these Fifth District cases conflict with Horne's pronouncement that the pursuing officer is not responsible for the reckless driving of the pursued, even though that reckless driving may be (as the Fifth District said in Putnam) the most likely result of a high-speed pursuit, they should be rejected.

The large majority of cases (including Horne) addressing the issue of whether an officer is responsible for a collision between the pursued and an innocent party have held against liability. In most cases, the courts have reasoned that the sole proximate cause of the accident is the reckless driving of the offender. Texas recently confronted the identical issue, in Dent v. City of Dallas, 729 S.W. 2d 114 (Tex. App.-Dallas 1986). The court on Pages 116 and 117 of the opinion, collected the cases on this issue, and held squarely that the fleeing offender is the sole proximate cause of his accident with the innocent victim:

> ...the sole proximate cause of the accident as a matter of law was Davis's grossly negligent behavior in fleeing from Officer Reed and by ignoring all traffic laws during his flight until he crashed into Dr. Dent. The question of a police officer's liability to an innocent third party, who is injured or killed in an accident involving a suspect being pursued by the officer, has never been addressed in Texas. In the jurisdictions where this question has arisen, the majority of courts have found no liability on the part of the officers. The rationale for these decisions is that the sole proximate cause of the

accident is the suspect's negligent conduct and not the officer's conduct in electing to pursue the lawbreaker. Simply stated, courts will not make police officers the insurers for the conduct of the suspects they pursue. See United States v. Hutchins, 268 F. 2d 69, 72 (6th Cir. 1959); State of West Virginia v. Fidelity and Casualty of N.Y. 263 F. Supp. 88, 90-91 (S.D.W. Va 1967); Pagels v. City and County of San Francisco, 135 Cal. App. 2d 152, 153-56, 286 P. 2d 877, 878-79 (1955); Draper v. City of Los Angeles, 91 Cal. App. 2d 315, 318, 205 P.2d 46, 48 (1949); City of Miami v. Horn, 198 So. 2d 10, 12-13 (Fla. 1967); Downs v. Camp, 113 Ill. App. 2d 221, 227, 252 N.E. 2d 46, 50 (1969); Bailey v. L.S. Edison Charitable Foundation, 152 Ind. App. 460, 466, 284 N.E. 2d 141, 145 (1972); Thornton v. Shore, 233 Kan. 737, 753, 666 P.2d 655, 688 (1983); Chambers v. Ideal Pure Milk Co., 245 S.W. 2d 589, 590-91 (Ky. 1952); Oberkramer v. City of Ellisville, 706 S.W. 2d 440, 442 (Mo. 1986); Lee v. City of Omaha, 209 Neb. 345, 348, 307 N.W. 2d 800, 803 (1981); Blanchard v. Town of Kearney, 145 N.J. Super. 246, 248, 367 A. 2d 464, 465 (Law Div. 1976); Roll v. Timberman, 94 N.J. Super. 530, 536, 229 A.2d 281, 284 (1967); Silva v. City of Albuquerque, 94 N.M. 332, 333, 610 P. 2d 219, 220 (Ct. App. 1980); Mitchell v. State, 108 A.D. 2d 1033, 1034, 486 N.Y.S. 2d 97, 99 (1985; Simmen v. State, 81 A.D. 2d 398, 400, 442 N.Y.S. 2d 216, 218 (1981); Stanton v. State, 29 A.D. 2d 612, 612-14, 285 N.Y.S. 2d 964, 967-69 (1967); Wrubel v. State, 11 Misc. 2d 878, 879-81, 174 N.Y.S. 2d 687, 689-90 (Ct.Cl. 1958); McMillan v. Newton, 63 N.C.App. 751, 753, 306 S.E. 2d 470, 472 (1983); Jackson v. Olson, 77 Or. App. 41,44-47, 712 P.2d 128, 130-31- (1985); annot., 4 A.L.R. 4th 865 (1981); Annot., 83 A.L.R. 2d 452 (1962). Contra Tetro v. Town of Stratford, 189 Conn. 601, 603-07, 458 A.2d 5, 7-8 (1983); Fiser v. City of Ann Arbor, 417 Mich. 461, 471-75, 339 N.W. 2d 413, 417-418 (1983); Kuzmics v. Santiago, 256 Pa. Super. 35, 38-41, 389 A. 2d 587, 589-90 (1978).

See also Thornton v. Shore, 233 Kan. 737, 666 P. 2d 555 (1983), wherein an officer conducted a lengthy pursuit of a vehicle near or in a downtown and university campus area, during which pursuit the fleeing driver committed numerous traffic violations. The violator ultimately ran a stop sign hitting and

killing innocent parties. The pursuing officer was one-half block behind the violator at the time of the accident.

See also Reenders v. City of Ontario, 68 Cal. App. 3d 1024, 137 Cal. Rptr. 736 (1977), where at Page 742, the court commented:

> "As to the policy of preventing future harm, who can say whether greater harm would result from the imposition or non-imposition of a duty upon municipalities to refrain from pursuing a lawbreaker already engaged in reckless and dangerous operation of a motor vehicle on the public streets. The injury in this case was tragic. Conceivably, however, even more tragic results could have ensued had the (violator) not been pursued. Suppose he had lost control of his motorcyle and had run into a group of children standing on the sidewalk, killing or maiming several of them.
>
> To impose a duty upon municipalities not to pursue a lawbreaker already engaged in dangerous conduct on the city streets would obviously cast a considerable burden on such cities and have serious consequences to the community. One of the prime functions of government is to insure law-abiding, orderly conduct. What is a law enforcement officer to do faced with a situation such as that contronting the police officers in this case? Nothing? The imposition of a duty not to pursue would severely restrict necessary law enforcement conduct without any guaranty that serious injury to members of the public might not ensue anyway."

Section 316.072(5) of the Florida Statutes specifically authorizes a pursuit. It requires the officer to use due care in the operation of his vehicle; it does not require that the pursuing officer require the fleeing offender to use due care in operating the fleeing vehicle. Obviously, if the offender were to use due care, he would pull over, and there would be no pursuit.

The officers in this pursuit, as in most of them, simply reacted to Deady when Deady elected to flee, thus causing pursuit to begin. To hold a law enforcement officer responsible for the acts of the offender, because those acts are foreseeable, is to make a law enforcement officer an insurer for the actions of every offender who does not want to be taken into custody, and who might do anything to stay out of jail. Because the very act of fleeing is a criminal offense, most courts examining the issue have held the acts of the fleeing offender to be the sole proximate cause of the accident he causes. The District Court incorrectly held that the pursuit could be a proximate cause of the death of the Browns' daughters.

ARGUMENT

III

CONTINUING POLICE PURSUIT OF A FLEEING OFFENDER IS AN IMMUNE DISCRETIONARY DECISION UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY, AND NO EXCEPTION TO THE DOCTRINE IS CREATED BY PURCHASE OF LIABILITY INSURANCE.

This action was instituted by the parents against Pinellas Park, a municipality. Because it is a municipality, the Doctrine of Sovereign Immunity applies to protect the actions undertaken by Pinellas Park officers. Section 768.28(2), Fla. Stat (1975). This Court, in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), noted that not all governmental functions are exempt from waiver. A distinction must be made between discretionary governmental functions and operational governmental functions. Commercial Carrier adopted the four pronged test of Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P. 2d 440 (1965), as follows:

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, judgment, 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?

This Court divided governmental activities into four general 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; and (4) providing professional, educational, and general services. Trianon Park Condominium Assoc., Inc. v. City of Hialeah, 468 So. 2d 912, at 919 (Fla. 1985). The activities alleged in this case fall within the second category: law enforcement and public safety protection.

Sovereign immunity is the rule, rather than the exception, and a waiver of sovereign immunity should be strictly construed in favor of the state and against the claimant. Windham v. Florida Department of Transportation, 476 So. 2d 735 (Fla. 1st DCA 1985) rev. den., 488 So. 2d 69 (Fla. 1985). In recent years, this Court consistently has refused to allow interference with the executive branch of government, recognizing that authorities must be left free to exercise discretion and choose tactics they deem appropriate without fear of liability for negligence. Trianon, supra; City of Cape Coral v. Duvall, 436 So. 2d 136 (Fla. 2d DCA 1983), approved, 468 So. 2d 961 (1985).

In Everton v. Willard, 468 So. 2d 936 (Fla. 1985), this Court held that the sheriff and the county taxpayers could not be held liable for negligent failure of law enforcement officers to protect citizens from criminal offenses, so a sheriff and his

deputy were held immune for alleged negligence of the deputy in not arresting a drunk driver who had been stopped for a violation, but not detained, and who later was involved in an accident causing death and injury to members of the public. This Court noted that discretionary power is critical to the ability of a police officer to perform his duties, and that there has never been a common law duty of care owed to an individual with respect to discretionary judgmental power of a officer making arrests and enforcing the law.

In City of Miami v. Horne, 198 So. 2d 10 (Fla. 1967), this Court held that pursuing police are insulated from liability unless they operate their motor vehicles negligently, and are not obligated to terminate pursuit, nor are they responsible for the acts of the offender. The decision to pursue and to continue to pursue a fleeing offender is a discretionary governmental function. Holding that the decision to pursue is discretionary but continuing it up to the point of an accident is operational is an impossible distinction. At what point does the pursuit transform into an operational act? Based upon the facts, as alleged in the Second Amended Complaint by the parents, the claims against Pinellas Park are barred by the Doctrine of Sovereign Immunity.

Mr. and Mrs. Brown take the position that Pinellas Park had available to it a policy of tort liability insurance for torts committed by its employees within the scope of their office or employment. Mr. and Mrs. Brown claim the purchase of this liability insurance waived Pinellas Park's sovereign immunity

claim to the extent of the liability insurance, based upon Avallone v. Board of County Commissioners, 493 So. 2d 1002 (Fla. 1986), and Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989). They argue that the purchase of a liability insurance and the consequent waiver of sovereign immunity creates a separate cause of action.

Nothing in Avallone or Kaisner suggests the purchase of liability insurance results in more than a waiver of sovereign immunity. A waiver of sovereign immunity, however, does not create a duty where none exists. As noted in Kaisner, the issue of sovereign immunity does not come into play unless there is a duty. Kaisner at 733, citing Trianon Park Condominium Association v. City of Hialeah, 468 So. 2d 912, 917 (Fla. 1985). Absent that duty, purchase of liability insurance does not create a new cause of action.

CONCLUSION

The Second District's determination that the Second Amended Complaint stated a cause of action was error. No duty was owed by the Pinellas Park police officers to the daughters of Mr. and Mrs. Brown, nor was their conduct the proximate cause of the collision and deaths. Even if the Second Amended Complaint had stated a cause of action for negligence, the acts of the Pinellas Park police officers were discretionary governmental functions, immune from liability under the Doctrine of Sovereign Immunity, and purchase of liability insurance by Pinellas Park did not create a cause of action against Pinellas Park. For all of the above reasons, this Court should answer the certified question in the negative to prohibit a claim against law enforcement officers for a high speed pursuit unless it is alleged that the actual manner of driving by the police officers was negligent or reckless.

Respectfully submitted,

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APPENDIX

1. General Order No. 45-Vehicular Pursuit Policy of the City of Pinellas Park.

2. Case of Brown v. City of Pinellas Park, et al., 557 So. 2d 161 (Fla. App. 2 Dist. 1990).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to STEVEN T. NORTHCUTT, ESQUIRE, LeVine, Hirsch, Segall & Northcutt, P.A., Ashley Tower, Suite 1600, Post Office Box 3429, Tampa, FL 33601-3429; HOWARD M. BERNSTEIN, ESQUIRE, County Attorney's Office, 315 Court Street, Clearwater, FL 34616, and JAMES E. THOMPSON, ESQUIRE, Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., P.O. Box 1438, Tampa, FL 33601, this 4th day of May, 1990.

C. WADE YEAKLE, III, ESQUIRE
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