047

IN THE SUPREME COURT OF FLORIDA

CITY OF PINELLAS PARK, a municipal corporation; CITY OF KENNETH CITY, a municipal corporation; and EVERETT S. RICE, as Sheriff of Pinellas County, Florida,

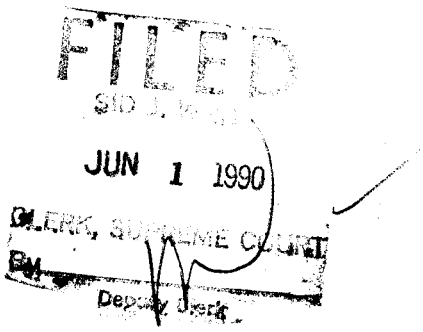
Petitioners,

vs.

LAWRENCE P. BROWN and ADA L. BROWN, as personal representatives 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, and as parents of Judith A. Brown, deceased, and Susan A. Brown, deceased,

Respondents.

Case Nos. 75,721
75,722
75,726



DISCRETIONARY REVIEW OF THE DECISION OF THE FLORIDA SECOND DISTRICT COURT OF APPEAL

RESPONDENTS' BRIEF ON THE MERITS

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Summary of Argument

I. Duty of Care. The petitioners' effort to resurrect the old "special duty - general duty" test established in Modlin, infra, and discarded in Commercial Carrier, infra, is not supported by this Court's decision in Kaisner, infra. Although the duty found in that case arose from a finding that the plaintiffs were in the officers' "custody", Kaisner nowhere intimated that such a special relationship was necessary to establish a duty on the part of law enforcement officers. To the contrary, Kaisner held just the opposite, applying the duties associated with a private individual's "foreseeable zone of risk" to the police.

As in Kaisner, there is a duty of care owed by officers undertaking a vehicular pursuit. In City of Miami v. Horne, infra, this Court held that an officer engaged in a chase must "not exceed proper or rational bounds". Moreover, section 316.072(5)(c), Florida Statutes, admonishes that, though the driver of an emergency vehicle may disregard certain traffic regulations, he is not protected from the consequences of his reckless disregard for the safety of others.

This duty is not, as petitioners contend, limited solely to the operation of their own vehicles. General tort law recognizes that a negligent actor may be held liable if his negligence involves the foreseeable risk of harm to another through the foreseeable action of a third person. Horne did not devise a different rule for law enforcement officers; rather, it held that officers would not be responsible for the negligence of the

pursued driver so long as the officers did not exceed proper or rational bounds.

Neither does section 316.072(5) modify the general rule for the benefit of the police. Indeed, foreign courts interpreting identical emergency vehicle statutes have held that they do not relieve pursuing officers of responsibility for the foreseeable negligence or even recklessness of the pursued driver.

The standard of conduct, i.e. "proper and rational bounds" under Horne or "reckless disregard" under section 316.072(5), implies that the actor has made a conscious decision to proceed on a course of conduct with knowledge of the substantial danger that conduct poses to others. The district court articulated a test that is consistent with those expressions. It held that an officer's continued pursuit becomes actionable when the circumstances put him on clear notice of the imminent danger to others that may be avoided simply by terminating the pursuit.

This formulation is consistent with the "sudden emergency" hypothetical posed in footnote 3 of Kaisner, for it presumes that the officer has had sufficient opportunity to take note of the circumstances and their dangerous ramifications. Moreover, it is consistent with the sudden emergency doctrine in general, and therefore complies with the legislative mandate that government entities be held liable for their negligence under circumstances in which private individuals would be held liable.

Furthermore, the district court's articulation of the standard of care is fully compatible with the departmental

policies adopted by the petitioners themselves. Those policies clearly called for termination of the pursuit under the circumstances presented in this case.

Given those departmental policies, it is difficult to fathom petitioners' criticism of the district court decision on public policy grounds. In any event, the decision does not, as petitioners contend, require the police to allow offenders to escape scott free. Rather, the decision recognizes that the manner in which police go about apprehending a suspect may subject them to liability when its risk outweighs its utility.

This is not an infringement of the legislature's policy-making function. To the contrary, by enactment of section 768.28 the lawmakers have already expressed the policy that government agencies be held accountable for their negligent or reckless acts. And in section 316.072(5)(c) the legislature expressly provided that drivers of emergency vehicles would not be relieved of the consequences of their recklessness.

II. **Proximate causation.** The courts of Florida and of many other jurisdictions reject petitioners' argument that the sole proximate cause of the collision in a case such as this is the conduct of the fleeing driver. The rule in a majority of jurisdictions, including this one, is that the intervention of another causative force or event will not relieve an actor of responsibility for his negligence if the intervention was foreseeable. As one Florida court has put it, a collision between a pursued vehicle and an innocent bystander is not only foreseeable, but is

the "most likely" result of an extended vehicular chase.

Florida courts also hold that proximate cause is virtually always a jury question. Courts are admonished to make the determination only in those very rare cases where reasonable men could not differ.

Horne did not alter this rule vis-a-vis police officers engaged in vehicular chases. Rather, it held that a pursuing officer would not be held responsible for the acts of the pursued driver if the officer did not exceed proper or rational bounds.

III. **Sovereign immunity.** Petitioners seek broad immunity for virtually all law enforcement activities, based on an expansive reading of this Court's Everton decision, supra. But the Everton majority specifically cautioned that it addressed only the narrow issue whether an officer's decision not to arrest was immunized. The majority wrote that its decision did not have the broad ramifications claimed by the dissenters in that case--and by the petitioners herein.

Nor are petitioners correct to suggest that the determination whether their activities were immunized in this case turns on the practical difficulty of distinguishing between the immunized discretionary decision whether to chase and the actionable operational manner in which the chase was implemented. Such difficulties are always present in sovereign immunity cases. It is for that reason that this Court has adopted tests devised by the California and Washington courts as aids in making the determination.

The district court carefully and appropriately applied those tests in the instant case, and correctly determined that the manner in which petitioners' officers conducted their pursuit of the traffic violator was "operational" and therefore actionable. It is telling that the courts of California and Washington, applying their tests to similar cases, have reached the same conclusion.

Finally, petitioners City of Pinellas Park and Kenneth City urge that their purchases of liability insurance under former section 286.28 did not create separate causes of action against them. The Browns have never made such a contention. But this Court has recognized that a government entity's purchase of such insurance does waive its sovereign immunity to the extent of the liability insurance coverage.

Argument

I. THE PETITIONERS' OFFICERS OWED AND BREACHED A DUTY OF CARE TO RESPONDENTS' DECEDENTS.

As this Court noted in Kaisner v. Kolb, 543 So.2d 732, 733-734 (Fla. 1989), in a government negligence case the questions of whether a duty of care was owed to the plaintiff and whether the government entity is protected from liability by sovereign immunity are distinct. If no duty was owed, the second question does not arise.

A. The existence of an applicable duty of care.

The petitioners here urge that their officers owed no duty of care to the Browns' daughters because they were not in a "special relationship" with them. This position rests on a rather expansive reading of this Court's decision in Everton v. Willard, 468 So.2d 936 (Fla. 1985), wherein it was pointed out that the police owe no general duty to make arrests, and upon a narrow reading of Kaisner, in which the Court held that the negligent deputies owed the plaintiffs a duty of care because the plaintiffs were in their custody.

By putting those opinions together--or rather, by putting their misinterpretations of them together--the petitioners attempt to resurrect for themselves and other law enforcement agencies the protection they once enjoyed under the "special duty-general duty" test prescribed by Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967). But this Court long ago recog-

nized that Modlin "and its ancestry and progeny" had no continuing vitality after the effective date of the general waiver of sovereign immunity contained in section 768.28, Florida Statutes. Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010, 1016 (Fla. 1979).

In neither Everton nor Kaisner did this Court purport to revive the Modlin test with respect to law enforcement activities, or otherwise seek to qualify the legislative mandate that a government agency answer for its negligence under circumstances in which a private person would be liable. Section 768.28, Florida Statutes. To the contrary, both cases were fully consistent with that mandate.

For example, the holding in Everton was in accord with the principle that no one is duty-bound to protect another from the negligence or criminal acts of a third person except under special circumstances. Restatement (Second) of Torts s.314; W. Prosser The Law of Torts, s.33, pp. 170, 174-176 (4th Ed. 1971).

Among the special relationships that give rise to a duty of protection is that between a custodian and the person in his custody. Restatement ss.314A, 320; White v. Palm Beach County, 404 So.2d 123 (Fla. 4th DCA 1981). In Kaisner the Court found that the circumstances of that case satisfied the pertinent elements of "custody" in this context; therefore, the deputies owed the plaintiffs a duty to protect them from harm.

Nowhere did the Court suggest that a duty of care would be recognized only in those circumstances. Nor did the Court hold

that duties of care which might otherwise arise in the case of private individuals do not apply to law enforcement officers unless they are in some sort of "special relationship" with the plaintiff. To the contrary, Kaisner emphasized the very opposite:

> 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. See Stevens v. Jefferson, 436 So.2d 33, 35 (Fla.1983)(citing Crislip v. Holland, 401 So.2d 1115, 1117 (Fla. 4th DCA), review denied sub nom. City of Fort Pierce v. Crislip, 411 So.2d 380 (Fla. 1981)0.
>
> We see no reason why the same analysis should not obtain in a case in which the zone of risk is created by the police. ...

Kaisner, 543 So.2d at 735-736.

Some activities create sufficiently wide zones of sufficiently serious risk as to impose upon the actor a duty of care in favor of the public at large. Among these activities is the operation of a motor vehicle on the public highways. See, Vining v. Avis Rent-A-Car Systems, Inc., 354 So.2d 54 (Fla. 1977); Atlantic Coast Line R. Co. v. Timmons, 36 So.2d 430, 431 (Fla. 1948)(operator of truck owed duty of care for safety of life and property "either directly or remotely involved in the operation"); Jackson v. Reardon, 392 So.2d 965, 957 (Fla. 4th DCA 1981)(motorist has duty of care to prevent injury "to persons and property within the vehicle's path").

The petitioners point out that under section 316.072(5), Florida Statutes, an authorized emergency vehicle in pursuit of

an actual or suspected violator of the law is excused from compliance with a number of traffic laws.

But the privileges granted under that statute are qualified. Thus, the driver of an emergency vehicle is permitted to proceed through a red traffic light, "but only after slowing down as may be necessary for safe operation[.]" He may exceed the maximum speed limits "so long as he does not endanger life or property." He may disregard regulations governing direction or movement "so long as he does not endanger life or property." Section 316.072(5)(b)2-4, Florida Statutes. Moreover, the subsection concludes with the admonition that

> [t]he foregoing provisions shall not relieve the driver of a vehicle specified in paragraph (a) from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Section 316.072(5)(c), Florida Statutes.

Clearly, when relieving the police of their obligations to observe traffic regulations while in pursuit of lawbreakers, the legislature did not license them to careen about the community with no thought to the danger their actions posed to others.

Indeed, vis-a-vis his civil liability, the actor's duty is not merely to obey the law; it is to use due care to avoid exposing others to unreasonable risks. Thus, whereas the violation of a law or regulation may give rise to a presumption of negligence, or even constitute negligence <u>per se</u>, the fact that the actor's conduct did not violate regulations does not absolve him of liability if a reasonable man would have taken greater

care. Restatement s.288; Prosser, s.36, p.203. See Bowes v. Lerner Shops International, Inc. 422 So.2d 1041 (Fla. 4th DCA 1982).

A number of courts in other jurisdictions, construing emergency vehicle statutes similar or identical to section 316.072(5), have concluded that the enactments were intended to shield drivers of emergency vehicles from findings of negligence based solely on violations of traffic laws, but not from findings of negligence under common law principles. E.g., Tetro v. Town of Stratford, 189 Conn. 601, 458 A.2d 5 (Conn. 1983); Fiser v. City of Ann Arbor, 417 Mich. 461, 339 N.W.2d 413 (Mich. 1983); Mason v. Bitton, 85 Wash. 321, 534 P.2d 1360 (Wash. 1975).

This notion may well account for the Court's failure to mention the then-existing emergency vehicle statutes when deciding City of Miami v. Horne, 198 So.2d 10 (Fla. 1967).1/ Rather, the Court decided the case under common law principles, finding that a police officer engaged in pursuit must "not exceed proper

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1/ When Horne was decided, provisions that were materially identical to section 316.072(5) were contained in section 317.041(5), Florida Statutes, applicable to highways. The Model Traffic Ordinance for Municipalities, Ch. 186, excused drivers of emergency vehicles from the posted speed limits when responding to an emergency call, with the proviso that "[t]his provision shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard to the safety of all persons using the street, nor shall it protect the driver of any such vehicle from the consequences of a reckless disregard for the safety of others." Section 186.80, Florida Statutes (1967).

In his brief petitioner Rice suggests that in Horne this Court "elaborated on the meaning of" section 316.072(5). Manifestly, that opinion made no reference whatever to the current statute or its predecessors.

and rational bounds nor act in a negligent, careless or wanton manner." Horne, 198 So.2d at 13.

As will be discussed, the meaning of that language is not altogether clear. But one thing is certain: whatever may have been the nature of the duty recognized in Horne, the Court did not hold that it was owed only to those with whom the officer had a "special relationship."

Neither does the proviso set forth in section 316.072(5)(c) contain any such limitation. To the contrary, that paragraph expressly preserves an officer's duty to maintain "due regard for the safety of all persons[.]" (Emphasis added.)

In Kaisner this Court wrote of a defendant's duty of care to those within a "foreseeable zone of risk." As the petitioners' officers roared en masse along a busy, urban street in the early hours of June 24, 1984, that zone surely included the intersection into which the Browns' daughters innocently ventured.

Thus, under Kaisner, the petitioners had a duty to the young women to either lessen the risk or see that sufficient precautions were taken to protect them from the harm the risk posed. Kaisner, 543 So.2d at 735-736. It was on this basis that the district court found that Sheriff's Corporal Rusher, who sat in his patrol car next to the Browns' daughters as the chase caravan approached the intersection, had a duty to warn them of the danger he knew to be coming.

The Sheriff argues here that the district court was mistaken in this regard because (1) the women were not in Rusher's custody

or under his direction, and therefore were not owed a "special duty"; (2) Rusher was not part of the pursuit; and (3) the officers' negligence did not create the danger.

The last assertion rests on a proximate cause determination, an issue that will be discussed, infra.

As for the first argument noted, under Kaisner an officer's duty to take reasonable steps to lessen the risk of harm to others is not limited to those with whom he has a special relationship. Rather, the duty is owed to all who may venture into the foreseeable zone of risk. Surely, this included the Browns' daughters who were sitting in their car in the lane next to Rusher's vehicle, obviously intending to drive into the path of the oncoming chase.

The Sheriff's claim that Rusher owed no duty because he had not joined the pursuit, as did the concurring opinion below, depends on a technical definition of "pursuit". But, as the majority below pointed out, certainly Rusher had already joined the effort to apprehend the pursued vehicle:

> Allegations that Corporal Rusher was, while next to plaintiffs' decedents at the intersection, waiting for Deady to pass and that he then pulled out onto U.S. 19 to get behind Deady when Deady was expected to pass manifestly indicate that he was in communication and coordination with the other officers. Thus, the second amended complaint sufficiently alleges that he was, although ahead of the fleeing lawbreaker, already effectively a part of the pursuit. He was involved in the effort to stop Deady in the same sense as would be an officer setting up a roadblock to intercept a pursued lawbreaker or an officer speeding ahead of a pursued lawbreaker on another route to intercept or get closer to him. To say that because Corporal Rusher had not yet actively engaged in the pursuit from behind he was not legally accountable for its consequences would, we conclude, relieve him of a responsibility which was properly his if the al-

legations are proved. His location ahead of Deady was the only place from which he could, from the information he had as a part of the pursuit, have prevented those consequences.

DCA Opinion at 10-11.

B. The nature of the petitioners' duty.

Petitioners argue, without analytical support, that under Horne and section 316.072(5) their officers' only duty was to avoid driving their own vehicles negligently, and that they cannot be held responsible for the pursued driver's actions.

That certainly is not the rule applicable to private individuals, as contemplated by section 768.28. Indeed, "[a] negligent act or omission may be one which involves an unreasonable risk of harm to another through either (a) the continuous operation of a force started or continued by the act or omission, or (b) the foreseeable action of another, a third person, animal, or a force of nature." Restatement s.302. This includes the negligent, reckless, or even criminal act of a third person. Id. ss. 302A, 302B. See e.g., Vining, supra; Angell v. F. Avanzini Lumber Co., 363 So.2d 571 (Fla. 2d DCA 1978). See also, Downs v. United States, 522 F.2d 990, 998-999 (6th Cir. 1975)(applying Florida law, court held that FBI agent's negligent mishandling of hijacking caused deaths of plaintiffs' decedents when hijacker reacted violently).

Horne did not state a contrary rule with respect to law enforcement officers, although it did observe that police officers' conduct should be judged in light of their duties.

Rather, Horne merely held that an officer would not be responsible for the acts of the pursued driver so long as the officer did not exceed proper and rational bounds or act in a negligent, careless or wanton manner.

Moreover, as the district court of appeal observed, Horne cited Town of Mount Dora v. Bryant, 128 So.2d 4 (Fla. 2d DCA 1961). That case directed a jury trial of a claim arising from a police chase that resulted in a collision between the pursued vehicle and an innocent bystander.2/

Nor does section 316.072(5), by its terms, create the special rule petitioners advocate. Indeed, foreign courts construing like or identical statutes have rejected petitioners' view. For example, in Mason, supra, the Washington Supreme Court construed an emergency vehicle statute that was identical to Florida's section 316.072(5):

> The defendants admit that enforcement officers have a duty to act with due regard for the safety of others, yet they contend that this duty, as set forth in RCW 46.61.035 and the above policy statements, is quite limited and can be violated only in instances where the police vehicle itself is involved in an accident. We find no merit to this argument.
>
> Whenever a duty is imposed by statutory enactment, a question of law arises as to which class of persons is intended to come within the protection provided by the statute [citation omitted] The statutory construction urged by the defendants would imposed only have a duty and would

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2/ See also Miller v. Department of Highway Safety, 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); Reed v. City of Winter Park, 253 So.2d 475 (Fla. 4th DCA 1971); Evanoff v. City of St. Petersburg, 186 So.2d 68 (Fla. 2d DCA 1966). Contra, Rhodes v. Lamar, 490 So.2d 1061 (Fla. 5th DCA 1986).

> disregard the intended purpose underlying the statute; i.e., to provide for the safety of all persons and property from all consequences resulting from negligent behavior of the enforcement officers. The safety of those individuals within the intended class of persons protected by RCW 46.61.035, can be jeopardized just as much by the negligence of the pursuer as it can by the negligence of the party being pursued. The defendants' own policy statements recognize that at times it would be more prudent to cease a pursuit in order to protect the public. This clearly evidences that the defendants are aware that innocent third parties may be injured by the individual being pursued, and that it is their responsibility to determine whether the purpose of the pursuit warrants this risk. It is the duty of this Court "to construe legislation so as to make it purposeful and effective." [citations omitted] This mandates a statutory construction which does not limit the scope of RCW 46.61.035 to situations where only the police vehicle is directly involved in the accident.

Mason, 534 P.2d at 1363 (emphasis by the court). See also, Fiser v. City of Ann Arbor, 417 Mich. 461, 339 N.W.2d 413 (Mich. 1983); Tetro v. Town of Stratford, 189 Conn. 601, 458 A.2d 5 (Conn. 1983); Kuzmics v. Santiago, 389 A.2d 587 (Pa.Super. 1978).

C. The applicable standard of conduct.

In Horne the Court did not articulate what it meant by the observation that an officer chasing a suspect must "not exceed proper and rational bounds". But the phrase certainly implies a limitation or parameter established according to an assessment of what is reasonable under the circumstances.3/

3/ Among the definitions of "proper" set forth in Webster's Third New International Dictionary are "1: marked by suitability, fitness, accord, compatibility: as a: naturally suiting, complying with, or relevant to [...] b: sanctioned as according with equity, justice, ethics, or rationale [...] c: socially appropriate : according with established traditions and feelings of rightness and appropriateness [...] d: acceptable as being qualified or competent : marked by adequate qualification, knowledge, or standards [...] e: adequate to the purpose [...]."

(continued...)

Section 316.072(5)(c), Florida Statutes, refers to the consequences of an officer's "reckless disregard for the safety of others." Conduct is in reckless disregard for the safety of others if the actor

> does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement s.500.

Recklessness differs from intentional misconduct in that, though the reckless actor intends his act, he does not intend to the cause the harm which results from it. "It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless." Id., comment f.

The Restatement contrasts recklessness and negligence as follows:

> [Recklessness] differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice

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3/(...continued)

The same source defines "rational" as "2 a: of, relating to, or based upon reason [...] 4 a: agreeable to reason: intelligent, sensible [...]."

"Bound" is defined as "1 a: the external or limiting line of an object, space or area [...] b: something that limits or restrains : limit <beyond the bounds of reason> [...]."

> of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

Id., comment g.

This standard would appear to comport with conduct which Florida courts have held to constitute "gross negligence". Jackson v. Edwards, 144 Fla. 187, 197 So. 833 (1940); Glaab v. Caudill, 236 So.2d 180 (Fla. 2d DCA 1970). See also, Prosser s.34, pp. 183, 185.

Thus, the "proper and rational bounds" language in Horne and the "reckless disregard" language in section 316.072(5) both would seem to contemplate an election to proceed under circumstances which should reasonably alert the officers to the substantial risk the endeavor poses to others.

This, indeed, was the test applied by the district court of appeal below, which held that the petitioners could be liable in this case because the respondents alleged circumstances in which the officers had "a reasonable opportunity to terminate the pursuit after the danger of its continuation from the disregard of traffic control devices became fully apparent." DCA Opinion at 25-26.

> While the mere initiation of such a pursuit, i.e., the fact of there being a pursuit which results in injuries to innocent bystanders, is not actionable, the manner of its continuation may be actionable under circumstances like those here which are alleged to have put the pursuing officers on clear notice of impending danger to innocent bystanders which could have been avoided by terminating the pursuit.

Id. at 3-4.

This formulation is consistent with footnote 3 of the Kaisner opinion, wherein the Court observed that the officers in that case might have been excused for their conduct if they had been "confronted with an emergency requiring swift action to prevent harm to others, albeit at the risk of harm to petitioners." Kaisner, 543 So.2d at 738, n.3.

Indeed, as Horne noted, the determination whether an officer in pursuit has acted negligently or recklessly must take into account the duties of his office. Horne, 198 So.2d at 13. The courts of other jurisdictions have made similar statements. E.g., Fiser v. City of Ann Arbor, 417 Mich. 461, 339 N.W.2d 413, 416 (Mich. 1983); Gibson v. City of Pasadena, 83 Cal.App.3d 651, 148 Cal.Rptr. 68, 72 (Cal.App. 1978).

And, indeed, the "sudden emergency" rule is well-established in Florida, and has been applied to actions of police officers. E.g., Scott v. City of Opa Locka, 311 So.2d 825 (Fla. 3d DCA 1975). But, as the district court of appeal noted, an emergency that is itself created or contributed to by the actor's own

conduct does not operate to excuse his negligence. 4/ The application of the sudden emergency rule is for the jury. Klepper v. Breslin, 83 So.2d 587 (Fla. 1955); Scott, supra; Dupree v. Pitts, 159 So.2d 904 (Fla. 3d DCA 1964).

The district court's ruling leaves plenty of room for the sudden emergency rule to operate. An officer's initial decision to pursue an offender is not actionable. But if the manner of the pursuit takes it beyond "proper and rational bounds", i.e., beyond the point at which the officer has had a reasonable opportunity to weigh his actions against the imminent risk of harm to others, his conduct may be characterized as reckless and actionable.

A number of courts have suggested factors which the jury should consider when making this assessment: the speed of the chase, the type of streets it covered, the density of traffic, and threats or other circumstances which put the pursued driver in fear of the pursuing driver. Putnam v. Eaton Construction Co., 535 So.2d 615, 617 (Fla. 5th DCA 1988).

4/ The factual elements required to support a jury instruction on sudden emergency are (1) that the claimed emergency actually or apparently existed; (2) that the perilous situation was not created or contributed to by the person confronted; (3) that alternative courses of action in meeting the emergency were open to such person, or that there was an opportunity to take some action to avert the threatened casualty; and (4) that the action or course taken was such as would or might have been taken by a person of reasonable prudence in the same or a similar situation. Dupree v. Pitts, 159 So.2d 904, 907 (Fla. 3d DCA 1964)(emphasis added).

See also, Tetro, 458 A.2d at 10 (seriousness of pursued driver's offense, traffic conditions); Marsh, 534 P.2d at 1364 (nature of pursued driver's offense, officers' opportunity to perceive that offender will not stop, officers' opportunity to perceive imminent dangerousness of continuing pursuit); Kuzmics, 389 A.2d at 591 (speed of pursuit, area of pursuit, presence or absence of audible or visual warnings); Fiser, 339 N.W.2d at 413 (speed of pursuit, area of pursuit, weather and road conditions, presence of pedestrians or other traffic, presence or absence of warnings, reason for pursuit); Gibson v. City of Pasadena, 83 Call.App.3d 651, 148 Cal.Rptr. 68, 73 (Cal.App. 1978)(seriousness of pursued driver's offense, speed of chase, traffic conditions).5/

Significantly, as pointed out by the district court of appeal, here the petitioners had adopted policies invoking similar considerations. Kenneth City had an oral policy altogether prohibiting its officers from engaging in high speed chases. (R.125) Pinellas Park's officers were governed by General Order No. 45, entitled "Vehicular Pursuit", which in pertinent part stated:

> At times it becomes necessary for Officers of this Department to become involved in pursuit of fleeing vehicles. Due to the extreme hazards of this undertaking, there are restrictions that must be imposed. When any of the following criteria becomes apparent to the pursuing Officer and/or the

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5/ "Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." Restatement s.291.

on-duty Supervisor, the pursuit will be terminated:

1. The identity of the fleeing individual is known to the Officer.

* * * * * *

3. The Officer believes that the driver of the fleeing vehicle would cease driving in a hazardous manner if the pursuit were terminated.

* * * * * *

5. The seriousness of the crime is not such that it would warrant the risking of innocent bystanders, the Officer or the occupants of the fleeing vehicle.

It is the responsibility of any Officer involved in a pursuit to drive with due regard for the safety of all persons. (F.S.S. 316.072) With the above in mind, it is not necessary to have a procession of police vehicles following the fleeing vehicle or for an Officer to go racing across the City when that Officer is too far distant to be of any possible aid. . . .

(R. 53)

The Sheriff had issued General Order A-9, regarding emergency vehicle operations, or "10-18 runs". Under the "Pursuits" heading it provided, among other things:

B. A minimal number of emergency vehicles will take part in the actual visual pursuit of a violator or suspected criminal. This will not restrict efforts on the part of others from trying to contain, head off, anticipate or otherwise assist in attempting to end said pursuit. This would include parallel pursuit. This section is designed to prevent a "caravan" type pursuit situation which serves no purpose and is in fact a danger to other citizens on the road.

* * * * * *

D. Deputy has responsibility to break off pursuit when it is apparent, due to conditions (e.g., traffic, weather, etc.), that the area's citizenry are being endangered by hard pursuit. It is recognized that the nature of the crime and other circumstances will play a role in the decision of whether or not to break off a pursuit.

> However, it should be recognized also that the innocent citizen's safety is of more importance than the apprehension of a criminal.

(R. 54) 6/

Thus, it can be seen that the district court of appeal's decision herein is consistent with Horne, with section 316.072(5), and with the petitioners' own policies establishing standards for their officers' conduct.

D. Public policy considerations.

It is ironic that petitioners criticize the district court of appeal on policy grounds, given petitioners' own regulations which clearly would have curtailed the chase under the circumstances alleged in this case and, in the case of Kenneth City, would have forbidden any chase at all.

In any event, petitioners' criticisms are misguided in several respects. For instance, petitioners mistakenly contend that the decision under review requires them to allow law violators to go uncaptured.

Mind, a policy that favors letting an offender go scott free for the sake of public safety, as opposed to attempting his

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6/ As the district court of appeal noted, such policies may be determinative of whether the officers' conduct was negligent. DCA Opinion at 15, cite 57 Am.Jur.2d Municipal, County, School, and State Tort Liability s.471 (1988); 57A Am.Jur.2d Negligence s.185 (1989). Kenneth City cites to City of St. Petersburg v. Reed, 330 So.2d 256 (Fla. 2d DCA 1976), for the broad proposition that such departmental policies are not admissible or relevant to the question of negligence. But that case merely holds that as to that issue statewide standards must control over local ones.

apprehension in an extended high speed chase, would hardly be unwise.

> More than 500 Americans die and over 1,000 sustain major injuries each year as a result of rapid police pursuit of lawbreakers, most of whom are guilty of only minor traffic offenses . . . one pursuit in five leads to a traffic fatality (and) in only one percent of the cases was someone in the car wanted for violent crimes. . . . Twenty percent of the pursued cars had been stolen.

Kuzmics v. Santiago, 389 A.2d 587, 590 (Pa.Super. 1978), quoting Survey by Physicians for Automotive Safety reported to American Medical Association Annual convention, June 1968. Certainly, petitioners' very own policies weigh in favor of letting an offender escape.

But, in fact, that is not the choice imposed by the district court of appeal's decision. Rather, the court noted that there are other less dangerous, albeit less direct, methods of apprehending a suspected violator, some of which were alluded to in the policies established by the Sheriff and City of Pinellas Park.

It is when the risk involved in attempting to apprehend the suspect by chasing him down at high speeds through busy urban streets outweighs the utility of that method, especially in light of the alternatives, that it may be characterized as actionably reckless. Indeed, it is this very balance between risk and utility that characterizes the reasonable man standard. Green v. Atlantic Co., 61 So.2d 185 (Fla. 1952); J.G. Christopher Co. v. Russell, 63 Fla. 191, 58 So. 45 (1912); Restatement s. 291; Prosser s.31, p.148.

Nor does the district court decision usurp the policy-making function of the legislature, as petitioners claim, though the court itself may have invited the charge by observing that it had weighed two conflicting societal values: "(1) that of encouraging motor vehicle pursuits of lawbreakers by law enforcement officers, thereby encouraging apprehensions of lawbreakers, and (2) that of discouraging injury or death to innocent bystanders resulting from motor vehicle pursuits of lawbreakers by law enforcement officers." DCA Opinion at 40-41. The court noted that it gave more weight to the second mentioned value under the circumstances of this case.

What the court overlooked, and what petitioners ignore, is that the legislature has already weighed those values and made its choice. When enacting section 768.28 it declared that henceforth all agencies of government would be answerable for their negligent acts as if they were private individuals. It made no exception for high speed pursuits by police officers. To the contrary, the very statute which permits such chases admonishes that it does not protect the driver from the consequences of his reckless disregard for the safety of others. Section 316.072(5)(c), Florida Statutes.

E. The instant case.

As the district court's opinion reflects, the Browns' complaint alleged:

--a continued, high speed, night, vehicular pursuit covering a total distance of over twenty-five miles in a densely populated area

--by law enforcement personnel ultimately totaling fifteen officers

--of a person who had run a red light and who during the pursuit disregarded approximately thirty-four traffic control signals before his disregard of the next one resulted in his vehicle colliding at an intersection with a vehicle occupied by the Browns' daughters.

If, as the district court held, the "proper and reasonable bounds" and "reckless disregard" standards are equatable with an election to proceed after the circumstances put the officers on clear notice of impending danger to innocent bystanders which could have been avoided by terminating the pursuit, the Browns clearly alleged a breach of duty by the petitioners.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT PROXIMATE CAUSATION IS AN ISSUE FOR THE JURY.

The petitioners urge that the intervening negligence of the pursued driver must be viewed as the sole proximate cause of his collision with the Browns' daughters. They point to a number of foreign decisions, listed in Dent v. City of Dallas, 729 S.W.2d 114 (Tex.App.1986), which hold as much.

But the courts are hardly unanimous in this regard. Examples of decisions to the contrary are Jackson v. Olson, 77 Or.App. 41, 712 P.2d 128 (Or.App.1985); Smith v. Nieves, 197

N.J.Super. 609, 485 A.2d 1066 (N.J.Super. 1984); Mobell v. City and County of Denver, 671 P.2d 444 (Colo.App. 1983); Fiser v. City of Ann Arbor, 339 N.W.2d 413 (Mich. 1983); Tetro v. Town of Stratford, 458 A.2d 5 (Conn. 1983); Lee v. City of Omaha, 209 Neb. 342, 307 N.W.2d 800 (Neb. 1981); Duarte v. City of San Jose, 100 Cal.App.3d 648, 161 Cal.Rptr. 140 (Cal.App. 1980); Gibson v. City of Pasadena, 83 Cal.App.3d 651, 148 Cal.Rptr. 68 (Cal.App. 1978); Kuzmics v. Santiago, 389 A.2d 587 (Pa.Super. 1978); Alexander v. City of New York, 385 N.Y.S.2d 788 (N.Y.App. 1976); Mason v. Bitton, 85 Wash.2d 321, 534 P.2d 1360 (Wash. 1975); Schatz v. Cutler, 395 F.Supp. 271 (D.Vermont 1975)(applying Vermont law); Myers v. Town of Harrison, 438 F.2d 293 (2nd Cir. 1971)(applying New York law); Thain v. City of New York, 313 N.Y.S.2d 484 (N.Y.App. 1970); Sundin v. Hughes, 107 Ill.App. 105, 246 N.E.2d 100 (Ill.App. 1969); Jansen v. State, 301 N.Y.S.2d 811 (N.Y.App. 1968).7/

Among the Florida decisions permitting the jury to make the proximate cause determination in cases such as this are Bryant, supra, and the cases collected in note 2, supra.

All of the foregoing decisions are consistent with the general rule that proximate causation is a jury question. Indeed, courts rarely wade into the "murky waters" of proximate

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7/ As one court put it: "The intervention of negligent or even reckless behavior by the driver of the car which the police pursue does not, under the emergent majority view, require the conclusion that there is a lack of proximate cause between the police negligence and the innocent victim's injuries." Tetro, 458 A.2d at 8.

cause. Bennett M. Lifter, Inc. v. Varnado, 480 So.2d 1336, 1337 (Fla. 3d DCA 1985). Courts are admonished to decide the question only in those rare instances where reasonable men could not disagree. Helman v. Seaboard Coast Line Railroad Co., 349 So.2d 1187 (Fla. 1977).

Proximate cause involves two elements: causation in fact, and foreseeability. Stahl v. Metropolitan Dade County, 438 So.2d 14 (Fla. 3d DCA 1983); Goode v. Walt Disney World Co., 425 So.2d 1151 (Fla. 5th DCA 1983).

As noted in Putnam, supra, death or injury to innocent bystanders is not only a foreseeable consequence of high speed chases; it is "the most likely" one. Thus, even if the pursued motorist's actions in this case could be considered an intervening cause as to otherwise preclude a finding that the pursuing officers' negligence caused his collision with the Browns' daughters, the petitioners would nevertheless be liable. The intervention of another cause is no defense if the intervening event was foreseeable to the defendant. Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980); Robinson v. Florida Dept. of Transportation, 465 So.2d 1301 (Fla. 1st DCA 1985); Stahl, supra; Prosser, s.44, p.272. This includes the foreseeable criminal act of a third person. Restatement ss. 447, 448, 449; K-Mart Enterprises of Florida, Inc. v. Keller, 439 So.2d 283, 287 (Fla. 3d DCA 1983); Holley v. Mt. Zion Terrace Apart-

ments, 382 So.2d 98, 101 (Fla. 3d DCA 1980).8/

As for causation-in-fact, jurors in Florida are instructed that

> [n]egligence is a legal cause of [injury] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [injury], so that it can reasonably said that, but for the negligence,the [injury] would not have occurred.

Florida Standard Jury Instruction 5.1a.

Further:

> In order to be regarded as a legal cause of [injury], negligence need not be the only cause. Negligence may be a legal cause of [injury] even though it operates in combination with [the act of another] [or] some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such [injury].

Florida Standard Jury Instruction 5.1b.

Indeed, the law recognizes that "proximate cause" is not synonymous with "only cause".

> In the ordinary negligence context, a defendant is liable for injury produced or substantially produced in a natural and continuous sequence by his conduct such that "but for" such conduct, the injury would not have occurred. Such liability is not escaped in the recognition that the injury would not have occurred "but for" the concurrence or intervention of some other cause as well. The defendant is liable when his act of negligence combines with some other

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8/ Kenneth City argues that the fleeing driver's conduct broke the chain of causation flowing from its own officers' negligence because its officers did not "set [him] in motion", citing Mann v. Pensacola Concrete Construction Co., Inc., 527 So.2d 279 (Fla. 1st DCA 1988) rev. den. 534 So.2d 400 (Fla. 1988). Indeed, in that case the intervening cause had been disregarded because the party's own negligence had set it in motion. But that ruling is a far cry from the proposition that an otherwise foreseeable intervening cause will be deemed to have broken the causative chain so long as the defendant's negligence did not set it in motion.

> concurrence or intervening cause in the sense that, "but for" the other cause as well, injury would not have occurred.

Jones v. Utica Mutual Insurance Co., 463 So.2d 1153, 1156 (Fla. 1985).

Petitioners in effect contend that Horne adopted a contrary rule with respect to law enforcement officers when it held that pursuing officers are not responsible for the acts of the fleeing driver.

But the Horne court's statement in that respect did not relate to proximate causation. More important, the statement was not the blanket one described by the petitioners. Here is what the Court wrote:

> The rule governing the conduct of police in pursuit of an escaping offender is that he must operate his car with due care and, in doing so, he is not responsible for the acts of the offender. Although pursuit may contribute to the reckless driving of the pursued, the officer is not obliged to allow him to escape. [footnote omitted]

Horne, 198 So.2d at 13 (emphasis added).

In the footnote to that passage, the court quoted Wrubel v. State, 11 Misc.2d 878, 174 N.Y.S.2d 687, 689 (1958), including the following:

> In so holding we do not say that it is impossible for an officer to be negligent or reckless in the performance of his duties. That it is possible is amply pointed out by some of the cases cited by claimants. * * *
>
> A police officer has a right to use whatever means necessary to make an arrest and unless he exceeds proper and rational bounds or acts in a negligent, careless or wanton manner, he is not liable for damages sustained, even by innocent parties, under the circumstances that arose herein.

Horne, 198 So.2d at 13-14, n.9 (emphasis added).

Thus, where the police exceed proper and rational bounds when conducting a chase, or do so negligently, carelessly or wantonly, they are indeed responsible for injuries proximately caused by their conduct, even if the injuries are physically inflicted by the fleeing driver.

It cannot be disputed that the accident here would not have occurred if the pursued motorist had not run the red light at U.S. 19 and State Road 584 at 90 miles per hour. But a jury could reasonably find that the offender would not have done so if the officers had not taken their pursuit of him beyond proper and rational bounds, or that he would not have collided with the Browns' daughters if the officers had taken a more responsible approach to their duty to protect others from the harm the chase posed. It certainly cannot be said that no reasonable juror would take that view.

III. THE PETITIONERS ARE NOT PROTECTED FROM SUIT UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY.

A. Pinellas Park, Kenneth City, and the Sheriff.

When addressing the sovereign immunity question in this case the district court of appeal distinguished the officers' decision to initiate the pursuit, which it held to be immunized, from the manner in which the pursuit was thereafter carried out, which the court held was actionable.

Petitioners attack this result on two grounds. First, they again engage in a broad reading of Everton, supra, so as to

support their claim to immunity for virtually the entire scope of law enforcement activity. But the possibility that Everton would be employed in this manner prompted vigorous dissents from that decision. These in turn caused the Everton majority to emphasize that its decision was not meant to apply beyond the specific issue involved in that case, i.e., an officer's decision whether to arrest.

> We note as we did in Trianon[Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985)] that this is a narrow issue relating to the discretionary judgmental decision of making an arrest under the police power of a governmental entity. It does not have the broad ramifications attributed to it by the dissents, nor does it recede from Commercial Carrier.

Everton, 468 So.2d at 939.9/

Second, petitioners urge that, as a practical matter, in a case such as this it is impossible to discern where the immunized discretionary decision to pursue leaves off and the actionable operational manner of implementation begins. But this reasoning is unsound on at least two bases.

First, the distinction between the decision to pursue and the manner of pursuit is conceptually no more difficult in the sovereign immunity context than it is in the duty of care context. Yet the Horne court managed to make it. Under that decision an officer's decision to initiate pursuit is not ac-

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9/ Vis-a-vis petitioners' expansive view of Everton, it is notable that the Second District relied on that decision when deciding Kaisner v. Kolb, 509 So.2d 1213 (Fla. 2d DCA 1987). When this Court later reversed that decision, it failed to mention Everton at all.

tionable. But once he embarks on the pursuit, he is under a duty "not to exceed proper and rational bounds".

Second, difficulty in distinguishing between discretionary and operational activities has always plagued sovereign immunity analyses. If that was the dispositive test, as petitioners suggest, virtually every government activity would be immunized --or none of them would be. As this Court noted in Kaisner, "every act involves a degree of discretion, and every exercise of discretion involves a physical operation or act." Kaisner, 543 So.2d at 736.

That is not the test, of course. Kaisner reminded us that the discretionary function exception to the waiver of sovereign immunity is itself a means of effectuating the doctrine of separation of powers. Kaisner, 543 So.2d at 736, citing Trianon, 468 So.2d at 918, and Commercial Carrier, 371 So.2d at 1022.

> Accordingly, the term "discretionary" as used in this context means that the governmental act in question involved an exercise of executive or legislative power such that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning. See Department of Health and Rehabilitative Services v. Yamuni, 529 So.2d 258, 260 (Fla. 1988). An "operational" function, on the other hand, is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented.

Kaisner, 543 So.2d at 737.

To assist its effort to classify the activity at issue in Kaisner, this Court applied the tests adopted from the states of California and Washington in Commercial Carrier. The district court of appeal did likewise in the instant case.

The first test, from Johnson v. State, 69 Cal.2d 782, 794, 73 Cal.Rptr. 240, 248-49, 447 P.2d 352, 360-61 (1968), requires a determination whether the officers' acts involved "quasi-legislative policy-making ... sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision." Kaisner, 543 So.2d at 737, quoting Johnson, supra. The Kaisner court found that the acts at issue there did not involve such policy-making.

As the district court found, the same holds true here. The precise manner in which law enforcement officers attempt to apprehend a traffic violator is neither quasi-legislative nor sensitive--certainly not so sensitive as to require a blanket rule against resulting tort actions. For, as was pointed out in Point I, supra, Florida courts have long entertained negligence suits arising from injuries suffered during police chases. E.g., Bryant, supra, and cases collected in note 2, supra.

And it is notable that the California courts, applying their own Johnson test, have held that the manner in which police officers undertake a highway chase is not immunized. Gibson v. City of Pasadena, 83 Cal.App.3d 651, 148 Cal.Rptr. 68, 72-73 (Cal.App. 1978).

The second test adopted in Commercial Carrier and applied in Kaisner was taken from Evangelical United Brethren Church v. State, 67 Wash.2d 246, 255, 407 P.2d 440, 445 (Wash. 1965). It poses four questions.

First, did the act of the officers in this instance involve a basic governmental policy, program or objective? The Kaisner Court held that the officers' acts in that case did not. "The decision as to where motorists will be ordered to the side of the road at best is a secondary concern[.]" Kaisner, 543 So.2d at 737. Similarly, here, the suit did not interfere with basic governmental policy making. Rather, it examined a secondary decision as to how that policy was to be carried out, involving the decision whether to continue a pursuit, by how many cars, under what circumstances, and at what level of risk.

Indeed, as the district court pointed out, "since, as noted above, the policies of the governmental entities in this case were allegedly contrary to the continuation of the pursuit--and, in fact, it is alleged that there had been an order to terminate the pursuit, this suit would clearly seem to be consistent, and not an interference, with governmental policy." DCA Opinion at 19.

The second question under the Washington test is whether the act at issue is essential to the realization of basic policy. In Kaisner the answer was no: "Safer places or methods of ordering motorists to the roadside may exist that would both protect the motorists and meet the government's objectives." Kaisner, 543 So.2d at 737. Likewise here, the district court noted, there are obviously safer methods of apprehending a traffic offender that would not unreasonably imperil innocent parties and would at the same time adequately meet governmental objectives. DCA Opinion

at 19-20. Some of these were referenced in the petitioners' policies, e.g., establishing a roadblock, or identifying the offender (by license plate, for example) and arresting him later under less dangerous circumstances. (R. 53, 54)

Third, did the act require basic policy evaluation or expertise? Kaisner, again, found that pulling the motorists to the roadside did not:

> [T]he act in this instance at best involved secondary judgment. Were we to establish a rule preventing officers from ordering motorists to the roadside, then we improperly would be entangling ourselves in matters involving basic policy evaluation or planning. Such is not the case at hand. This lawsuit merely asks the courts to consider the way in which this basic policy is implemented, not its fundamental wisdom.

Kaisner, 543 So.2d at 737.10/

Here, the Browns do not seek a ruling that the police may not engage in vehicular chases. Rather, they seek an evaluation of the manner in which this chase was carried out. The district court agreed:

> [I]n the context of this case, we find no threat to basic policy evaluation. This lawsuit does not, we conclude, "entangle" the courts in basic policy because, as we have said, it does not challenge the appellees' authority to use police pursuits to further the governmental policy of law

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10/ This passage was accompanied by the following footnote:

> We implicitly recognized this distinction in Trianon when we noted that some activities of police officers in carrying out their duties, such as the way motor vehicles or firearms are used, may be actionable. Trianon Park Condominium Ass'n v. City of Hialeah, 468 So.2d 912, 920 (Fla. 1985). We do not consider these two examples to be an exhaustive list of all possible actionable activities involving law enforcement officers.

Kaisner, 543 So.2d at 737, n.2.

> enforcement. That is, both Kaisner and this case involve the way a governmental policy is implemented.

DCA Opinion at 20-21.

Finally, was the act lawfully authorized? In Kaisner the answer was yes: "Law enforcement officers have the authority to pull motorists to the roadside for traffic infractions." Kaisner, 543 So.2d at 737. Here, too, the answer is yes; officers are authorized to exceed the speed limit and proceed against traffic control signals when chasing an offender. Section 316.072(5).11/

Noting that a negative answer to any of the four questions calls for further inquiry, the Kaisner court then examined the matter before it in light of the distinction between "operational" and "discretionary" functions, as those terms were previously defined. The court's conclusion:

> While the act in question in this case certainly involved a degree of discretion, we cannot say that it was the type of discretion that needs to be insulated from suit. Intervention of the courts in this case will not entangle them in fundamental questions of public policy or planning. It merely will require the courts to determine if the officers should have acted in a manner more consistent with the safety of the individuals involved. [footnote omitted]

Kaisner, 453 So.2d at 737-38.

That passage could have been written about the instant case. The Browns do not challenge the petitioners' policies regarding vehicular pursuits, nor do they seek to predicate liability on

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11/ This Court has observed that the last question has limited value because the answer will almost always be yes. Yamuni, 529 So.2d at 260, n.1.

the decision to initiate pursuit in this particular case. Instead, the problem here was the way the attempt to apprehend the traffic violator was implemented. (R. 129-131) As in Kaisner, the courts indeed may review that issue in an action for negligence. Again, the district court agreed:

> [P]ermitting this suit to proceed under its pleadings will merely require the courts to determine if the law enforcement officers should have conducted the pursuit in a manner more consistent with the safety of innocent bystanders like appellants' decedents.

DCA Opinion at 21.

Thus, the district court correctly concluded that the petitioners' actions in continuing the pursuit as they did were operational, not discretionary, and were not entitled to sovereign immunity. In a similar case the Washington Supreme Court applied its Evangelical United Brethren Church test, and reached the same conclusion. Mason v. Bitton, 85 Wash.2d 321, 534 P.2d 1360 (Wash. 1975).

B. Pinellas Park and Kenneth City.

In their second amended complaint the Browns alleged that the defendant municipalities had purchased insurance covering liability for personal injury and wrongful death arising from the cities' operations. They were authorized to do so by section 286.28(1), Florida Statutes (1983). Subsection (2) of the statute provided that an insurer issuing such a policy would not be entitled to assert sovereign immunity as a defense to an action brought against the insured.

The Browns pointed out to the district court that in 1986 this Court held that a political subdivision which purchased such insurance waived its sovereign immunity to the extent of the coverage. Moreover, this "contingent waiver" was independent of the general waiver of immunity contained in Florida Statute section 768.28. Avallone v. Board of County Commissioners, 493 So.2d 1002, 1004-1005 (Fla. 1986).

The legislature responded to Avallone by enacting Chapter 87-134, Laws of Florida, which purported to "clarify" the legislative intent behind section 728.28, and repealed section 286.28 retroactively.12/

However, in Kaisner, the Court observed that

> it would be absurd to construe the repeal of a statute, even where the legislature purports to make the repealer partially retroactive, as a "clarification" of original legislative intent. Subsequent legislatures, in the guise of "clarification," cannot nullify retroactively what a prior legislature clearly intended. Art. I, s.10, Fla. Const.

Kaisner, 543 So.2d at 738.

The Court went on to hold that the legislature could not, by retroactive application of Ch. 87-134, impair rights which had vested prior to the enactment. Thus, the Court held, Ch. 87-134 could not divest a party of the right to sue for injuries which

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12/ Chapter 87-134, section 5, Laws of Florida, provides:

> This act shall take effect upon becoming a law and shall apply to all causes of action then pending or thereafter filed, but shall not apply to any cause of action to which a final judgment has been rendered or in which the jury has returned a verdict unless such judgment or verdict has been or shall be reversed.

occurred prior to the repealer. Id., citing Rupp v. Bryant, 417 So.2d 658 (Fla. 1982).

Under Avallone, supra, Pinellas Park and Kenneth City waived their sovereign immunity to the extent of their liability insurance coverage. And, since the Browns' cause of action accrued in June 1984, long before the enactment of Ch. 87-134, their right to sue the insured municipalities for the deaths of their daughters was unaffected by the repeal of section 286.28. Kaisner, supra.

In the district court the municipalities argued that their purchase of insurance merely increased the limits of liability imposed by section 768.28, Florida Statutes. Proceeding from that premise, they urged that their purchase of insurance had no bearing on the sovereign immunity question. They contended that even with liability insurance, their waiver vel non of sovereign immunity depended on the same operational-discretionary analysis that is applied to section 768.28 waivers.

But, of course, this Court dispelled that notion in Kaisner:

> [W]e disagree with the district court's holding that the enactment of section 286.28, Florida Statutes (1985), did not waive governmental immunity up to the limits of insurance coverage. Both the plain language of the statute and our holding in Avallone require a contrary conclusion. 493 So.2d at 1004-05. This contingent waiver operates independently of the general waiver of sovereign immunity and would be sufficient to allow recovery up to the limits of coverage in this instance provided the elements of negligence are properly found to exist.

Kaisner, 543 So.2d at 738.

In its decision below the district court did not address this matter, because it found that none of the petitioners were entitled to sovereign immunity in any event. DCA Opinion at 16, n.3.

Here the municipalities take a different tack. Apparently conceding that their purchase of insurance operated as a separate waiver of sovereign immunity, they seek to confuse the matter by arguing that purchasing insurance under section 286.28 did not create separate causes of action against them. That is certainly true; the Browns have never contended otherwise.

But under the law as interpreted in Avallone and Kaisner, vis-a-vis the cause of action the Browns have against them, the municipalities have waived sovereign immunity to the extent of the insurance coverage.

Conclusion

For the reasons described herein, respondents submit that the district court's decision was correct. Therefore, it should be affirmed in every respect.

Respectfully submitted,

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Certificate of Service

I certify that true copies of the foregoing have been furnished by U.S. Mail to Howard M. Bernstein, Esq., County Attorney's Office, 315 Court Street, Clearwater, Florida 34616; James E. Thompson, Esq., P.O. Box 1438, Tampa, Florida 33601; and C. Wade Yeakle, III, Esq., One 4th Street N., St. Petersburg, Florida 33701, this 30th day of May, 1990.

Stevan T. Northcutt, Esq.