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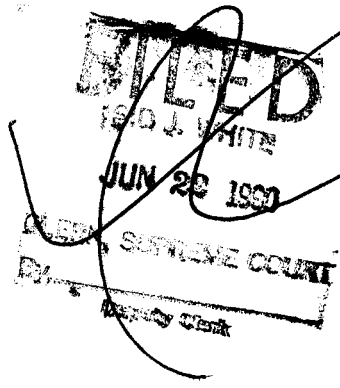

IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

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 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, as parents of Judith A. Brown, deceased, and Susan A. Brown, deceased,

Respondents/Plaintiffs.
_____/

REPLY BRIEF OF PETITIONER
CITY OF PINELLAS PARK

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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.

Mr. and Mrs. Brown in their Brief quite correctly point out that the "special duty-general duty" distinction of Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967), no longer is the law in Florida, as reflected by this Court's ruling in Commercial Carrier Corporation v. Indian River County, 371 So. 2d 1010 (Fla. 1979). However, Pinellas Park is not attempting to breathe life into Modlin. To the contrary, Pinellas Park takes the position that this is a situation in which there simply is no duty at all. In Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985), this Court ruled that when a governmental entity exercises its discretionary power to enforce compliance with the law, this is a matter of governance for which there has never been a common law duty of care. Discretionary power to enforce compliance with the law and protect public safety is most often reflected in the discretionary power given to judges, prosecutors, law enforcement officials and fire protection agencies, and there is no liability for the exercise of that discretionary power. A necessary distinction must be made to the extent that common law duties of care do apply to such officials when they are operating a motor vehicle or handling firearms in the course of their employment in the performance of their duty to enforce compliance with the law. In

those situations, the common law has recognized the duty of care, so the Waiver of Sovereign Immunity is possible.

Mr. and Mrs. Brown misinterpret the holding of this Court in Kaisner v Kolb, 543 So. 2d 732 (Fla. 1989). As Kaisner points out, a governmental agency can be held liable for injury when law enforcement officials have taken persons into custody, detained them, deprived them of their liberty, and then placed them in a position of danger. Unlike the situation involving the general public as a whole, the facts in Kaisner showed a situation in which the relationship between law enforcement officers and particular members of the public had been altered, and in which the members of the public had been deprived of the freedom of action. They have been singled out for direct police contact as opposed to being merely members of the public body at large.

In short, to take the particular facts in Kaisner, and attempt to create a duty in the case involving the deaths of the daughters of Mr. and Mrs. Brown, would be to ignore the general rule announced by this Court in Trianon and Everton v. Willard, 468 So. 2d 936 (Fla. 1985), that there is no duty owing to the public as a whole. Further, Trianon demonstrates that there is no common law duty to prevent the misconduct of third persons.

Since City of Miami v. Horne, 198 So. 2d 10 (Fla. 1967), stands for the proposition that the decision to pursue is not actionable negligence, Mr. and Mrs. Brown would have this Court decide that the decision to continue to pursue creates actionable negligence, even though it was the pursued whose vehicle collided with the vehicle occupied by the daughters of Mr. and Mrs. Brown,

a collision in which no law enforcement motor vehicle was involved. Pinellas Park cannot comprehend how there could be an actionable decision to continue pursuit when the initial decision to begin the pursuit is insulated. Of necessity, one must remember that this Court in Trianon held that there could be no liability for exercise of discretionary power by police officials to enforce compliance with the law and to protect the public's safety. Pinellas Park again points out (as it did on Page 10 of its initial Brief on the merits in this action), an officer's thought process is the same whether he is initiating or deciding whether to continue a pursuit, and the mere length or speed of a pursuit cannot create a duty. If the position of Mr. and Mrs. Brown is correct, 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. Faced with the possibility that a jury might get to second guess a decision on whether to continue a pursuit, the reaction of the majority of law enforcement officials would most likely be to avoid pursuit. Thus, the valid discretion in law enforcement and protection of the public safety outlined in Trianon would be frustrated if the decision to continue pursuit could be the basis of a tort action.

Granted, Pinellas Park had a written policy pertaining to pursuits, but the internal operation of a police department and the guidelines in its General Orders cannot create a duty. Departmental policy more restrictive than state law is not even admissible in evidence. City of St. Petersburg v. Reed, 330 So.

2d 256 (Fla. 2d DCA 1976).

Finally, as pointed out in Everton, creation of an actionable duty to avoid negligent conduct in discretionary judgmental decisions made by police officers in enforcing the law should be a matter of legislative enactment rather than judicial fiat.

REPLY ARGUMENT

II

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

Having reviewed the argument of Mr. and Mrs. Brown on this point, Pinellas Park does not feel that further discussion is required, and will rely on its argument on Point II on Pages 13-18 of Pinellas Park's Initial Brief on the Merits.

REPLY 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.

Mr. and Mrs. Brown simply miss the point when they talk about purchase of liability insurance. This Court, in Avallone v. Board of County Commissioners, 493 So. 2d 1002 (Fla. 1986), ruled the purchase of liability insurance waived sovereign immunity to the extent of the coverage, but the decision does not stand for the proposition that simply buying insurance will create duties that otherwise do not exist.

Otherwise, the argument of Mr. and Mrs. Brown in this area boils down to a request that the Court ignore its decisions in Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985) and Everton v. Willard, 468 So. 2d 936 (Fla. 1985), and instead, create by this particular case involving Mr. and Mrs. Brown in Pinellas Park a new common law cause of action for negligence that would strike directly at the heart of a discretionary police power function critical to the ability of law enforcement officials to carry out their duties. Everton explains that such discretionary decisions are inherent in enforcing the law of the state, rather than being ministerial acts. Trianon stands for the proposition that governmental entities are immune when making basic decisions on how to enforce the laws. Everton and Trianon are well-reasoned, and nothing can be accomplished by receding from them in this case except to

create a multitude of lawsuits in which jurors would have the right to act as Monday morning quarterbacks on fundamental decisions involving law enforcement and public safety.

CONCLUSION

As members of the general public, Pinellas Park owed no duty to the daughters of Mr. and Mrs. Brown because those daughters had not been taken into custody, nor was their existence known, nor had any event taken place whereby the Pinellas Park officers restricted the daughters' freedom of movement and ability to provide for their own safety. The improper driving of Mr. Deady rather than the conduct of Pinellas Park officers was the proximate cause of the collision and deaths, the decision to initiate and to continue the pursuit were discretionary ones, immune from liability, and in the absence of a common law duty, the mere purchase of liability insurance by Pinellas Park cannot create a duty that otherwise does not exist.

Respectfully submitted,

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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 and 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 21st day of June, 1990.

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