SUPREME COURT OF FLORIDA

RANDALL JERROLD VANN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FAYE LAMB VANN,

Appellant,

v. CASE NO: 85,415

STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS,

Appellee.

REPLY BRIEF OF THE APPELLANT, RANDALL JERROLD VANN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FAYE LAMB VANN, DECEASED

APPEAL FROM THE DISTRICT COURT OF APPEAL, STATE OF FLORIDA, FIRST DISTRICT
CASE NO: 94-00015

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Attorney for Appellant, Randall Jerrold Vann, as personal representative of the Estate of Faye Lamb Vann, Deceased.

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STATEMENT OF THE CASE AND OF THE FACTS

PRELIMINARY STATEMENT

The Appellant, Randall Jerrold Vann, as personal representative of the Estate of Faye Lamb Vann, adopts by reference the Statement of the Case and of the Facts presented in his initial Brief.

A brief chronological summary of the pertinent facts for this appeal are as follows:

1. March 30, 1979 - Donald Dillbeck stabbed Mr. Reeder with a knife in Anderson, Indiana while attempting to steal a CB Radio from Mr. Reeder's Chevrolet Blazer truck. (P. Ex. 35, Madison County, Indiana Case - Complaint Report).

2. April 11, 1979 - Donald Dillbeck brutally shot and murdered a Lee County Deputy Sheriff in Ft. Myers, Florida. (P. Ex. 23, p. 2208).

3. June 6, 1979 - Donald Dillbeck was sentenced to life imprisonment with a mandatory twenty-five (25) year sentence for the 1st Degree murder of Deputy Hall of the Lee County Sheriff's Department. (P. Ex. 19, p. 1).

4. June 13, 1979 - Donald Dillbeck was incarcerated and taken into custody by the DOC. (P. Ex. 19, p. 1).

5. December, 1980 - DOC received notice from the State of Indiana of the charges of attempted murder, trespassing and theft filed by Mr. Reeder. (P. Ex. 19, pp. 1-2).

6. February 7, 1983 - Donald Dillbeck attempted to escape from Zephyr Hills correctional Institution but was caught between the fences. (P. Ex. 19, p. 2).

7. August 19, 1984 - Donald Dillbeck stabbed a fellow inmate with a fifteen (15) inch homemade knife. (P. Ex. 18, pp. 2176-2177).

8. September 9, 1988 - Donald Dillbeck was transferred from Sumter Correctional Institution to Desoto Correctional Institution because he was determined by DOC to be a "security risk" in DOC's investigation of a possible escape attempt by Donald Dillbeck. (P. Ex. 19, Exhibit # 1, p. 2).

9. June 22, 1990 - Donald Dillbeck escaped from DOC's custody while on a work detail serving food at Gretna Elementary School in Gretna, Florida. (P. Ex. 19, pp. 3-4). Prior to the escape, Donald Dillbeck stated that he stood around for about twenty (20) minutes while trying to work up the nerve to leave since the DOC officers were not watching him. (p. Ex. 17, p. 1974).

10. June 22, 1990 - By it's own admission, DOC only notified the Florida Highway Patrol and the Gadsden County Sheriff's Office that Donald Dillbeck a convicted cop killer with violent propensities was on the loose. (See p. 4 of DOC Brief). DOC did not contact the Tallahassee Police Department and inform it of Donald Dillbeck's escape. Tallahassee, Florida is the closest metropolitan area to Florida with Tallahassee being approximately 30 miles from Quincy.

11. June 27, 1990 - In DOC's own internal special investigative report concerning the escape of Donald Dillbeck, the DOC found itself negligent. (P. Ex. 19). Specifically, the June 27, 1990 special investigative report found that on June 22, 1990, the DOC employees negligently performed their duties in supervising Donald Dillbeck in that up to thirty minutes elapsed before Dillbeck's escape was noticed and the outside exit was not locked. (P. Ex. 19). The DOC concluded in the June 27, 1990 report that it's employees provided thoroughly inadequate supervision of an inmate of Dillbeck's type and failed to follow established DOC policies on June 22, 1990. (P. Ex. 19).

SUMMARY OF ARGUMENT

The certified issue on appeal is whether the State of Florida, Department of Corrections may be held liable as a result of the criminal acts of an escaped prisoner which are committed in the furtherance of the escape.

The specific issue involved is whether or not the DOC has a common law duty to protect an individual from crimes committed by an escaped prisoner.

The DOC clearly has a common law duty to exercise reasonable care in controlling and supervising it's inmates in order to prevent harm to the general public by individuals placed under its control and custody.

In addition to the legal duty issue, this Honorable Court should consider and find that the DOC is not immune from suit under the facts of this case and that Donald Dillbeck's stabbing of Mrs. Vann to death while attempting to steal her car was foreseeable under the circumstances in this case.

ARGUMENT

I. WHETHER THE STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS, MAY BE HELD LIABLE AS A RESULT OF THE CRIMINAL ACTS OF AN ESCAPED PRISONER?

A. Does the DOC have sovereign immunity in this case? No.

Section 768.28, Fla. Stat., Florida's sovereign immunity statute, in pertinent part, is as follows:

> "Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act."

Additionally, § 768.28(5) Fla. Stat. states, in pertinent part, that the recovery limits against the state and its agencies and subdivisions is as follows:

> "(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgments. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000....."

Therefore, there is no question that the DOC does not have sovereign immunity in this case since a private person would be liable to Mrs. Vann in accordance with the general laws of this state. See Nova University, Inc. v. Wagner, 491 So.2d 1116 (Fla. 1986) which held that a child care institution was liable for the acts of runaway delinquent children since the child care institution had a duty to exercise reasonable care in its operation to avoid harm to the general public and Garrison Retirement Home Corporation v. Hancock, 484 So.2d 1257 (Fla. 4th DCA 1985) which held that a retirement home is liable to a third party who was injured by an escaped resident based on common law negligence.

B. Does the DOC have qualified immunity in this case? Yes.

1. **Planning Functions** - The DOC has immunity for planning or discretionary functions. It is clear from the facts of this case that the DOC officers in Quincy, Florida on June 22, 1990 failed to follow the policies and rules of the DOC which resulted in the escape of Donald Dillbeck from their custody. This case is not about establishing or not establishing policies, rules or regulations.

2. **Operational Functions** - The DOC does not have immunity for it's operational functions. The facts clearly show that the actions of the DOC officers on June 22, 1990 were operational in nature. In fact, the DOC admits in it's June 27, 1990 Special Investigative Report that it's officers did not follow DOC's own policies and rules and that this failure resulted in Donald

Dillbeck's escape on June 22, 1990. See Appendix I - June 27, 1990 DOC Special Investigative Report without attachments.

C. Does the DOC have a statutory duty to Mrs. Vann in this case? No.

It is undisputed that the DOC does not have a statutory duty to protect members of the public from prisoners. Department of Health & Rehabilitation Services v. Whaley, 574 So.2d 100, 102-03 n.1 (Fla. 1991); George v. Hitek Community Control Corporation, 639 So.2d 661, 663 (Fla. 4th DCA 1994). Although no statutory duty exists, it is clear that the DOC has a statutory right of control over inmates placed in its custody, which gives rise to the special relationship discussed below under Restatement (Second) of Torts, Sections 314A, 315, and 319 (1965). Specifically, Section 945.04(1), Florida Statutes (1989), makes the DOC "responsible for the inmates and for the operation of, and shall have supervisory and protective care, custody, and control of, all..... matters connected with, the correctional system."

D. Does the DOC have a common law duty to Mrs. Vann in this case? Yes.

The Restatement (Second) of Torts, § 315 (1964) provides:

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."

Section 315 of the Restatement, as it applies to the facts of this case, states that there is a duty to control the conduct of a third person to prevent harm to others if a special relationship exists between the actor (DOC) and the third person (Donald Dillbeck).

The Restatement (Second) of Torts, §319 (1964) provides:

> "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

Section 319 of the Restatement, as it applies to the facts of this case, placed upon the DOC, when it takes charge of a third person (Donald Dillbeck) who it knew to be likely to cause harm to others (Mrs. Vann) if not controlled, a duty to exercise reasonable care to control the third person (Donald Dillbeck) to prevent him from doing such harm.

Section 314A of the Restatement (Second) of Torts (1964) also provides that one who voluntarily assumes to act for another, which he knows is necessary for the protection of a third person, owes the third person a duty of care if his failure to exercise such care increases the risk of harm.

These traditional tort law principles establish a common law duty of care. This duty of care was owed to Mrs. Vann to the same extent as it exists at common law.

The DOC in its Brief on Page 7 states that "Petitioner has not cited one case to this Court in which the State of Florida has been held liable for the criminal acts of an escaped prisoner." It can only be speculated that the DOC uses that statement to infer to this Honorable Court that there are no cases in which the DOC has been held liable for the criminal acts of an escaped prisoner. That is not true.

In Division of Corrections v. Wynn, 438 So.2d 446 (Fla. App. 1 Dist. 1983), a DOC inmate escaped lawful custody and shortly thereafter raped Mrs. Wynn. Mrs. Wynn filed an action against the DOC for the injuries she sustained as a result of the DOC's negligence in failing to properly supervise and control inmate Robert White, who was a work release inmate at the time of the escape. The facts of this case are very similar to Wynn, supra. Although the District Court of Appeal, First District did not address the duty issue in that opinion, it did affirm a judgment against the DOC for Mrs. Wynn's damages. In a similar case to Wynn, supra, the District Court of Appeal, First District held the DOC was liable for the criminal acts of an escaped prisoner in Newsome v. Dept. of Corrections, 435 So.2d 887 (Fla. 1st DCA 1983). In Newsome, supra, a case very similar to Wynn, supra, and the instant case, the DOC was held liable for the damages sustained by Ms. Newsome as a result of the negligence of the DOC in allowing an inmate to escape its custody and control. Ms. Newsome was raped by a DOC escapee who actually escaped from a Department of Transportation Work Center where the inmate was "on loan" by the

DOC. The District Court of Appeal, First District in Newsome, supra, held that DOC was liable for the Department of Transportation's negligent supervision because DOC had the responsibility for supervising inmates remanded to it by a Court as a part of an imposed sentence.

However, the duty issue was not raised in these cases.

It is important to note that the First District Court of Appeal has issued two other decisions involving injuries to the public by escaped prisoners, since the Vann decision. See Department of Corrections v. McGhee, 20 Fla. L. Weekly D945 (Fla. 1st DCA April 13, 1995) and Department of Corrections v. Burnett, 20 Fla. L. Weekly D939 (Fla. 1st DCA April 13, 1995). McGhee and Burnett followed the reasoning and analysis set forth in Vann in concluding DOC does not have a common law or statutory duty of care to the plaintiffs in those cases. Judge Ervin's concurring and dissenting opinion in McGhee addresses the underlying common law or statutory duty of care necessary for governmental tort liability. See attached for your review Appendix II - McGhee opinion. Additionally, Judge Ralph Smith's trial court judgment opinion in Burnett finding against the DOC for $1,300,000.00 discusses DOC's liability for failing to properly supervise and control its inmates. See Appendix III - Judge Ralph Smith's May 2, 1994 Judgment opinion in Burnett.

Judge Ervin's concurring and dissenting opinion in McGhee is a well-reasoned opinion which correctly states the law as it concerns the common law duty of the DOC.

In Burnett, supra, the inmates escaped on May 24, 1990. The DOC admitted that it was guilty of negligence in maintaining the custody of the inmates. See Appendix III at Page 3. On June 22, 1990, less than one month later, Donald Dillbeck escaped. The DOC's internal investigation found that the escape was the result of the negligence of DOC personnel.

Apparently, sometime shortly thereafter, someone with the DOC decided that DOC owed no duty to the public. The reasoning simply is not correct, nor logical, and is not supported by the law.

II. IS IT FORESEEABLE THAT THE DOC'S BREACH OF IT'S COMMON LAW DUTY OF CUSTODY AND CONTROL OF INMATE DILLBECK WOULD RESULT IN THE STABBING DEATH OF MRS. VANN BY THE ESCAPEE, INMATE DILLBECK?

The trial court correctly found the death of Mrs. Vann was factually and legally foreseeable. The trial court entered a judgment for Mr. Vann, as personal representative of the Estate of Faye Lamb Vann, and against the DOC after the evidence in this case was submitted to the trial court. Foreseeability is generally a fact question for the jury to decide. City of Pinellas Park v. Brown, 604 So.2d 1222 (Fla. 1992). In this case, the Trial Judge was the fact finder.

The trial court considered the fact that Donald Dillbeck's escape took place on June 22, 1990 and Mrs. Vann being murdered on June 24, 1990; the fact that the murder occurred approximately 30 miles from where Donald Dillbeck escaped; and the fact that Donald Dillbeck was a convicted murderer. Therefore, the trial court as fact finder properly found that Mrs. Vann's murder by Donald Dillbeck was foreseeable.

In order to attempt to cloud this issue, the DOC has misstated the following fact in it's Respondent Brief. The misstated fact is as follows:

> "(and there is no evidence that Dillbeck was considered dangerous prior to the escape)" Page 21 of the Respondent's Brief.

That statement goes beyond all reason, considering the facts of this case. DOC knew prior to the escape that Donald Dillbeck was a convicted cop killer who had also stabbed an inmate while in DOC's custody. (P. Ex. 19, pp. 1-2; P. Ex. 18 pp. 2176-2177). DOC knew that Donald Dillbeck had stabbed a man in Indiana prior to murdering Deputy Lee in Florida. (P. Ex. 19, pp. 102). DOC also knew prior to Donald Dillbeck's escape that he had attempted escape from the DOC several times prior to the escape which resulted in the death of Mrs. Vann. (P. Ex. 19, p. 2; Exhibit # 1, p. 2).

It is clear from the facts of this case that the trial court, as fact finder, properly held that it was foreseeable that should the DOC fail to exercise reasonable care in supervising and controlling Donald Dillbeck, Donald Dillbeck would seriously injure a third party if he was allowed to escape. The trial court properly held that Mrs. Vann's murder by Donald Dillbeck occurred during, or as an integral part of, the process of escaping from the custody of the DOC.

III. WERE THE ACTS OF DOC WHICH RESULTED IN INMATE DILLBECK'S ESCAPE; PLANNING LEVEL FUNCTIONS OR OPERATIONAL LEVEL FUNCTIONS?

The trial court in this case correctly ruled that the negligent acts of the officers of the DOC on June 22, 1990 were operational in nature. The DOC in it's own June 27, 1990 Special Investigative Report admitted that it's negligence was operational in nature because it's officers failed to follow DOC policies and rules on June 22, 1990. (See Appendix I). The DOC has misstated facts in its Respondent's Brief as follows:

(1) "Likewise, the supervision of inmate Dillbeck was done in accordance with existing rules and regulations, and there can be no finding of negligence associated with that activity." Page 23 of Respondent's Brief.

(2) "There is simply no indication that any of the officers conducted themselves in a manner inconsistent with their general responsibilities." Page 23 of Respondent's Brief.

(3) "However, the State (through its employees) has not failed in its responsibilities so as to give rise to a claim in negligence." Page 24 of Respondent's Brief.

These statements are simply not true. The DOC, through its own internal investigation of Donald Dillbeck's escape, found that it was negligent in supervising and controlling Donald Dillbeck on June 22, 1990. (See attached as Appendix I, P. Ex. 19 - June 27, 1990 DOC Special Investigative Report). The DOC's June 27, 1990 Special Investigative Report concluded that:

A. Correctional officers who supervised the outside work assignments at Gretna Elementary School testified that up to thirty minutes lapsed before Dillbeck's escape was noticed, and that the kitchen's outside exit was not locked. (P. Ex. 19).

B. **This thoroughly inadequate supervision of an inmate of Dillbeck's type constitutes negligent supervision and, also failure to follow established DOC policies.** (P. Ex. 19) (Emphasis added).

Contrary to DOC's assertions on Page 23 of the Respondent's Brief, the trial court had before it sufficient evidence to find that the DOC failed to follow its own rules.

CONCLUSION

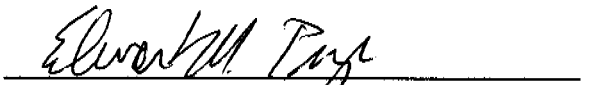
DOC breached its common law legal duty of maintaining custody and control of inmate Dillbeck, which was the foreseeable direct result of the death of Mrs. Vann. The DOC is not immune from suit in this case since the DOC's actions were clearly operational.

This appeal and this Honorable Court's decision is a matter of great public importance. Specifically, it would be egregious to Mr. Vann and his children as well as to all citizens of the State of Florida to hold that the DOC is not liable for it's failure to perform it's duties at the operational level. Although DOC's internal investigation found that it's personnel had committed negligence at the operational level as concerns inmate Dillbeck's escape from DOC's custody and control, rather than accepting the limited responsibility provided by the Waiver of Sovereign Immunity (i.e., $200,000.00 damage cap as pertains to this case), the DOC has taken the position that "THE KING CAN DO NO WRONG", no matter how egregious its conduct.

There is no logical basis for holding that DOC should not be held accountable for its irresponsible acts. This is particularly so in light of the Waiver of Sovereign Immunity and accompanying cap on damages.

The First District Court of Appeal's decision is due to be reversed with this Honorable Court directing that the trial court's judgment be reinstated in this case.

Respectfully submitted this the 14 day of June, 1995.



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CERTIFICATE OF SERVICE

I hereby certify that I have this date mailed a copy of the above and foregoing to the Offices of the Clerk, Sid White, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399, one copy by U.S. Mail to Cynthia S. Tunnicliff, Esquire, Davidson F. Dunlap, Jr., Esquire, Pennington & Haben, P.A., Post Office Box 10095, Tallahassee, Florida 32302 and Loren E. Levy, Esquire, Academy of Florida Trial Lawyers, Post Office Box 10583, Tallahassee, Florida 32302 this the 14 day of June, 1995.

Edward M. Price

OF COUNSEL

reply2.bri

Appendix Part 1

DEPARTMENT OF CORRECTIONS
2601 BLAIRSTONE ROAD
TALLAHASSEE, FLORIDA 32399-2500

SPECIAL INVESTIGATION

ENTRY #90-0590-I

DATE: June 27, 1990

INSPECTOR: Brian D. Pimm
Michael A. Cravener

LOCATION: Quincy Vocational Center

DATE OF INCIDENT: June 22, 1990

TYPE OF INCIDENT: Escape

SUSPECT: Donald Dillbeck A-068610
DOB: 5/24/63; Sentenced on 6/6/79 to Twenty-five Years Mandatory for First Degree Murder; Received on 6/13/79 from Lee County. Sentenced on 4/14/83 to One Year and One Day for Escape

SYNOPSIS:

This investigation began in response to the escape of inmate Donald Dillbeck from Quincy Vocational Center on the evening of June 22, 1990 while participating in a community service function at the Gretna Elementary School. Dillbeck was missed at approximately 8:15PM. All immediate recapture efforts were unsuccessful.

Inmate Dillbeck was recaptured on June 24, 1990 by the Tallahassee Police Department after he allegedly committed a homicide in the parking lot of the Tallahassee Mall.

NARRATIVE:

Inmate Dillbeck was sentenced to Life imprisonment with a Mandatory 25 years in Lee County on June 6,1979 for the murder of a police officer. He was received by the Department on June 13, 1979 and transferred to Sumter Correctional Institution on June 16, 1979. The record reflects that Dillbeck progressed without problem while at Sumter. In December of 1980 the Department received notice from State of Indiana that charges of Attempted Murder, Trespassing and

Theft were pending against Dillbeck. However, these charges were not pursued by the State of Indiana.

In November of 1982 inmate Dillbeck was transferred to Zephyrhills Correctional Institution in order that he might participate in additional programs available there. He attempted escape in February 1983 but was apprehended between the fences. He was subsequently charged with Attempted Escape and sentenced to a year and a day to run consecutively to his current sentence.

Following the escape attempt and the legal proceedings connected with it, he was transferred back to Sumter Correctional Institution, arriving there in May 1983. He was temporarily assigned to Baker Correctional Institution for one week in January 1984 for training as a Law Clerk.

In August 1984 he received a Disciplinary Report for Armed Assault. In his version of the offense Dillbeck claimed that the inmate he attacked had been pressuring him for money and sexual favors and that he attacked him with a knife in order to scare him off. He used a fifteen inch homemade knife in the attack but did no serious harm to the other inmate. There is no record of Dillbeck seeking staff assistance prior to the offense.

In March of 1985 he received a Disciplinary Report for Intoxication. In this case he admitted drinking several cups of homemade wine.

He was transferred to Avon Park Correctional Institution in January 1986. The transfer order cites a "management problem" as the reason for the transfer but the Progress Report states that the transfer was made due to changes in the Youthful Offender Program Criteria. In September of 1988 he was temporarily transferred to Desoto Correctional Institution with two other inmates for investigation of a possible escape attempt. They were returned to Avon Park one week later with no further action taken. No record of the investigation has been found and none of those associated with it have recollection of the circumstances.

On May 11, 1989 a Progress Report was done which recommended that inmate Dillbeck's custody grade be reduced from Close to Medium. When the Custody Scoresheet was prepared a point was overlooked which caused Dillbeck to score a 4 which would have made him a candidate for Minimum Custody. Had the Scoresheet been prepared correctly he would have scored a 5 which would have placed him in the Medium Custody range. Despite the incorrect scoring, he was reduced only to Medium Custody. The Progress Report was prepared

by Frank Carey, Correctional Probation Officer and Mike Kidd, Vocational Instructor and was reviewed and approved by Brian Hendrickson, Classification Supervisor and M. K. Sawyer, Assistant Superintendent for Programs.

It is apparent upon review of the documents that the team failed to give proper weight to the length of sentence and type of crime in arriving at their custody decision. The Classification Manual is clear in placing the professional judgement of the team members above the indication of the Custody Scoresheet.

Inmate Dillbeck's next Progress Report was done on November 8, 1989. The Team was chaired by James Benton, Correctional Probation Officer, R.E. Turner, Correctional Officer II and Ken Cribb, Correctional Probation Officer. This report carries forward the scoring error made in the May 11, 1989 report but once again makes exception to the score and maintains the inmate at Medium Custody. The Team went on to recommend Dillbeck for transfer to Quincy Vocational Center for training as a cook and baker. This training was requested by inmate Dillbeck. The report was reviewed and approved by Gregg Albritton, Classification Supervisor and James Prevatt, Assistant Superintendent. The recommended transfer was approved at Central Office by Kathryn Cavendish, Correctional Services Assistant Administrator.

On February 6, 1990, Dillbeck was transferred to Quincy Vocational Center. On February 22, 1990 he was assigned to an outside community service project for the first time and made similar trips on February 28, March 8 and June 18.

On June 19, 1990 inmate Dillbeck received a Progress Report from Phillip Adams, Correctional Probation Officer II. In this case Mr. Adams did not repeat the scoring error made in the two previous reports from Avon Park. However, after calculating the Scoresheet at the correct figure of 5 which would continued Dillbeck in Medium Custody, Mr. Adams made exceptional consideration citing Dillbeck's "exceptional institutional adjustment" at Quincy Vocational Center and lowered his custody to Minimum. This reduction was approved by Classification Supervisor Tom Cockrell.

On June 6,1990 Major Clyde Keels, Correctional Officer Chief I, Quincy Vocational Center received a formal request from the North Florida Educational Development Corporation to cater their annual banquet on June 22, 1990. This organization consists mainly of senior citizens. The affair was being held at the Gretna Elementary School, Gretna, Florida. Major Keels received approval from Superintendent Wayne Helms and Regional Director Phillip Shuford

to provide the requested services.

Major Keels then notified Sergeant Herbert Wester, Food Service Supervisor, that the catering detail had been approved.

Sergeant Wester submitted a list of names of inmates that he wished to have assigned to the catering crew to the facility classification officer, Phillip Adams, Correctional Probation Officer II. Mr. Adams approved the inmates for participation in the work crew. This approval was given over the telephone.

When interviewed, Major Keels explained that it is routine practice for Mr. Adams to be the approving authority on such matters and that he, as Correctional Officer Chief, does not normally get involved in this process. Although the shift Lieutenant's name is typed in the Transportation Request indicating his approval, Major Keels reported that this was merely a formality. Major Keels also related that there was no written policy regarding the method in which inmates were selected and approved for outside work details at Quincy Vocational Center.

The work detail was supervised by Sergeant Wester, Correctional Officer I Darryl Washington and Correctional Officer I Joseph Fleming. The crew departed Quincy Vocational Center at approximately 6:30PM on June 22. Upon arrival at the Gretna Elementary School the crew assembled the serving line and served the guests of the function. After serving the guests, the inmates themselves ate dinner.

Inmate Dillbeck was observed by all three correctional officers standing near the serving line eating a serving of dessert. After eating, some inmates were taken outside the rear door of the kitchen for a smoke break. Inmate Dillbeck was among this group but was reportedly a non-smoker. Officer Fleming supervised this group and testified that he was sure all the inmates returned to the kitchen. However, Officer Fleming did not possess the key with which to lock the rear exit door of the kitchen and was not sure if anyone locked this door.

A few minutes after the smoke break, Sergeant Wester assembled the inmates and instructed them to prepare to leave. At this time, approximately 8:15PM, it was discovered that Inmate Dillbeck was missing.

The officers did a quick search of the area, then telephoned the vocational center at approximately 8:25PM to report that Inmate Dillbeck had escaped. The remaining nine inmates were returned to

the vocational center.

Escape and recapture procedures were implemented. Local law enforcement agencies were notified and supplied with Dillbeck's identifying data. An All Points Bulletin was issued and the surrounding vicinity patrolled. Numerous correctional officers were also dispatched to search the surrounding community in addition to a canine team that was dispatched from River Junction Correctional Institution.

All immediate recapture efforts were unsuccessful.

On June 24, 1990 Inmate Dillbeck was arrested by the Tallahassee Police Department in connection with a homicide committed at the Tallahassee Mall.

At the time of this writing no information is available concerning Dillbeck's whereabouts or activities between the time of his escape and the time of his arrest.

FINDINGS:

Inmate Dillbeck was reduced to Medium Custody by Classification Team action at Avon Park on May 11, 1989. The Progress Review was conducted by Frank Carey, CPO and Mike Kidd, Vocational Instructor. This action was reviewed and approved by Brian Hendrickson, Classification Supervisor and M.K.. Sawyer, Assistant Superintendent. Although a scoring error was made on the Custody Scoresheet, this did not effect the actual custody assigned.

The Progress Review conducted by Mr. Carey and Mr.Kidd on May 11, 1989 failed to prudently weigh Inmate Dillbeck's length of sentence and type of crime in making their custody recommendation.

Inmate Dillbeck was maintained at Medium Custody and recommended for transfer to Quincy Vocational Center on November 8, 1989. The previous scoring error was brought forward but once again did not effect actual custody. The Team consisted of James Benton, Correctional Probation Officer, R.E. Turner, Correctional Officer II and Ken Cribb, Correctional Probation Officer. The report was approved by Gregg Albritton, Classification Supervisor and James Prevatt, Assistant Superintendent.

Inmate Dillbeck was permitted to participate in community based functions within sixteen days after his arrival at Quincy Vocational Center with the approval of Mr. Adams.

Major Clyde Keels, Officer In Charge of Quincy Vocational Center, failed to exercise his authority to disapprove the utilization of a high risk inmate in the community.

Inmate Dillbeck was reduced to Minimum Custody by special exception in his Progress Review of June 19, 1990 conducted by Mr. Adams with the approval of Mr. Cockrell.

Page 109 of the Classification Manual states that all custody decisions should be made based on the individual case and facts of that case and that the decision maker is responsible for considering Department Policy and the Public Interest and Safety.

Page 58 of the Department of Corrections Institutional Profile, General Criteria For Assignment To Road Prisons, Work Camps, Forestry Camps, and Vocational Centers states in part that the limitations of these facilities requires that the strictest precautions be taken in regard to the assignment of certain categories of inmates. These special categories include inmates convicted of heinous crimes such as kidnapping and murder.

While at Quincy Vocational Center, Inmate Dillbeck participated in outside work details on five occasions.

On June 22, 1990, Inmate Dillbeck escaped while on a work detail. According to the officers supervising the inmate crew, Dillbeck was last seen approximately five minutes before he was missed.

WITNESSES:

A: STAFF

1. Joseph Fleming, Correctional Officer I
2. Darryl Washington, Correctional Officer I
3. Herbert Wester, Correctional Officer II

B: INMATES

1. Darias Barnes 490687
2. James Black 203271
3. George Decosta 047116
4. Lewis Jones 412987
5. Enoch Robinson 073997
6. Calvin Paige 090446
7. Steve Shaw 085161
8. Moses Simpson 024664
9. Mark Wilhelm 664224

EXHIBITS:

1. Printout of inmate Dillbeck's institutional history
2. Disciplinary Report of August 18, 1984
3. Disciplinary Report of March 18, 1985
4. Progress Report of May 11, 1989
5. Progress Report of November 8, 1989
6. Inmate Reclassification Scoresheet of June 19, 1990
7. Transcribed statement of Major Keels
8. Transcribed statement of Mr. Adams
9. Transcribed statement of Sergeant Wester (2)
10. Transcribed statement of Officer Fleming (2)
11. Transcribed statement of Officer Washington (2)
12 Transcribed statement of Inmate Barnes
13. Transcribed statement of Inmate Black
14. Transcribed statement of Inmate Decosta
15. Transcribed statement of Inmate Jones
16. Transcribed statement of Inmate Paige
17. Transcribed statement of Inmate Robinson (2)
18. Transcribed statement of Inmate Shaw
19. Transcribed statement of Inmate Simpson
20. Transcribed statement of Inmate Wilhelm
21. Copy of Escape and Recapture Log
22. Copy of Incident Report by Sergeant Wester, 6/22/90
23. Copy of Control Room Log, 6/22/90
24. Copy of documentation regarding outside work detail, 6/22/90
25. Copy of documentation regarding outside work detail, 6/18/90
26. Copy of documentation regarding outside work detail, 3/8/90
27. Copy of documentation regarding outside work detail, 2/28/90
28. Copy of documentation regarding outside work detail, 2/22/90
29. Chronology of events

SIGNATURE: Brian D. Linam — 7/2/90
Correctional Officer Inspector II — Date

Michael A. Cramer — 7-2-90
Correctional Officer Inspector II — Date

REVIEWED BY: _____ 7/2/90
Inspector General Date

_____ 7/2/90
Deputy Inspector General Date

APPENDIX PART 2

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DEPARTMENT OF CORRECTIONS,

Appellant/cross appellee,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

v.

LINDA MCGHEE,

CASE NO. 93-3757

Appellee/cross appellant.

_____/

Opinion filed April 13, 1995.

An appeal from the Circuit Court for Leon County.
P. Kevin Davey, Judge.

Robert A. Butterworth, Attorney General; Laura Rush, Assistant Attorney General, Tallahassee, for appellant/cross appellee; Jack W. Shaw, Jr. of Osborne, McNatt, Shaw, O'Hara, Brown & Obringer, P.A., Jacksonville, for Florida Defense Lawyers Association, amicus curiae.

Louis K. Rosenbloum and Virginia M. Buchanan of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., Pensacola; Dawn Wiggins Hare of Hare and Hare, Monroeville, Alabama, for appellee/cross appellant; Joel S. Perwin of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Miami, for Academy of Florida Trial Lawyers, amicus curiae.

WOLF, J.

The Department of Corrections (DOC) appeals from a final judgment awarding damages in a negligence action in favor of Linda McGhee (appellee). The appellant raises four issues on

appeal; appellee filed a cross appeal which raises one issue. As a result of our disposition, it is only necessary for us to rule on two issues raised by appellant: (1) Whether the trial court erred in determining that the law of Florida rather than the law of Mississippi applied in determining whether DOC could be held liable as a result of criminal acts of escaped convicts, and (2) whether the trial court erred in determining that DOC owed a duty to appellee under the circumstances of this case.

We find that the trial court did not err in applying Florida law in determining whether the Florida DOC could be held liable as a result of alleged negligence occurring in Florida. We do find, however, that no common law or statutory duty existed in favor of appellee or her deceased husband, and reverse the final judgment. We also certify the same question which was certified in State of Florida, Dep't of Corrections v. Vann, 20 Fla. L. Weekly D381 (Fla. 1st DCA Feb. 9, 1995), as being one of great public importance.

John Fred Woolard and Dempsey Alexander Bruner escaped from the custody of DOC while being taken to the doctor for an eye examination. The escapees fled from Florida to Alabama and ultimately to Mississippi where they were responsible for the shooting of appellee's husband, a park ranger. Appellee filed suit against DOC, alleging that the agency was negligent in its care, supervision, and control of Woolard and Bruner, and that as a result of such negligence, the inmates escaped on May 24, 1990,

and thereafter caused the death of Robert McGhee, Jr., her husband, on May 26, 1990. DOC moved to dismiss the complaint on the grounds that the law of Mississippi rather than Florida should determine the rights and liabilities of the parties, and that Mississippi law did not recognize liability under these circumstances. Following the submission of written memoranda of law by the parties and a hearing, the trial court denied the motion on a finding that Florida had the most significant relationship with the events and occurrences surrounding the claim. Prior to trial, the parties submitted written memoranda of law pertaining to the issue of whether DOC owed a duty of care to the decedent. At the close of McGhee's case, DOC moved for a directed verdict on grounds that DOC did not owe a duty of care to the decedent as a matter of law, relying on arguments set forth in its memorandum of law. The court denied the motion. DOC's timely motion for a new trial on the same grounds was also denied. The jury returned a verdict in favor of appellee.

Mississippi, like Florida, follows the "significant relationships" or "center of gravity" test from the Restatement (Second) of Conflict of Laws § 145, et. seq. (1971), for choice of law decisions in tort cases. The focus of the significant contacts analysis is as to the particular issue which is to be decided rather than the case as a whole.

Section 146 of the Restatement provides:

> In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 146 (1971) (emphasis added). Following the Restatement's mandate, the Mississippi Supreme Court has specifically ruled that the center of gravity test followed in that state may require application of the law of different jurisdictions to different issues within the same case:

> First, the law of a single state does not necessarily control every issue in a given case. We apply the center of gravity test to each question presented, recognizing that the answer produced in some instances may be that the law of this state applies and on other questions in the same case the substantive law of another state may be enforceable.

Boardman v. United Services Automobile Ass'n, 470 So. 2d 1024, 1031 (Miss. 1985). See also Hanley v. Forester, 903 F.2d 1030, 1032 (5th Cir. 1990) (Mississippi "center of contacts test may be applied in piecemeal fashion such that in a single case, the law of one state may be applied to one issue in the case while the law of another state may apply to another issue in the case depending upon which state has the most significant contacts with respect to each particular issue.")

Florida follows the same rule applicable in Mississippi. In Stallworth v. Hospitality Rentals, Inc., 515 So. 2d 413 (Fla. 1st

DCA 1987), following section 146 of the Restatement, this court stated,

> The Restatement's significant relationships test does not require the court to evaluate the recited contacts with a view to determine which state's local law should be applied to all issues in the case as a whole; rather, the contacts must be evaluated with respect to the particular issue under consideration.

Stallworth at 413 (emphasis added).

DOC's emphasis upon the situs of the injury, Mississippi, is misplaced because the location of the injury is unrelated to the issues of sovereign immunity and duty. DOC's immunity was determined by deciding whether its conduct in allowing the inmates to escape could result in liability for the criminal conduct of the escapee. All facts relevant to the issue of immunity and duty were centered in the state of Florida, and the state of Mississippi had no relationship to any of DOC's activities giving rise to its potential liability.

The determination of whether a state agency may be held liable for its conduct within the state of Florida is properly determined pursuant to Florida law.

While we have no problem with the trial court's decision to apply Florida law, we do find that it was error to find that DOC could be held liable for the criminal conduct of escapees. The trial court did not have the benefit of this court's recent decision in Vann, supra, at the time it was faced with this

issue. We find that Vann is controlling, and that under the rationale stated in the opinion, DOC could not be held liable under these circumstances. We, therefore, reverse the final judgment and direct the trial court to enter a final judgment in favor of appellant. As in Vann, however, we certify the following question to be one of great public importance:

> WHETHER THE DEPARTMENT OF CORRECTIONS MAY BE HELD LIABLE AS A RESULT OF THE CRIMINAL ACTS OF AN ESCAPED PRISONER?

MINER, J., concurs; ERVIN, J., concurring and dissenting with written opinion.

ERVIN, J., concurring and dissenting.

I concur with the majority in affirming the trial court's denial of appellant's motion to dismiss for the reason that the law of Florida rather than the law of Mississippi was correctly applied in determining that the Department of Corrections (Department or DOC) could be held liable as a result of the escaped convicts' criminal acts. I dissent from that portion of the majority's decision reversing the denial of appellant's motion for directed verdict on the ground that the DOC owed no duty to appellee's decedent, for the reasons set out under part one of this opinion, but I concur with the majority in certifying a question to the Florida Supreme Court. I would also affirm the remaining issues appellant raised. Because the majority has reversed as to the above point, its consideration of the issue submitted in appellee's cross-appeal was rendered moot. Since I dissent from the reversal of the denial of the motion for directed verdict, I will also address the issue presented in the cross-appeal under the second portion of this opinion, and I would affirm as to it.

I.

I cannot agree with the majority that no common law duty exists in favor of appellee or her deceased husband under the circumstances involved in this case. In so concluding, I note that the majority relies upon a recent opinion of this court in Department of Corrections v. Vann, 20 Fla. L. Weekly D381 (Fla. 1st DCA Feb. 9, 1995), wherein it was similarly held that the

Department owed no common law duty to a decedent, the victim of a criminal act committed by an escaped inmate. I acknowledge that the decisions in the case at bar and Vann are consistent with those in Parker v. Murphy, 510 So. 2d 990 (Fla. 1st DCA 1987); George v. Hitek Community Control Corp., 639 So. 2d 661 (Fla. 4th DCA 1994); and Bradford v. Metropolitan Dade County, 522 So. 2d 96 (Fla. 3d DCA 1988). I am convinced, however, that these holdings are inconsistent with Florida's waiver of sovereign immunity statute, section 768.28, Florida Statutes (1989), as well as certain general rules of law enunciated by the Florida Supreme Court in Trianon Park Condominium Ass'n v. City of Hialeah, 468 So. 2d 912 (Fla. 1985), and Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989).

Because section 768.28(5) imposes liability upon government entities "for tort claims in the same manner and to the same extent as a private individual under like circumstances," the Department may, under appropriate conditions, be subject to an underlying common law duty to exercise reasonable care to control an inmate or inmates the Department knows or should know would be likely to cause bodily harm to others if not properly controlled by it. In reaching this conclusion, I think it necessary to restate basic principles applicable to the issue. In Trianon Park, the supreme court emphasized that section 768.28 did not, per se, create any new cause of action in tort but merely eliminated the immunity which had previously prevented recovery for existing common law torts committed by the government. Trianon Park, 468 So. 2d at

914. In order for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care in regard to the alleged negligent conduct. Id. at 917. The duty issue is entirely separate from the question of whether the complained-of activity is barred by governmental immunity, i.e., a discretionary rather than operational function, as analyzed in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979). See also Kaisner v. Kolb, 543 So. 2d 734 (Fla. 1989) (a court is required to find no liability as a matter of law if either (1) no duty of care arose, or (2) the doctrine of governmental immunity bars the claim).

Thus, the preferred analysis is to decide first whether a duty of care is owed. If not, the court is not obligated to determine whether the challenged act is a discretionary or operational-level activity. I consider that the only substantial question before us for resolution is whether a common law duty could be imposed upon a private person under circumstances similar to those at bar.[1] Because I believe a common law duty of care does exist, I am convinced that the DOC was properly held liable. Moreover, I feel confident that the bar of governmental immunity is inapplicable,

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[1]The Department owes no statutory duty of care to a person injured by the violent acts of an escaped inmate. Department of Health & Rehab. Servs. v. Whaley, 574 So. 2d 100, 102-03 n.1 (Fla. 1991); George v. Hitek Community Control Corp., 639 So. 2d 661, 663 (Fla. 4th DCA 1994).

because the facts clearly show, as discussed infra, that the DOC's conduct was operational.

Turning to the element of duty, the court in Trianon noted "the general common law rule that there is no duty to prevent the misconduct of a third person," referring to the Restatement (Second) of Torts § 315 (1964), which provides:

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."

Trianon, 468 So. 2d at 917 n.2.

Comment c. to section 315 refers the reader to sections 314A and 320 in regard to clause (b). Restatement (Second) of Torts § 315, at 123 (1965) (hereinafter "Restatement"). The supreme court explicitly recognized section 320, involving the duty of a person having custody of another to control the conduct of third persons, in subjecting HRS to liability for failing to take adequate measures to protect a juvenile placed in its care from a sexual assault by fellow detainees housed in the same holding cell. See Department Health & Rehab. Servs. v. Whaley, 574 So. 2d 100, 103 & n.2 (Fla. 1991). The court earlier acknowledged the existence of such a duty in Everton v. Willard, 468 So. 2d 936, 938 (Fla. 1985): "[I]f a special relationship exists between an individual and a

governmental entity, there could be a duty of care owed to the individual."

Unlike the duty a public custodian owes to a person placed in its care, described under clause (b) of section 315, the supreme court has not explicitly held that a governmental entity owes a duty to a person injured by the intentional acts of a third person with whom the agency has a special relationship, as provided in clause (a). Nevertheless, such duty clearly exists at common law in actions involving private individuals, as section 315 and the comments appended thereto demonstrate.

Florida jurisprudence has, moreover, in a number of cases involving private parties, specifically adopted the exception recognized under clause (a) to the general common law rule barring a duty of one to prevent the criminal acts of another or to warn those placed in danger by such acts when a special relationship exists between the defendant and the person whose behavior needs to be controlled. Nova Univ., Inc. v. Wagner, 491 So. 2d 1116 (Fla. 1986); Palmer v. Shearson Lehman Hutton, Inc., 622 So. 2d 1085 (Fla. 1st DCA 1993); Boynton v. Burglass, 590 So. 2d 446 (Fla. 3d DCA 1991); Garrison Retirement Home Corp. v. Hancock, 484 So. 2d 1257 (Fla. 4th DCA 1985). Additionally, Comment c. to clause (a) of section 315 refers the reader to sections 316 through 319 of the Restatement,[2] and the Florida Supreme Court has specifically

[2]The special relations listed in clause (a) are parent-child, master-servant, possessor of land, and custodian of a

applied section 319 in a case involving an action for damages between private parties.

In Nova University, Inc. v. Wagner, 491 So. 2d 1116 (Fla. 1986), the supreme court held that the university, operating a residential rehabilitation program which accepted delinquent, emotionally disturbed and/or ungovernable children as residents, had a duty to exercise reasonable care in its operation to avoid harm to the general public. There, two juvenile residents who had exhibited a propensity toward physical violence, of which the defendants were aware or should have been aware, ran away from the center and the following day encountered two small children, one of whom they killed and the other permanently injured. The complaint alleged that the defendants were negligent in failing to supervise and control the two delinquents assigned to their custody. In approving the Fourth District's decision reversing the trial court's summary judgment in favor of the university, the court relied upon the principle of law provided in section 319[3] of the

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person with dangerous propensities. As observed in Garrison Retirement Home Corp. v. Hancock, 484 So. 2d 1257, 1261 (Fla. 4th DCA 1985): "Implicit in the special relationship exception [under clause (a)], however, is the proposition that such special relationship must include the right or the ability to control another's conduct."

[3]This section, involving the duty of those in charge of persons having dangerous propensities, provides: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Restatement § 319. An example provided in the Illustrations to section 319 is similar

Restatement and concluded "that a facility in the business of taking charge of persons likely to harm others has an ordinary duty to exercise reasonable care in its operation to avoid foreseeable attacks by its charges upon third persons." Nova Univ., 491 So. 2d at 1118. I think it clear that the special relation described in section 319 applies to the relationship between the DOC and the escapees in this case, thus DOC's duty of care is encompassed by section 315(b) of the Restatement.

In her complaint filed against the DOC, McGhee alleged that before the escape, the defendant knew or should have known that the two inmates placed in its care would commit violent crimes of the kind committed on the plaintiff's decedent, because they had been convicted of violent felonies before they were committed to DOC's custody. She further alleged that the Department, through its agents and employees, was negligent in allowing the inmates to escape during their transfer from the Holmes Correctional Institution to a doctor's office in Bonifay, Florida, for an eye examination, by, among other things, failing to provide adequate secure detention for them, failing to provide adequate security while moving the prisoners, failing to adequately search the

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to the factual pattern in Nova University and the case at bar: "A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes harm to C. A is subject to liability to C." Id. at 130.

inmates for weapons, and failing to have the inmates properly restrained to prevent their escape.[4]

I have found nothing in any Florida Supreme Court opinion which supports the majority's conclusion that a governmental entity owes no common law duty of care to individual members of the public to protect them from injuries perpetrated by escapees. A supreme court opinion presenting the most analogous factual situation to that at bar is Reddish v. Smith, 468 So. 2d 929 (Fla. 1985). In that case, the court held that because the theory of liability expressed in plaintiff's complaint was that the DOC, in reclassifying an inmate's institutional status from "medium custody" to "minimum custody," had failed to conform to the proper standard of care required in classifying and assigning the custody of prisoners, its conduct was immune from liability to a victim of the escaped prisoner's criminal acts, as it involved simply a planning-level function which was an inherent feature of an

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[4]The facts alleged and the evidence presented in the instant case show obvious operational-level activity which is not barred by governmental immunity in that the failure of the guards to properly supervise the inmates placed in their custody can hardly be considered a discretionary function of the government which is inherent in the act of governing. See Trianon, 468 So. 2d at 918. The conduct of the DOC, moreover, is similar to the nonexclusive examples the supreme court listed in Trianon as indicative of existing common law duties of care: the negligent operation of motor vehicles or the handling of firearms by public employees during the course of their employment for the purpose of enforcing compliance with the law. Id. at 920. Indeed, before the trial of the case, the DOC admitted that it was negligent in allowing the two prisoners to escape, but that it owed no duty to the victim because his injuries were not a foreseeable consequence of DOC's admitted negligence.

essential governmental role assigned to the Department. Cf. Everton v. Willard, 468 So. 2d 936, 939 (Fla. 1985) (law enforcement officer's decision of whether to arrest an individual for an offense is a basic discretionary, judgmental decision which is inherent in enforcing the laws of the state and is therefore immune from liability). In so holding, the court proceeded directly to the second prong of the analysis the court approved in Trianon, i.e., the issue of governmental immunity, but never reached the question of whether any duty of care existed.

By focusing on the discretionary nature of inmate classification, it is possible that the court in Reddish considered that a duty arose because of the special relation between the DOC and the inmate. Indeed, the following statement in the opinion suggests that a cause of action might have been stated if the plaintiff had pled a different theory of liability: "The complaint in this case was based on the classification and assignment of Prince [the inmate] and not on the possible negligence of the department's employees having a direct and operational-level duty to supervise him and keep him confined at the time of his escape." Reddish, 468 So. 2d at 931-32. Clearly, then, Reddish provides no authority for concluding that the Department can never owe a common law duty to one injured by the intentional, tortious acts of an escapee who had been placed in the DOC's custody.

In the case which the majority cites to support its conclusion that the state cannot be held liable for injuries stemming from the criminal acts of its escapees, Department of Corrections v. Vann, the court quotes the following excerpt from Department of Health & Rehabilitative Services v. Whaley, 574 So. 2d at 102-03 n.1: "'[T]he Department of Corrections has no specific duty to protect individual members of the public from escaped inmates.'" Vann, 20 Fla. L. Weekly at D382. A complete reading of the above footnote in Whaley shows, however, that the supreme court was not confronted with the issue of whether a common law duty of care could arise. Rather, the certified question before the court in Whaley was whether the assignment of juvenile delinquents to an HRS detention facility was an inherently governmental function protected by sovereign immunity, a question the court answered in the negative. In arguing that the assignment constituted a discretionary act for which sovereign immunity had not been waived, HRS relied on, among other cases, Reddish v. Smith. In rejecting this argument, the court in Whaley distinguished the facts in Reddish from those before it and made the following pertinent observations:

> Moreover, *Reddish* is further distinguished because the department of corrections has no specific duty to protect individual members of the public from escaped inmates while HRS has specific statutorily imposed duties to protect children. See *Yamuni* [Department of Health & Rehabilitative Services v. Yamuni, 529 So. 2d 258 (Fla. 1988)]. HRS' statutory duties toward children are, ultimately, the main difference between this case and prisoner

> cases such as *Reddish* . . . and we decide this case solely on HRS' duty, not the duty of any other governmental agency.

Whaley, 574 So. 2d at 103 n.1.

Consequently, I maintain that the quoted portion from Whaley, referred to in Vann, means simply that a statutory duty was imposed upon HRS for the protection of children transferred to its care,[5] whereas no such duty was placed on the DOC by statute for the protection of members of the public from escaped prisoners.[6] Nothing in Whaley addresses the question of whether an underlying common law duty of protection may arise in favor of members of the general public once a special relationship has been established between a state agency and a person entrusted to its charge whom the agency knows to be likely to cause bodily harm to others if not properly controlled.

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[5]Why the court considered it necessary to emphasize the existence of a statutory duty as a distinguishing factor is unclear in that the court otherwise mentioned that one who takes a person into custody owes such person a common law duty of care, and in support thereof the court referred to Restatement (Second) of Torts § 320 (1965), pertaining to the duty of a person having custody of another to control the conduct of third persons. Consequently, as a common law duty of care exists under such circumstances, the portion of the opinion discussing the imposition of a statutory duty appears nonessential to the court's decision.

[6]Although no statutory duty exists, clearly DOC has the statutory right of control over inmates placed in its custody, which gives rise to the special relationship discussed under Restatement section 315(a). Section 945.04(1), Florida Statutes (1989), makes DOC "responsible for the inmates and for the operation of, and shall have supervisory and protective care, custody, and control of, all . . . matters connected with, the correctional system."

Although I have found no Florida Supreme Court opinions directly supporting the majority's decision that DOC is not under a duty to exercise reasonable care to control the conduct of an inmate in order to prevent him or her from doing harm to another, I admit that authority for same is furnished in the three district courts of appeal cases cited in Vann: Parker v. Murphy, 510 So. 2d 990 (Fla. 1st DCA 1987); George v. Hitek Community Control Corp., 639 So. 2d 661 (Fla. 4th DCA 1994); and Bradford v. Metropolitan Dade County, 522 So. 2d 96 (Fla. 3d DCA 1988), all involving victims of attacks by escapees from custodial restraints placed on them by various governmental entities. Unlike appellee, I am unable to distinguish the facts in the above cases from those at bar in order to reach a different result. My position is simply that all three were incorrectly decided as a matter of law. Although these opinions emphasize the lack of a special relationship between the person injured and the particular governmental entity, none address the question of whether, because of the existence of a special relationship between a custodian and the person placed in confinement as described in Restatement section 315(a), the caretaker could owe a duty to individual members of the general public injured by the person in its control as a reasonable consequence of its negligent failure to monitor such person's conduct. Thus, the above three cases ignore or overlook the special relationship recognized under section 315(a), apparently because the Florida Supreme Court has not yet

specifically acknowledged its applicability in any of its opinions involving negligent actions brought against public agencies, and the confusion spawned by this omission continues to plague appellate court decisions.[7]

I am therefore of the view that because of the special relation between the DOC and the two inmates placed in its custody, a duty of care was owed to appellee's deceased husband to the same extent as it exists at common law between private persons. Liability was therefore correctly imposed upon the DOC as a result of the criminal acts of the escapees, persons whom the DOC knew to be likely to cause bodily harm to others if it did not exercise reasonable care to control them from doing such harm.

As a result of the confusion previously alluded to, I concur with the majority in certifying to the Florida Supreme Court a

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[7]An additional reason for such confusion is the tendency of some of the district courts to read certain portions of the supreme court's opinions in isolation and out of context. For example, in George v. Hitek Community Control Corp., the court relied upon the following quoted material as support for its conclusion that governmental responsibility to manage persons under criminal sentences flows from the state's inherent police power to enforce the laws, and, therefore, the challenged activity could not give rise to a duty of care: "'How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there has never been a common law duty of care.'" George, 639 So. 2d at 663 (quoting Trianon Park, 468 So. 2d at 919). See also the following statement in Everton v. Willard, 468 So. 2d 936, 938 (Fla. 1985): "The victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common law duty of care to the individual citizen and resulting tort liability, absent a special duty to the victim."

question of great public importance. I think, however, the question should be more narrowly tailored to the facts and law before us to ask:

> WHETHER THE DEPARTMENT OF CORRECTIONS, WHICH IS IN THE BUSINESS OF TAKING CHARGE OF PERSONS WHOM IT KNOWS TO BE LIKELY TO CAUSE BODILY HARM TO OTHERS IF NOT CONTROLLED BY IT, IS UNDER A DUTY TO EXERCISE REASONABLE CARE TO CONTROL SUCH PERSONS TO PREVENT THEM FROM DOING SUCH HARM?

In concluding that a common law duty is present under the circumstances, I think it important to note that the DOC advanced an argument based on a different theory from that addressed by the majority in its decision to reverse. Indeed, the Department makes the following pertinent concession: "Had inmates Bruner and Woolard shot an individual in Bonifay at the time they escaped from DOC custody or within the parameters of DOC's search and recapture efforts immediately after the escape, there would be no question as to whether that individual was owed a duty of care by DOC." (Appellant's reply brief at 12.) The thrust of the Department's argument is that it owed no duty, because it was not foreseeable that the harm which was in fact suffered would ensue from the inmates' escape, and it noted that Restatement section 319, while imposing a duty of care upon those taking charge of dangerous persons, does not define the scope and extent of such duty.

In support of this argument, the DOC cites McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992), which states: "The duty element of negligence focuses on whether the defendant's

conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." The court continued that each defendant who creates a risk is required to exercise prudence whenever others might conceivably be injured as a result of the defendant's breach of such risk. It concluded its discussion with the following admonition: "[T]he trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not is created by the defendant." Id. at 503.

It is appellant's position that any negligence the DOC committed in permitting the two inmates to escape from its custody did not create a foreseeable zone of risk which encompassed the victim, because the facts disclose that the victim's injuries were suffered more than 300 miles from the place of escape, across two state lines and 46 hours following the escape. Thus, the Department contends that the facts at bar are determinative regarding whether it was foreseeable that DOC's negligent conduct would create a zone of risk which posed a general threat of harm to others. See McCain, 593 So. 2d at 503 n.2 (citing Restatement (Second) of Torts § 285 (1965)).

In its discussion of why the facts demonstrate the lack of any foreseeable risk, the DOC cites Wilson v. Department of Public Safety & Corrections, 576 So. 2d 490 (La. 1991), a case which provides a more specific test than McCain for determining whether a victim of an escaped prisoner's criminal acts comes within the zone of risks that can be considered a reasonably foreseeable

consequence resulting from a custodian's negligent act. The test there adopted, however, provides little assistance to appellant's cause. The court stated:

> In resolving the scope of the duty issue, improper emphasis has occasionally been placed . . . on the proximity of time and distance between the escape and the escapee's offense that caused the injury to his victim. The proper question is whether the offense occurred *during, or as an integral part of, the process of escaping.*

Wilson, 576 So. 2d at 493. In so deciding, the court noted that the operative word in the analysis is "process," because "there is no bright-line point of delineation which will satisfactorily assist a court in making the appropriate duty-risk analysis." Id. at 494. It concluded that the time and distance from the escape to the time and place of injury were but two factors among many which should be considered in determining whether the acts for which the plaintiff sought compensation were committed during, or as an integral part of, the process of escaping. Id.

In applying the above test to the instant case, it appears that the injuries suffered by appellee's decedent transpired during an integral part of the inmates' process of escape, as the facts disclose that they occurred at a time while the two escapees were continuing their flight from custody. Because I conclude, after applying the test approved in McCain, that the DOC's negligence more likely than not created a foreseeable zone of risk that

included the harm suffered by the victim. I would affirm as to the second issue raised by the DOC.[8]

II.

Appellee urges as a point of reversal in her cross-appeal that the trial court erred in permitting the jury to apportion noneconomic damages between negligent and intentional tortfeasors,[9] and, in so doing, it misconstrued the intent of the legislature in enacting section 768.81(3), Florida Statutes (1989), a portion of the comparative fault statute. As to this issue, I would also affirm.

In allowing apportionment of damages, the trial court proceeded according to the provisions of section 768.81(3), which provides:

> (3) APPORTIONMENT OF DAMAGES.--In cases to which this section applies, the court shall

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[8]I would also affirm all of DOC's remaining issues. The third point urges reversal on the ground that the trial court erred in allowing an expert witness to opine that the injuries the victim suffered were a reasonably foreseeable consequence of the DOC's negligence in permitting the inmates to escape. Although I agree with the DOC that the court erred in permitting the testimony, because the opinion had the effect of applying a legal standard to a set of facts, I think the error was harmless considering the totality of other evidence supporting the verdict. Cf. Tallahassee Memorial Regional Medical Ctr. v. Meeks, 560 So. 2d 778 (Fla. 1990). As to the final issue, that the lower court erred in refusing to give a requested special jury instruction defining the term "reasonably foreseeable," I agree with appellee that Florida Standard Jury Instruction 5.1(c) adequately covered the request. Cf. Reeder v. Edward M. Chadbourne, Inc., 338 So. 2d 271 (Fla. 1st DCA 1976).

[9]The jury allocated 50 percent of the fault to the Department and 25 percent to each of the two inmates.

> enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

(Emphasis added.)

Although McGhee concedes that no Florida decision has as yet decided whether the above subsection authorizes apportionment of fault between both negligent and intentional defendants in the same action, she relies upon section 768.81(4) as an indication that the legislature intended to exclude intentional tortfeasors from the ambit of the comparative fault statute. Section 768.81(4)(a) and (b) explain:

> (a) This section applies to negligence cases[,] . . . [which] includes . . . civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or beach of warranty and like theories. In determining whether a case falls within the term "negligence cases," the court shall look to the substance of the action and not the conclusory terms used by the parties.
>
> (b) The section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.

(Emphasis added.) (Footnotes omitted.)

The DOC argued successfully before the trial court that the two inmates, who were not named parties to the action, were partially at fault based upon their intentional, criminal conduct; therefore, the jury should consider the percentages of fault of all tortfeasors in reaching its verdict on damages. Due to the non-negligent nature of the inmates' acts, McGhee now contends that DOC's claim for apportionment must be barred by the provisions of section 768.81(4)(b), excluding from its operation any action based upon an intentional tort.

McGhee argues that her interpretation of the statute is consistent with the common law rule preventing a defendant from raising the defense of contributory negligence once such defendant has been found liable because of his or her intentional conduct. McGhee admits that she did not charge the DOC with an intentional tort in her complaint, but contends that the earlier cases show that fault based on negligence cannot be compared with fault grounded on intentional conduct. It follows, under her theory, that it is not fair to allocate responsibility among negligent and intentional tortfeasors, because their conduct is governed by different legal standards.

McGhee concludes that the comparative fault statute is in derogation of common law, thus should be strictly construed. In support of her argument, she cites Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc., 819 P.2d 587 (Kan.

1991), wherein an action was brought on behalf of a mentally retarded child against a school bus driver, school bus transportation service, and school district for the bus driver's molestation of the child. On appeal, the transportation service and school district argued that the trial court erred by refusing to allow the jury to compare the fault of the intentional tortfeasor (the bus driver) with their own fault, which was based on negligence. The court affirmed, reasoning that intentional acts of third parties cannot be compared with the negligent acts of a defendant whose duty it is to protect the plaintiff from the intentional acts committed by the third party. Id. at 606. Accord Bach v. Florida R/S, Inc., 838 F. Supp. 559 (M.D. Fla. 1993); Doe v. Pizza Hut of Am., Inc., No. 93-709 (M.D. Fla. June 21, 1994).

The Academy of Florida Trial Lawyers joins McChee in urging reversal, contending that section 768.81 only abrogates joint and several liability to the extent it would otherwise apply under common law. It explains that under the common law, joint and several liability was only imposed against joint tortfeasors, defined as parties whose negligence combined to produce the plaintiff's injury. Thus, a defendant could not reduce his or her liability by pointing to wrongdoing (negligent or intentional) which occurred in a separate transaction, and he or she could not seek contribution except from a joint tortfeasor. See § 768.31(2)(a) & (c), Fla. Stat. (1989). Consequently, it is the Academy's position that because section 768.81 allows apportionment

in cases involving joint tortfeasors, but says nothing about non-joint tortfeasors, it does not alter the common law rule prohibiting contribution among non-joint tortfeasors.

The Florida Defense Lawyers Association has filed an amicus brief in this appeal urging affirmance of the trial court's action, and it distinguishes Kansas State Bank & Trust, because the statute there was worded in terms of a party's negligence, and not, as in Florida, in terms of a party's fault. Moreover, it cites contrary authority allowing a negligent defendant to apportion liability with an intentional tortfeasor. See Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991). The Association explains that while an intentional tortfeasor could not seek contribution from a negligent tortfeasor, the latter could seek contribution from an intentional tortfeasor. It also refers to case law indicating that although a third party's conduct may be intentional, such fact does not preclude the application of comparative negligence between the negligent parties. See Island City Flying Serv. v. General Elec. Credit Corp., 585 So. 2d 274 (Fla. 1991) (in aircraft owner's suit against flying service for negligent hiring or retention of employee who stole and crashed owner's plane, flying service was entitled to comparative negligence defense against owner who failed to lock plane, despite employee/thief's intentional tort).

After considering the arguments by counsel and the authorities cited, I would affirm as to this issue. It is clear that plaintiff's action against the DOC was based on negligence, and the

comparative fault statute specifically applies to actions for negligence. § 768.81(4), Fla. Stat. (1989). No action was brought by appellee on the theory of intentional tort. In reaching my conclusion, I am greatly persuaded by the cogent analysis of the Supreme Court of New Jersey in Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991), which appears to be in harmony with the spirit of Florida's comparative negligence law. In Blazovic, the court explained that early cases had distinguished between negligent and intentional conduct in order to circumvent the harsh effect of the contributory-negligence bar, under the view that intentional tortfeasors should be required to pay damages as a means of deterring them from future wrongdoing, regardless of whether a plaintiff had been partially negligent. Additionally, under common law, joint tortfeasors could not seek contribution from each other. With the passage of contribution law, joint tortfeasors could recover their pro rata share of the judgment from the other joint tortfeasors, thereby limiting their liability. Intentional tortfeasors could not seek contribution, however, and such prohibition was intended to deter future wrongdoing;[10] the same theory advanced vis-a-vis a plaintiff and an intentional tortfeasor. Id. at 228-29.

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[10]The common law rule has also been retained in Florida's Contribution Among Joint Tortfeasors statute. Although section 768.31(2)(a) and (3) permits two or more persons jointly or severally liable to seek contribution among them based on their relative degrees of fault, contribution is denied intentional tortfeasors. § 768.31(2)(c), Fla. Stat. (1989).

With the advent of comparative negligence, the all-or-nothing result of contributory negligence was eliminated and recovery was allowed based on a percentage of the parties' negligence. Moreover, under the comparative fault statute, joint tortfeasors were no longer liable for a pro rata share, but were liable in proportion to their percentage of fault. In the court's view, the application of the law in such manner results in greater fairness to both moderately negligent plaintiffs, as well as joint tortfeasors. Id. at 230.

The court further observed that some courts had refused to apportion negligence to intentional tortfeasors, but it was unpersuaded by those cases. It found the more just result was to allow comparative negligence as to both negligent and intentional tortfeasors, because it distributes the loss according to the respective faults of the parties causing the loss. Id. at 231.

The reasoning of the court's opinion in Blazovic appears to me to be consistent with the Florida courts' general interpretations of section 768.81 in that the statute clearly requires a jury's consideration of each individual's fault contributing to an injured person's damages, even if such person is not or cannot be a party to the lawsuit. See Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993); Allied-Signal, Inc. v. Fox, 623 So. 2d 1180 (Fla. 1993). As observed in Marin: "Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident,

regardless of whether they have been or could have been joined as defendants." 623 So. 2d at 1185.

I consider that the comparative fault statute, in precluding the comparing of fault in any action based upon intentional fault, expressed an intent to retain the common law rule forbidding an intentional tortfeasor from reducing his or her liability by the partial negligence of the plaintiff in an action based on intentional tort. However, such exclusion has no applicability to an action, such as that at bar, based solely on negligence, and, consequently, the fault of both negligent and intentional tortfeasors may appropriately be apportioned as a means of fairly distributing the loss according to the percentage of fault of each party contributing to the loss. I would therefore affirm as to this issue.

Appendix Part 3

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

Case No. 92-833
CIVIL DIVISION

CARRIE MARIE BURNETT

Plaintiff,

vs.

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

Defendant.

FINAL JUDGMENT

THIS ACTION was tried before the Court without a jury. The parties waived their right to a trial by jury and agreed to a Court determination of all matters of law, as well as all factual issues which had not previously been resolved by stipulation or admission. The Court, having duly considered all relevant matters, and being otherwise fully advised in the premises, finds and decides, as more fully set forth below, that final judgment should be entered in Plaintiff's favor, against the State of Florida, Department of Corrections (DOC), in the amount of $1,300,000.00.

The damages of $1.3 million were agreed to by both parties after significant litigation on various complex issues. The parties' stipulation to such damages is clearly in the best interests of both parties. The Plaintiff will be spared from having to re-live this horrible atrocity in a jury trial proceeding. The Defendant will avoid the possibility of a judgment being entered against it in excess of $1.3 million, and the facts clearly support a judgment greatly in excess of such agreed upon

sum. The Court hereby approves the stipulation as reasonable. The recognition of such reasonableness by counsel for the respective parties, and the Court, should be worthy of great weight by the Florida Legislature in its consideration of any claims bill which may be filed on behalf of this Plaintiff, especially considering the underlying facts of this case, as set forth hereinafter, which the Plaintiff should not be required to substantiate any further.

In May 1990, Ms. Burnett was working as a night auditor at a motel, her night shift beginning at 11:00 p.m. and ending at 7:00 a.m. At approximately 4:45 a.m. on May 25, 1990, she heard the sound of a swinging door next to her desk and as she turned around a black man came at her with a gun, grabbed her around the neck, and put the gun to her head. The man robbed her of the motel funds and abducted her from the motel so as to prevent her from calling the police. He threw her into an awaiting car where another man assisted him, and they fled with Ms. Burnett as their hostage. During the next 29-hour period she was repeatedly raped and sexually violated in every possible manner. The attack included an approximate seven-hour period during which she was sexually battered, both orally, vaginally and anally, physically and mentally tortured and threatened with her life, and forced to fondle the rapist's penis and perform oral sex on him while he forced himself upon her, sitting on her chest. While not being raped, during this 29-hour ordeal, Ms. Burnett was bound and gagged while she was being kidnapped to Mississippi. Her abductors told

her they had just escaped from jail and they would never go back to jail alive.

Ms. Burnett was finally able to escape from her abductors 29 hours after they took her hostage. Although she survived the brutal rapes and mental torture, she suffered extensive vaginal and rectal tissue tearing and bruising, suffered an infection to her urinary tract, and suffered some residual left leg paralysis. Her psychological injuries include awaking at 4:47 a.m. every morning to the sound of that swinging door and nightmares three or four times a week, all associated with a choking sensation. She is afraid to be alone. She cannot work. She suffers severe depression and cries frequently. The emotional and mental suffering and pain she experienced is beyond comprehension and will continue forever.

The State has stipulated and agreed that the black assailant was Dempsey Alexander Bruner and the other assailant, a white man, was John Fred Woolard, both of whom had escaped from the custody of the DOC on May 24, 1990, as a result of the negligence of the DOC. Although admitting that the DOC was negligent in maintaining the custody of inmates Bruner and Woolard, and admitting that such inmates escaped as a result of such negligence, DOC contends that it is not liable to Ms. Burnett for her injuries caused by such escapees, based upon several theories, none of which have merit. The DOC simply misperceives the law applicable to the facts of this case.

In *Newsome v. Dept. of Corrections*, 435 So.2d 887 (Fla. 1st DCA 1983), a DOC inmate escaped lawful custody and shortly thereafter raped Ms. Newsome. Ms. Newsome filed an action against the DOC for the damage she suffered in such rape which resulted from negligence in the supervision and control of such inmate. The Court held that, in determining DOC's liability, it made no difference whatsoever that the inmate actually escaped from a Department of Transportation Work Center where he was "on loan" to such agency by the DOC. DOC is liable for DOT's negligent supervision because DOC has the responsibility for supervising inmates remanded to it by a Court as part of an imposed sentence.

In addition, the Court held that ". . . DOC is not entitled to the shield of sovereign immunity in carrying out its statutory operational duty of supervising such inmates. . ." *Newsome*, 435 So.2d at 888. Florida law clearly provides that the DOC is liable to persons who suffer injuries proximately caused by its negligent supervision of inmates in its custody. Sovereign immunity has been waived for such negligent acts. *Division of Corrections v. Wynn*, 438 So.2d 446 (Fla. 1st DCA 1983). *Emig v. State Dept. of Health & Rehab. Ser.*, 456 So.2d 1204 (Fla. 1st DCA 1984), establishes the state's duty to warn of known dangerous conditions created by its failure to properly supervise persons in its custody.

Florida law is controlling in this case. The escape occurred in Florida, but the robbery, kidnapping, rape, and other violent acts toward Plaintiff occurred in Alabama and Mississippi, during

the inmates' flight from custody in Florida. An analysis of this Court's resolution of the conflict of laws issue is set forth in full in the attached copy of this Court's Order Denying DOC's Motion to Dismiss. A consideration of what acts occurred in which state is relevant only to a resolution of the conflict of laws issue, and has absolutely nothing to do with proximate cause and foreseeability.

The "zone of risk" theory advanced by DOC does not specifically refer to the state boundary line as the end of its zone of risk, or area of responsibility, because arbitrary limitations of that nature would be clearly erroneous. Although such theory is only argued in a vague and general manner, without specific legal precedent, such arbitrary limitations are inherent in its zone of risk defense. Proximate cause and foreseeability issues do not involve state boundaries, county lines, or other limits of political subdivisions, but involve a consideration of facts, unique to each case, to see if there are a series of events that follow in a natural, direct, and continuous sequence probably resulting from the DOC's negligence. If Ms. Burnett's injuries are only possible consequences of the DOC's negligence, then the State is not liable. Thus, our inquiry is whether her injuries are the probable consequences of DOC's negligent act because they are those "that a person by prudent human foresight can anticipate as likely to result" from the negligence of DOC. *Pope v. Pinkerton-Hays Lumber Co.*, 120 So.2d 227, at 230 (Fla. 1st DCA 1960).

The evidence in this case is so compelling that the DOC stipulated and agreed that it was foreseeable that inmates Bruner and Woolard would attempt to escape from custody of the DOC. It was further stipulated that it was foreseeable that if an escape occurred, and if the opportunity existed, these inmates would commit violent, criminal acts upon members of the public, specifically to include forcible rape of an older white woman. Inmate Bruner was classified as a "close custody inmate" by the DOC because of his violent past and his current sentences for sexual battery, kidnapping, and robbery (involving an older white woman). Inmate Woolard was also classified as a "close custody inmate" because of his status as an habitual felony offender as well as his current sentences which included a conviction for escape.

The evidence shows that the DOC knew that inmate Bruner was born in Brewton, Alabama, which is located a short distance from Holmes Correctional Institution, from which the escape occurred. The DOC knew that inmate Bruner had lived in Brewton, Alabama, as an adult, and had been arrested there on a charge of sexual battery, among other crimes. It was clearly foreseeable that if inmates Bruner and Woolard escaped from custody of the DOC in Holmes County, they would likely travel to Brewton, Alabama, and it was foreseeable that they would probably rob, kidnap, and rape an older white woman in Brewton, Alabama, during the course of their escape.

The Plaintiff, Carrie Marie Burnett, was a 55 year old white woman who was residing and working in Brewton, Alabama, at the time

of Bruner and Woolard's escape. Plaintiff was robbed, kidnaped, and raped by these inmates in the course of their flight from Florida following their escape a few hours earlier. Neither the Plaintiff, nor anyone else in Brewton, Alabama, were warned that Bruner and Woolard had escaped and might be at large in Brewton, Alabama, posing a threat and danger to its citizens, particularly older, white females. There is simply no basis for a good faith argument that there is no causal connection between the DOC's negligence and the Plaintiff's injuries. The negligence of the DOC was the proximate cause of the injuries suffered by Plaintiff. Plaintiff was in the class of persons to whom the Defendant owed a duty of due care and was a reasonably foreseeable victim of violent acts of Bruner and Woolard. It can reasonably be said that, but for the DOC's negligence, the injuries to Plaintiff would not have occurred.

A determination of whether there is a causal connection between the DOC's negligence and Plaintiff's injuries requires a consideration of the facts involved in DOC's negligence as well as the subsequent events leading up to the injury. The DOC contends that when an escape results from DOC's negligent supervision of its inmates, it is only liable to persons injured "during the escape" or as "an integral part of the escape process." There is no Florida precedent for such contention nor does DOC attempt to define the latter concept. To meet the DOC's criteria for proximate cause, Ms. Burnett's abduction would have to have occurred from the doctor's office in Bonifay, Florida, where the

escape occurred. This over-simplified approach to proximate cause is equally as arbitrary as DOC's "zone of risk" theory. An arbitrary line, at some city, county or state boundary, or at some point in the sequence of events following a negligent act, cannot be drawn to limit recovery for injuries suffered up to that point. The test which must be applied is whether or not there is a natural, direct, and continuous sequence between the DOC's negligence and the criminal acts inflicted upon Ms. Burnett and whether it can reasonably be said that but for the DOC's negligence Ms. Burnett's injuries would not have occurred. As shown above, Ms. Burnett meets these tests of proximate cause. The brutal, savage, and perverted assault upon Ms. Burnett was not merely a "possible consequence" for which the State is not liable.

A mentally disordered sex offender, who has been classified and sentenced as an habitual, violent, felony offender is likely to commit violent criminal acts, including sex offenses, if he has the opportunity to do so. That is the reason the DOC stipulated that it was foreseeable that Bruner would escape, if he could; and further stipulated that it was foreseeable that if he escaped, he would commit violent crimes, including sex offenses, if he had the opportunity. Although no further proof is necessary to support a causal connection, one additional fact should be mentioned. In the course of committing these criminal acts upon Ms. Burnett, they told her they were escapees and would never return to prison alive.

The assailants knew that if they were arrested for the escape and convicted only for that offense, they could be sentenced to

thirty years in prison as habitual, violent felony offenders, with no reduction in time because of prison overcrowding. Such sentence would be consecutive to the sentences they were serving at the time of their escape, and they would forfeit all earned gain time accrued up to the time of escape. Thus, the consequences for the escape, alone, were virtually the same as the consequences for any other conviction, other than the death penalty. Because the consequences for the escape were so severe, Bruner had nothing to lose by kidnapping Ms. Burnett to prevent her from reporting the robbery. And he had nothing to lose by savagely and wantonly attacking her. The robbery occurred because they needed money to complete their planned escape. The kidnapping occurred to avoid being captured for the escape. The DOC was still in fresh pursuit of Bruner and Woolard at the time of Plaintiff's injuries, as defined in Section 941.35, Florida Statutes (1990). The escape was not over and complete. Had there been no escape, and its attendant consequences, most likely Ms. Burnett would not have been kidnapped and sexually assaulted. But, because of the facts of the escape, and the consequences thereof, Bruner could not leave Ms. Burnett to report the robbery. She was abducted and raped as a direct consequence of the escape and would have been murdered had she not succeeded in fleeing to safety. None of this would have happened had DOC properly fulfilled its responsibility for supervising these inmates; nor would the injuries have occurred if DOC had warned the public, including Plaintiff, of the escape of Bruner and Woolard and their dangerous and violent propensities.

It is, therefore ADJUDGED that Plaintiff, CARRIE MARIE BURNETT, recover from Defendant, STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS, the sum of ONE MILLION THREE HUNDRED THOUSAND DOLLARS ($1,300,000.00), that shall bear interest at the rate of 12 percent a year, for which let execution issue.

DONE AND ORDERED in Chambers, at Tallahassee, Leon County, Florida, this 2nd day of May, 1994.

L. RALPH SMITH, JR., Circuit Judge

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ATTACHMENT "A"

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

Case No. 92-833
CIVIL DIVISION

CARRIE MARIE BURNETT

Plaintiff,

vs.

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

Defendant.

ORDER DENYING DOC'S MOTION TO DISMISS

THIS CAUSE came on to be heard on the Motion To Dismiss filed by Defendant, STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS (DOC), and the Court having considered said motion, memoranda of law filed by the respective parties, and being otherwise fully advised in the premises, it is, therefore

ORDERED AND ADJUDGED that, for the reasons set forth hereafter, DOC's Motion To Dismiss be and the same is hereby DENIED.

The facts alleged by Plaintiff in her complaint reveal what must undoubtedly be a woman's worst nightmare. Plaintiff was kidnapped by two escaped felons, who took her to an adjacent state where they repeatedly raped her and violated her in every conceivable fashion. Had all of these activities taken place within the State of Florida, existing case law would clearly support Plaintiff's entitlement to present her case to a jury to

seek compensation for her devastating injuries. See *Newsome v. Department of Corrections of State of Florida*, 435 So.2d 887 (Fla. 1st DCA 1983) and *Division of Corrections v. Wynn*, 438 So.2d 446 (Fla. 1st DCA 1983). This case only becomes novel by virtue of the other facts alleged showing that none of the injuries to Plaintiff occurred within the State of Florida where the DOC's negligent acts occurred. Thus, the application of Conflict of Laws principles come into play.

Prior to 1980, Florida court's adhered to the inflexible rule that in personal injury actions the substantive law applicable is the law of the State where the injury occurred, sometimes referred to as *lex loci delicti*. E.g. *Hopkins v. Lockheed Aircraft Corp.*, 201 So.2d 743 (Fla. 1967). In 1980, however, Florida receded from such inflexible rule and adopted the "significant relationship test" as set forth in the *Restatement (Second) of Conflict of Laws*, § § 145-146 (1971). *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999 (Fla. 1980). In *Bishop, supra*, the Court noted that the theory set forth in the *Restatement* does not totally reject the "place of the injury" rule, and indeed, under most circumstances such place of injury would be the decisive consideration in determining the applicable law. In *Bishop*, supra, however, the Court did not apply the law of the place of injury. In 1981, the Supreme Court applied the "significant relationship test" set forth in the *Restatement* and held, based on the facts of that case, that the substantive laws of the state where the personal injury occurred would control in that case. *State Farm Mutual Auto Insurance Co. v. Olsen*, 406 So.2d 1109 (Fla. 1981). The reasons

given by the Court in *Bishop, supra*, and *Olsen, supra*, why the "place of the injury rule" would control most cases is because of certainty, predictability, uniformity of result, and ease in the determination and application of the law to be employed. The choice of law issues in the instant case is further complicated, however, because the injuries took place in two different states.

Plaintiff was assaulted and kidnapped in Alabama and taken across its state line to Mississippi, where she was repeatedly and violently raped. There were two places of injury. Mississippi has no particular interest in the outcome of the litigation between the State of Florida and a resident of Alabama. It merely happened to be the place where Plaintiff was able to flee from her captors after they had there raped her in the course of their fleeing from Florida to some unknown destination. By application of the "significant relationship test", as the Court did in *Bishop*, it is clear that Mississippi law should not apply. In *Bishop, supra*, several residents from Jacksonville boarded a small plane in Jacksonville to travel to North Carolina for a weekend vacation. The plane crashed while traveling over South Carolina after its engine failed. The Court held that South Carolina law, which would preclude recovery under the facts of that case, should not apply because it had no significant relationship to the case. Its relationship was "limited to the happenstance of the plane coming into contact with South Carolina soil after developing engine trouble in unidentified airspace." *id.* at 1000. In the instant

case, Mississippi's relationship is limited to the happenstance of these Florida prison escapees traveling across Mississippi, with a hostage from Alabama, to some other unknown location. Compared to Florida and Alabama, Mississippi clearly has the least significant relationship and its laws should not apply. By application of the test adopted in *Bishop, supra*, as set forth in the *Restatement*, it is also clear that Alabama law should not govern.

Alabama is the place from which Plaintiff was kidnapped, which was also her place of residence at that time. Plaintiff has since moved from Alabama to the State of Virginia. Virginia clearly has no significant relationship in this matter, but Alabama would if Plaintiff still resided there. Plaintiff's having moved from Alabama certainly decreases Alabama's relationship and its interest in this case and reduces the possibility of its laws being applied in this case. Other considerations, however, have greater weight in this Court's conclusion that Alabama law should not apply. Alabama, unlike Florida, is still immune from suit for an action in tort as alleged in this case. There is apparently some non-judicial forum in Alabama which can consider claims of this nature, but there still remains sovereign immunity from civil suits in the Courts of Alabama. If such law applied in this case, as the DOC contends it should, this action would have to be dismissed. Applying such a theory in this case would be contrary to the public policy of the State of Florida. Whether foreign laws are repugnant to the law of the forum state is a significant factor in conflict of laws decisions. *Wal-Mart Stores v. Budget Rent-A-Car*, 567 So.2d

918 (Fla. 1st DCA 1990); *Beattey v. College Centre of Finger Lakes*, 18 F.L.W. 133 (Fla. 4th DCA, December 30, 1992).

It is the public policy of the State of Florida to permit a civil action to lie against the State based upon the alleged negligence of a state employee, but to limit the amount of such recovery to a maximum of $100,000.00. The public policy has been enunciated by the legislature of the State of Florida, whose members were elected by the people of this State. § 762.28, Fla. Stat. (1992). It is the law of this state that liability may be imposed, and a jury verdict returned against the DOC, for its negligent supervision of inmates, which gives rise to an escape by such inmates, who cause injuries to third persons. *Newsome, supra*, and *Wynn, supra*. The negligent acts giving rise to the injuries occurred in this state, where suit was brought. On such significant public policy matters as sovereign immunity, the United States Supreme Court has held that the law of the state where the sovereign is being properly sued should apply. *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed 2d 416 (1979).

The facts alleged in Plaintiff's first amended complaint are legally sufficient to withstand the DOC's motion to dismiss. Venue is proper in Leon County. This Court has jurisdiction over the parties and the subject matter of this action. Florida law controls the rights and liabilities of the parties. The facts alleged operational level functions of the DOC employees, for which there is no sovereign immunity. The State's contention that it

owes no duty to Plaintiff, because she was kidnapped by DOC's prison escapees from across the state line in Brewton, Alabama, a stone's throw from the place of escape in Florida, is not supported by any citation of authority. Had this Plaintiff been kidnapped and raped a long time subsequent to the escape, or a great distance from the place of escape, then the question of duty, breach and proximate cause may well preclude recovery. Injuries to such a person could just as easily have occurred following a lawful expiration of a prison sentence, with no rehabilitation by the inmate. But the facts alleged in this complaint reveal a kidnapping in the course of completing an escape. Such kidnapping may very well not have occurred but for the escape and DOC negligence. These facts are sufficient to withstand a motion to dismiss, and if supported by proof at trial, are sufficient to allow a jury to determine if DOC's breach of duty was the proximate cause of Plaintiff's injuries, and assess damages.

The Motion to Dismiss should be and is DENIED, and the Defendant shall file its answer to the First Amended Complaint within twenty (20) days from the date hereof.

DONE AND ORDERED in Chambers, at Tallahassee, Leon County, Florida, this 18th day of February, 1993.

L. RALPH SMITH, JR., Circuit Judge

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