SUPREME COURT OF FLORIDA

CASE NO: 85,635

CARRIE MARIE BURNETT,

Petitioner,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

BRIEF OF AMICUS CURIAE, THE ACADEMY OF FLORIDA TRIAL LAWYERS

Loren E. Levy
Fla Bar No. 0814441
Law Offices of Larry E. Levy
Post Office Box 10583
Tallahassee, Florida 32302
904/222-7680

Counsel for amicus curiae
The Academy of Florida
Trial Lawyers

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INTRODUCTION

The Academy of Florida Trial Lawyers (academy) submits this brief as amicus curiae in support of the petitioner, Carrie Marie Burnett (Burnett). The academy is a statewide association of attorneys specializing in litigation, including personal injury litigation. The academy appears as amicus curiae in the instant case because the question certified by the district court as being one of great public importance, i.e., whether the State of Florida, Department of Corrections, may be held liable as a result of the criminal acts of an escaped prisoner, is of great public interest and social significance and should be explored from all points of view. The academy adopts the briefs and arguments of Burnett and respectfully urges this Court to quash the district court's decision.

PREFACE

The petitioner, Carrie Marie Burnett will be referred to herein as "Burnett." The respondent, State of Florida, Department of Corrections will be referred to herein as the "department." The Academy of Florida Trial Lawyers will be referred to herein as the "academy."

STATEMENT OF THE CASE AND OF THE FACTS

The academy adopts by reference the Statement of the Case and of the Facts presented in the petitioner's initial brief.

SUMMARY OF ARGUMENT

This case involves whether the State of Florida, Department of Corrections (department), may be held liable as a result of the criminal acts of an escaped prisoner. The more precise question presented to this Court is whether the department has a duty of care to operate its correctional facilities so as to prevent harm to the general public by inmates placed under its control and custody.

It is the academy's position that, as any private individual or entity, the department has a duty to exercise reasonable care in the operation of its facilities to prevent harm to members of the general public by individuals placed under its control and custody. Such a specific duty of care should be distinguished from the general duty of law enforcement officers to enforce the laws of this state, which this Court has found to not be actionable. The duty of care question is separate and distinct from any consideration of whether the department's alleged negligent acts are immune from suit or whether an injury to a member of the general public is foreseeable.

Currently, there are two other cases pending before this Court involving the same issue. Vann v. Department of Corrections, Case No. 85,415; McGhee v. Department of Corrections, Case No. 85,636. This Court has granted the academy leave to appear as amicus curiae in each of these cases, and briefs have been, or will be, submitted in each case. The legal arguments in each brief will remain essentially the same. The

facts of each case, however, will be discussed as they relate to the legal arguments.

ARGUMENT

THE DEPARTMENT OF CORRECTIONS HAS A DUTY OF CARE IN ITS OPERATION OF A CORRECTIONAL FACILITY TO AVOID HARM TO THE GENERAL PUBLIC BY INMATES PLACED UNDER ITS CONTROL AND CUSTODY.

Any tort action against the state or one of its agencies often begins with a review of the waiver of sovereign immunity set forth in section 768.28, Florida Statutes (1993), which states in pertinent part that:

> (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. 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.
>
> * * * *
>
> (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 judgment.

(Emphasis added.) This statute, on its face, waives immunity for the state to "the same extent as a private individual" under similar circumstances. See § 768.28(5), Fla. Stat. (1993).

This Court, however, has placed a more restrictive interpretation upon the language of section 768.28. Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). As this Court stated:

> So we, too, hold that although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain "discretionary" governmental functions remain immune from tort liability. This is so because certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance. In order to identify those functions, we adopt the analysis of *Johnson v. State, supra*, which distinguishes between the "planning" and "operational" levels of decision-making by governmental agencies. In pursuance of this case-by-case method of proceeding, we commend utilization of the preliminary test iterated in *Evangelical United Brethren Church v. State, supra*, as a useful tool for analysis.

Commercial Carrier, 371 So.2d at 1022 (emphasis added).

This Court further explained Commercial Carrier Corp. in Trianon Park Condominium Assoc., Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985). There, the court stated that:

> To better clarify the concept of governmental tort immunity, it is appropriate to place governmental functions and activities into the following four categories: (I) legislative, permitting, licensing, and executive officer functions; (II) enforcement of laws and the protection of the public safety; (III) capital improvements and property control operations; and (IV) providing professional, educational,

> and general services for the health and welfare of the citizens.
>
> * * * *
>
> In considering governmental tort liability under these four categories, we find that there is no governmental tort liability for the action or inaction of governmental officials or employees in carrying out the discretionary governmental functions described in categories I and II because there has never been a common law duty of care with respect to these legislative, executive, and police power functions, and the statutory waiver of sovereign immunity did not create a new duty of care. On the other hand, there may be substantial governmental liability under categories III and IV. This result follows because there is a common law duty of care regarding how property is maintained and operated and how professional and general services are performed.

Trianon Park, 468 So.2d at 919, 921 (emphasis added).

As Trianon Park specifically observed, however, the legislature's enactment of section 768.28 did not establish any new duty of care for governmental entities. Starting from this premise, this Court has based some of its holdings involving suits against governmental entities on the principle that there can be no governmental liability unless a common law or statutory duty of care existed that would have been applicable to an individual under similar circumstances. See Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989). Accordingly, a court must look initially at two separate and distinct issues in determining the liability of a governmental entity for negligence: (1) whether there exists a common law or statutory duty of care which inures to the benefit of the plaintiffs as a result of the alleged negligence

and (2) whether the alleged action is one for which sovereign immunity has been waived. See Kaisner.

The district court held that the department has no statutory or common law duty to protect individual members of the public from escaped inmates. In light of its conclusion, the district court did not address the second prong of the analysis, i.e., whether sovereign immunity had been waived for the department's stipulated negligence.[1] The district court, however, certified the following question to this Court as being of great public importance:

> Whether the State of Florida, Department of Corrections may be held liable as a result of the criminal acts of an escaped prisoner?

Department of Corrections v. Burnett, 20 Fla. L. Weekly D939 (Fla. 1st DCA Apr. 13, 1995).

The academy respectfully suggests to this Court that, in light of the district court's analysis, the certified question should be restated as follows:

> Whether the State of Florida, Department of Corrections has a duty of care in its operation of a correctional facility to avoid harm to the general public by inmates placed under its control and custody?

This question should be answered in the affirmative based on the following discussion.

Besides its decision in Burnett, the First District Court of Appeal recently has issued two other decisions involving

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[1]The academy's brief also will be limited to discussion of the duty of care issue. The academy adopts the petitioner's arguments with regard to sovereign immunity.

injuries to members of the general public by escaped prisoners. See Department of Corrections v. McGhee, 20 Fla. L. Weekly D945 (Fla. 1st DCA Apr. 13, 1995); Department of Corrections v. Vann, 20 Fla. L. Weekly D381 (Fla. 1st DCA Feb. 9, 1995). The majority decisions in Burnett and McGhee followed the reasoning and analysis set forth in Vann in concluding that the department had no common law or statutory duty of care to the respective plaintiffs under the circumstances of their cases. Of particular importance in these decisions, however, is the concurring and dissenting opinion of Judge Ervin in McGhee, which he also adopted in Burnett.

In his opinion, Judge Ervin initially reviewed this Court's observation in Trianon Park that, in order for there to be governmental tort liability, either an underlying common law or statutory duty of care must exist in regard to the alleged negligent conduct. With regard to the element of duty, Judge Ervin stated that:

> [T]he 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 section 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.

McGhee, 20 Fla. L. Weekly at D946 (Ervin J., concurring and dissenting)(emphasis added). It is the academy's position that the portion of Judge Ervin's opinion addressing the department's duty of care is the correct statement of law. This Court is therefore requested to quash the district court's decision in Burnett and adopt Judge Ervin's analysis in responding to the

certified question.[2]

As this Court has observed in Trianon Park and Kaisner, the waiver of sovereign immunity set forth in section 768.28 did not place any additional duty of care upon the government which did not previously exist. Likewise, the waiver of sovereign immunity did not limit or restrict the traditional concepts of duty of care when applied to the state. If a private individual or entity would have a statutory or common law duty of care under a given set of circumstances, so would the state. Simply because the state may have a duty of care, however, does not necessarily result in it being held liable. Instead, the inquiry would then turn to whether the state was immune from suit. Finally, the court also may inquire whether the resulting injury was unforeseeable as a matter of law, although foreseeability is generally a fact question for the jury to decide. See City of Pinellas Park v. Brown, 604 So.2d 1222 (Fla. 1992).

This Court addressed a similar situation in Nova University, Inc. v. Wagner, 491 So.2d 1116 (Fla. 1986). There, the university operated a residential rehabilitation program that accepted children whose continued residence with parents, foster parents, or legal guardians had been determined to be against the

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[2]The remainder of the academy's brief will attempt to paraphrase and expand upon Judge Ervin's well-written concurring and dissenting opinion. Judge Ervin's opinion also addresses an issue of apportionment of noneconomic damages between negligent and intentional tortfeasors pursuant to the comparative fault statute. The district court, however, did not address the apportionment of damages issue and, therefore, it is not involved in the instant case.

best interests of the general public because of behavioral problems. The children attended local public schools but otherwise were not permitted to leave the premises.

Two children were accepted in the program in 1974. In 1975, they ran away from the center. One day after their "escape," the children attacked two other young children, killing one and severely injuring the other.

Suit was filed against the university alleging that the two children had exhibited a propensity toward physical violence and, on occasion, injured younger children. The complaint further alleged that the university knew or should have known that the children had a propensity to commit acts which normally could be expected to cause harm to others and that the university was negligent in failing to supervise and control the two children.

The trial court granted summary judgment in the university's favor, finding that it owed no duty of care to the plaintiffs. The district court reversed, holding that the university stood in loco parentis to its residents and that a proper application of the theory prevented summary judgment in the university's favor. The district court certified the following question:

> Does knowledge of a child's violence require a parent to exercise control to avoid injury to another caused by subsequent violence which is more severe?

Wagner v. Nova University, Inc., 473 So.2d 731 (Fla. 4th DCA 1985). This Court restated the question as follows:

> Does a child care institution that accepts as residents delinquent, emotionally disturbed and/or ungovernable children have a duty to exercise reasonable care in its operation to avoid harm to the general public?

Nova University, 491 So.2d at 1118. This Court answered the question in the affirmative.

In reaching its conclusion that the university had a duty of care to the plaintiffs, this Court held that the Restatement (Second) of Torts section 319 (1965), was an applicable statement of traditional tort principles. Section 319 provides that:

> 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.

This Court then held that:

> We assume for purposes of this opinion that the Center is a socially desirable enterprise, and we express no view as to whether it was negligent. Neither do we pass judgment on the issue of proximate causation. We merely hold 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. If reasonable care is exercised, there can be no liability. The alternative, the exercise of no care or unreasonable lack of care, subjects the facility to liability.

Nova University, 491 So.2d at 1118 (emphasis added).

In the instant case, this Court should adhere to its decision in Nova University. Like the university, the department has an ordinary duty to exercise reasonable care in the operation

of its facilities to avoid foreseeable attacks by persons placed under its control and custody upon third persons. Whether the acts of the department claimed to be negligent are immune from suit and whether the attack upon Ms. Burnett was foreseeable are separate issues unrelated to the determination of whether the department has a duty of care under the circumstances.

In addition, the Restatement (Second) of Torts section 315 (1965), sets forth an applicable statement of the common law duty of care as follows:

> There is no duty so to control the conduct of to 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 of protection.

Nova University establishes that such a special relationship exists between the department and the inmate so as to impose a duty upon the department to control the inmate's conduct.

Moreover, this Court in Kaisner held that: "Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." 543 So.2d at 735. Interestingly, as Judge Ervin noted, the department conceded in its briefs in McGhee that, had the escaped inmates injured an individual at the time of the escape or within the search parameters of the department'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." McGhee, 20 Fla. L. Weekly at D948 (quoting from the department's reply brief at 12). The department continued its argument that any negligence in permitting the inmates to escape did not create a foreseeable zone of risk which encompassed the victim because the victim was injured more than 300 miles away, across two state lines, and 46 hours following the escape.

In the instant case, the department argued before the trial court that, when an escape results from its negligent supervision of its inmates, it is only liable to persons injured "during the escape" or as "an integral part of the escape process." See (trial court final judgment at p.7). Such a position, as well as the position taken in McGhee, appears to confuse the issues of duty of care and foreseeability. This Court recently explained the distinction between these two issues in McCain v. Florida Power Corp., 593 So.2d 500 (Fla. 1992). As this Court stated:

> 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 proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. In other words, the former is a minimal threshold *legal* requirement for opening the courthouse doors, whereas the latter is part of the much more specific *factual* requirement that must be proved to win the case once the courthouse doors are open. As is obvious, a defendant might be under a legal duty of care to a

> specific plaintiff, but still not be liable for negligence because proximate causation cannot be proven.

McCain, 593 So.2d at 502-503 (italics in original, emphasis added, citations omitted).

This Court further held that a duty of care is a legal question; while the question of foreseeability as it relates to proximate causation generally is a factual question. "As to *duty*, the proper inquiry is whether the defendant's conduct created a foreseeable zone of risk, *not* whether the defendant could foresee the specific injury that actually occurred." McCain, 593 So.2d at 504 (italics in original).

In the instant case, the department stipulated that the two inmates who had escaped from the department's custody assaulted Ms. Burnett and that the escape was the result of the department's negligence. The department also stipulated that it was foreseeable that the two inmates would attempt to escape from custody and that, if an opportunity existed, the inmates would commit violent criminal acts upon members of the public. In discussing the facts, the trial court stated as follows:

> 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, kidnapped, 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 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.

Trial court's final judgment at pp. 6-7, (emphasis added).

Under such circumstances, the department has a duty of care as a matter of law under two separate statements of the common law. First, a duty of care arises under Restatement (Second) of Torts, section 315 and 319 (1965), and this Court's decision in Nova University. Second, a duty of care arises by the department's alleged negligence in creating a "foreseeable zone of risk" as discussed in Kaisner and Brown. As this Court has observed, a duty of care is a minimal threshold legal requirement for opening the courthouse doors. In this case, that threshold has been reached.

The department's duty of care in the instant case must be distinguished from the general duty of the government to protect the public discussed in Everton v. Willard, 468 So.2d 936 (Fla. 1985). There, this Court held that there has never been a common law duty of care owed to an individual with respect to the discretionary judgmental power granted a police officer to make an arrest and to enforce the law. In reaching its holding, this Court stated that:

> A law enforcement officer's duty to protect the citizens is a general duty owed to the public as a whole. 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.

Everton, 468 So.2d at 938 (emphasis added). This Court cautioned, however, that its decision should be confined to the narrow issue relating to an officer's decision to make an arrest.

The negligence in the instant case does not involve law enforcement's failure to make an arrest which would have prevented the assault of Ms. Burnett or its failure to have apprehended the escapees. In contrast, the department stipulated to its negligence in a series of acts leading to the assailants' escape and the foreseeable consequences of allowing the escape of a dangerous convicted felons.

In addition, the special duty found lacking in Everton is present in this case pursuant to sections 315 and 319 and this

Court's decision in Nova University. Thus, the district court misplaced its reliance upon Everton.

Likewise, Department of Health & Rehabilitative Serv. v. Whaley, 574 So.2d 100 (Fla. 1991), and Reddish v. Smith, 468 So.2d 929 (Fla. 1985), do not require a contrary conclusion. Reddish involved a complaint alleging negligence in the department's act of reclassifying an inmate's institutional status from medium security to minimum security. This Court held that the department's act was a basic, discretionary, judgmental decision which was an inherent feature of an essential governmental role assigned to the department and, therefore, immune from suit.

As Judge Ervin observed, Reddish never addressed whether a duty of care existed under the circumstances of that case. As Judge Ervin stated:

> 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.' 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.

McGhee, 20 Fla. L. Weekly at D947 (emphasis added, citations omitted).

As to Whaley, Judge Ervin specifically observed that Vann had relied upon this Court's statement in Whaley that "the Department of Corrections has no specific duty to protect individual members of the public from escaped inmates." Whaley, 574 So.2d at 102-103 n.1. Judge Ervin opined that reliance upon the statement in Whaley for the court's holding in Vann was misplaced. As he stated:

> 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, whereas no such duty was placed on the DOC by statute for the protection of members of the public from escaped prisoners. 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.

McGhee, 20 Fla. L. Weekly at D947 (emphasis added, footnotes omitted).[3] The academy agrees that Whaley should be limited to

[3]The academy also agrees with Judge Ervin's conclusion that George v. Hitek Comm. Control Corp., 639 So.2d 661 (Fla. 4th DCA 1994), Bradford v. Metropolitan Dade County, 522 So.2d 96 (Fla. 3d DCA 1988), and Parker v. Murphy, 510 So.2d 990 (Fla. 1st DCA 1987), were incorrectly decided. However, the court in George specifically noted that the plaintiffs did not contend that any special relationship existed and that its decision was "compelled by, and confined to, the nature of the specific allegations made in the instant complaint." 639 So.2d at 664.

the proposition that no statutory duty of care has been placed upon the department to protect the public from escaped prisoners.

Accordingly, this Court should adhere to its decision in Nova University, distinguish this case from Everton and Whaley, and hold that the department has a duty to exercise reasonable care in the operation of its correctional facilities so as avoid harm to the general public by inmates placed under its control and custody. Importantly, such a duty of care would not necessarily require the department to be liable for all actions taken by escaped prisoners. There still would remain the questions of whether the alleged negligent act was immune from suit and whether the injury to a member of the general public was foreseeable.

CONCLUSION

Based upon the aforementioned argument and authorities, this Court respectfully is requested to answer the question certified by the district court as being of great public importance, i.e., whether the State of Florida, Department of Corrections may be held liable as a result of the criminal acts of an escaped prisoner, in the affirmative. Thus, the district court's decision should be quashed.

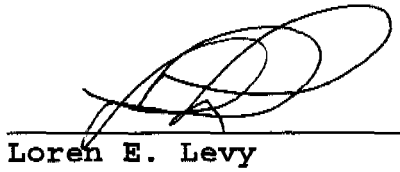
Respectfully submitted,

Loren E. Levy
Fla Bar No. 0814441
Law Offices of Larry E. Levy
Post Office Box 10583
Tallahassee, Florida 32302
904/222-7680

Counsel for amicus curiae
The Academy of Florida
Trial Lawyers

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U. S. Mail to **LOUIS K. ROSENBLOUM, ESQUIRE** and **VIRGINIA M. BUCHANAN, ESQUIRE**, Levin, Middlebrooks, et al., Post Office Box 12308, Pensacola, Florida 32581; **DAWN WIGGINS HARE, ESQUIRE**, Hare and Hare, Post Office Box 833, Monroeville, Alabama 36461; and **LAURA RUSH, ESQUIRE**, Assistant Attorney General, Department of Legal Affairs, The Capitol - PL01, Tallahassee, Florida 32399-1050 on this the **30th** day of June, 1995.



Loren E. Levy