IN THE SUPREME COURT OF FLORIDA

CARRIE MARIE BURNETT,

Petitioner,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

CASE NO. 85,635

DISTRICT COURT OF APPEAL
FIRST DISTRICT, No. 94-02091

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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Introduction

Petitioner, Carrie Marie Burnett, appellee below, seeks review of the decision of the District Court of Appeal, First District, reported as Department of Corrections v. Burnett, 653 So. 2d 1102 (Fla. 1st DCA 1995). The decision below reversed a final judgment entered in petitioner's favor based upon the district court's decision in the companion case, Department of Corrections v. McGhee, 653 So. 2d 1091 (Fla. 1st DCA 1995)(case number 85,636 in this court). The district court certified to this court a question of great public importance and this court has jurisdiction pursuant to Art. V, § 3(b)(4), Fla. Const.

References to the record on appeal will be made by designation "R." A copy of the decision subject to review is appended to this brief at Tab 1, and a copy of the decision in the companion case, Department of Corrections v. McGhee, is appended at Tab 2.

Course of Proceedings in the Courts Below

Carrie Marie Burnett filed a complaint for damages, as amended, against the State of Florida, Department of Corrections (DOC), following her abduction and rape by two escaped Florida inmates, John Fred Woolard and Dempsey Alexander Bruner (R 1-4, 13-21). Burnett alleged that DOC was negligent in its care, supervision and control of Woolard and Bruner, and that, as a

result of such negligence, the inmates escaped from Holmes Correctional Institution (HCI) on May 24, 1990, and thereafter kidnapped Burnett from Brewton, Alabama, and transported her to Ocean Springs, Mississippi (R 3, 17-20). Burnett also alleged that DOC knew or should have known, prior to the escape, that Woolard and Bruner would commit violent crimes of the type committed upon plaintiff if they were permitted to escape (R 3, 20).

DOC moved to dismiss the complaint on the grounds that the complaint failed to allege sufficient ultimate facts showing a duty owed by DOC to plaintiff and that the acts and omissions alleged in the complaint involved planning-level activities for which sovereign immunity had not been waived (R 5, 34). DOC also argued that Alabama law should be applied (R 47). The trial court found that the state of Florida had the most significant relationship with the events and occurrences surrounding the claim and that Florida law, rather than Alabama law, applied (R 69-73). Applying Florida law, the trial court denied DOC's motion to dismiss on both legal duty and sovereign immunity grounds (R 73-74).

DOC thereafter admitted it was negligent for allowing the inmates to escape (R 427). The parties stipulated to certain facts and to the amount of Burnett's damages and agreed to allow the trial court to decide the issues of law, including the issue of DOC's legal duty to plaintiff (R 91-108). In its final

judgment, the trial court rejected DOC's argument that no legal duty was owed to Burnett and entered final judgment in Burnett's favor for the stipulated amount of her damages, $1,300,000 (R 425-441).

The District Court of Appeal, First District, reversed. While the court determined that the trial court properly applied Florida law, the court held that the trial court erred by finding that DOC could be held liable for plaintiff's injuries caused by the escaped inmates. The district court relied upon its decision in the companion case, Department of Corrections v. McGhee, 653 So. 2d 1091 (Fla. 1st DCA 1995), which in turn was based upon the district court's earlier decision in State of Florida, Department of Corrections v. Vann, 650 So. 2d 658 (Fla. 1st DCA 1995). As it did in Vann and McGhee,[1] the district court certified the following question to this court:

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

Burnett, 653 So. 2d at 1102.

Statement of Facts

The parties stipulated that DOC was negligent for allowing Woolard and Bruner to escape, subject to the trial court's determination whether DOC owed a legal duty of care to Burnett (R 102-04, 107, 427). The stipulated facts indicated that on the

[1] The Vann case is presently pending in this court under case number 85,415 and McGhee is pending under case number 85,636.

morning of May 24, 1990, officers Williams and McMahan transported six HCI inmates, including Woolard and Bruner, to the Bonifay office of Dr. David Pelt for eye examinations (R 94). Near the end of the last inmate eye examination, Bruner and Woolard subdued McMahan by using a knife fashioned from barbers' scissors which Bruner had obtained from the prison barber shop[2] and took McMahan's revolver (R 104). Woolard and Bruner then escaped and traveled to Brewton, Alabama (R 97).

DOC admitted the following acts of negligence and that its negligence was the proximate cause of the inmates' escape and the subsequent abduction of Burnett (R 102-04, ¶¶ 60-73):

"60. The Defendant, State of Florida Department of Corrections, failed to provide adequate and secure detention for Dempsey Alexander Bruner and John Fred Woolard.

61. The Defendant, State of Florida Department of Corrections, failed to provide adequate security while transporting prisoners so as to minimize the risk of escape.

62. The State of Florida Department of Corrections failed to adequately search inmates for weapons that might aid in their escape.

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[2] Prior to the escape, barbers' shears were reported missing from the prison barber shop where Bruner worked (R 93). The inmates had not been searched when they left the prison to go to Dr. Pelt's office (R 95). A portion of the missing shears was located at the scene of the inmates' recapture in Mississippi (R 98).

63. The State of Florida Department of Corrections failed to properly inventory tools and instruments that might assist in an escape or be utilized as weapons against members of the public.

64. The State of Florida, Department of Corrections, failed to provided guards who were reasonably rested and trained in the safe and appropriate methods of searching, transporting and securing inmates.[3]

65. The State of Florida, Department of Corrections, failed to maintain an adequate and safe distance between the armed guards and inmates who were being transported and supervised.

66. The State of Florida Department of Corrections failed to have inmates properly restrained so as to preclude foreseeable attacks upon fellow inmates, guards or other members of the public.

67. The State of Florida, Department of Corrections failed to search the prison vehicle in which inmates were transported to preclude the concealment and subsequent utilization of any weapons or tools by inmates.

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[3] One of the transportation officers, Williams, had not completed transportation and escort classes and was working as a transportation officer on the day of the escape on the 7:30 a.m. to 3:00 p.m. shift, immediately after completing the 11:00 p.m. to 7:00 a.m. shift (R 96).

68. The State of Florida Department of Corrections failed to properly train guards in the method and manner of transporting and guarding inmate[s] to preclude the escape of prisoners.

69. The State of Florida Department of Corrections failed to follow established communications systems to appropriately advise transportation officers of any outstanding risks of weapons concealed or transported by inmates.

70. The State of Florida Department of Corrections failed to seek assistance from other law enforcement officials as soon as reasonably practicable upon notice of an escape or attempted escape of inmates Woolard and Bruner.

71. The State of Florida Department of Corrections failed to warn the public of the risk of harm posed by Inmates Woolard and Bruner which could not be reasonably known or appreciated by members of the public, including the Plaintiff, who could foreseeably come into contact with the inmate[s] upon escape.

72. The State of Florida Department of Corrections failed to maintain reasonable custody and control over Defendant's firearms so that a firearm was misused and removed from Defendant's possession.

73. The State of Florida Department of Corrections failed to safely transport inmates to outside premises which Defendant knew or should have known were too small, confined, and restricted in exits to allow the safe and reasonable

transportation and guarding of the inmates while receiving medical care and treatment."

The stipulated facts also revealed that Bruner was born in Brewton, Alabama, and had been previously incarcerated in the Alabama prison system for the rape of an elderly white woman in Brewton (R 97, 99). Bruner was incarcerated at HCI for sexual battery, kidnapping and robbery and had been classified as a "close custody" inmate, the highest security classification available under DOC regulations (R 92). Bruner considered himself a "prisoner of war" in the Florida prison system and had been labeled by DOC as posing a high risk of escape (R 100). Woolard was an "habitual offender" with an extensive record of arrests and violent criminal activity, which included previous prison escapes and violence against a police officer with a weapon (R 93). Woolard also attempted previously to escape from Holmes Correctional Institution by producing falsified release documents (R 93).

The trial court's final judgment accurately summarizes the horrific events that followed the inmates' escape (R 426-27):

"In May 1990, Ms. Burnett was working as a night auditor at a motel,[4] 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

[4] The motel was located in Brewton, Alabama, where Burnett resided (R 92, 97).

around a black man [Bruner] 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 [Woolard] 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."

After Burnett escaped from her captors in Ocean Springs, Mississippi, the inmates fled into a nearby national park where they encountered Park Ranger Robert McGhee who stopped the inmates' vehicle for running a stop sign (R 98). The inmates shot and killed McGhee using Officer McMahan's revolver as the murder weapon (R 98).

ISSUES PRESENTED FOR REVIEW

(as framed by the certified question)

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

SUMMARY OF ARGUMENT

Conflict of laws. The district court correctly determined that Florida law applied to the issues raised for review because Florida enjoyed all the significant contacts and relationships with respect to the issues of sovereign immunity and legal duty.

Legal duty. Under Florida's limited waiver of sovereign immunity, liability against a governmental agency is imposed in the same manner and to the same extent as liability against a private individual under similar circumstances. Under principles embodied by the Restatement (Second) of Torts, Florida courts have held that private parties who take charge of persons they know or should know are likely to cause bodily harm to others if not controlled are under a legal duty to exercise reasonable care to prevent those persons from doing harm. The same rule should be applied to the Department of Corrections to impose liability for criminal acts committed by escaped prisoners.

ARGUMENT

The district court below limited its decision to the conflict of laws and legal duty issues. Because the district court held that DOC owed no duty to plaintiff, thus entitling DOC to judgment in its favor, the district court did not decide the other issue presented by DOC for review--whether the trial court erred by failing to apportion fault to the intentional tortfeasors, Woolard and Bruner, under section 768.81, Florida Statutes (1989). Burnett, 653 So. 2d at 1103. Because no ruling has been obtained from the district court, this issue has not been addressed in this brief. If this court determines that the apportionment of fault issue should be considered, petitioner requests leave to file a supplemental brief.

A. The district court correctly determined that Florida law applied.

As a threshold issue, the district court, relying upon its decision in McGhee, affirmed the trial court's ruling that Florida law, rather than Alabama law, controlled the issue of DOC's legal duty. Burnett, 653 So. 2d at 1102. DOC had contended in the trial court that Alabama law applied because, DOC argued, that state maintained the more significant contacts with the occurrence and events surrounding the case. DOC argued further that it enjoyed complete immunity from suit and owed no legal duty to plaintiff under Alabama law (R 47-51).

In support of its contention that Alabama law should have been applied to this case, DOC emphasized Burnett's place of residence and the location of her abduction, both Alabama, as the controlling choice of law factors (R 49). As the district court in McGhee correctly observed, however, DOC's analysis was erroneous because it focused upon the significant contacts with respect to the case as a whole, rather than the significant contacts applicable to the particular issues under consideration, sovereign immunity and duty. McGhee, 653 So. 2d at 1093.

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 supplied). In Stallworth v. Hospitality Rentals, Inc., 515 So. 2d 413 (Fla. 1st DCA 1987), the court followed section 146 of the Restatement and 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.

Id. at 413(emphasis supplied).

DOC's emphasis upon the location of Burnett's residence and the situs of her abduction, Alabama, was misplaced because Burnett's residence and the location of her abduction were unrelated to the issues of sovereign immunity and legal duty, the only issues raised by DOC's amended motion to dismiss. As the district court correctly found in McGhee:

> 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[s]. 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.

McGhee, 653 So. 2d at 1093. The same rationale controls this case.

The trial court also found that application of Alabama law would be contrary to the public policy of the state of Florida because Alabama has not waived sovereign immunity, and under Alabama law, a person injured as a result of the negligence of a governmental entity is limited to restricted recovery from a non-judicial forum (R 72). The trial court cited Wal-Mart Stores v. Budget Rent-A-Car, 567 So. 2d 918 (Fla. 1st DCA 1990), rev. denied, 581 So. 2d 163 (Fla. 1991), and Beattey v. College Centre of Finger Lakes, Inc., 613 So. 2d 52 (Fla. 4th 1992), rev. denied, 626 So. 2d 204 (Fla. 1993), in support of its finding (R 72-73). Review of the applicable case law and comparison of the

Florida and Alabama governmental liability schemes indicate that the trial judge's public policy analysis was eminently correct.

Florida courts may refuse to apply the laws of another jurisdiction when the laws of the foreign jurisdiction are repugnant to the public policy of this state. Herron v. Passailaique, 92 Fla. 818, 110 So. 539 (1926). "Public policy" is determined through "the law of the state, whether founded in or clearly implied from its constitution, statutes or judicial decisions." White v. Bacardi, 446 So. 2d 150, 156 (Fla. 3d DCA 1984), quashed on other grounds, 463 So. 2d 218 (Fla. 1985).

The law of this state, as derived from its constitution, statutes and judicial decisions, unequivocally establishes that Florida public policy favors waiver of sovereign immunity and just compensation for persons injured by the negligence of the state and its agencies and political subdivisions. See Art. X, § 13, Fla. Const. ("Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."); § 768.28(1), Fla. Stat. (1989)("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 . . . ."); Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912, 917 (Fla. 1985)("The statute's [section 768.21's] sole purpose was to waive that immunity which prevented recovery for breaches of existing common law duties of care.").

In sharp contrast to Florida public policy, Alabama has not waived sovereign immunity. The Alabama Constitution, Article I, Section 14, prohibits suits against the state and provides "virtually complete sovereign immunity" for the state of Alabama. Sanders Lead Company v. Levine, 370 F. Supp. 115, 1117 (M.D. Ala. 1973). In Alabama "[t]he wall of 'governmental immunity' is almost invincible" and covers "almost every conceivable type of suit." Hutchinson v. Board of Trustees of University of Alabama, 288 Ala. 20, 256 So. 2d 281, 283-84 (1972).

Limited compensation is provided under Alabama law through a non-judicial forum known as the Alabama Board of Adjustment which maintains jurisdiction to hear and consider "claims for damages to the person or property growing out of any injury done to either the person or property by the state of Alabama or any of its agencies, commissions, boards, institutions or departments." Ala. Code § 41-9-62(a)(1). The power of the Board of Adjustment to compensate injury victims is severely limited, however, and the Board of Adjustment is directed by statute to determine damages in accordance with Alabama workers' compensation schedules. Ala. Code § 41-9-70. See Higgins v. Nationwide Mutual Insurance Co., 291 Ala. 462, 282 So. 2d 301 (1973)("We do not consider in a case of this kind [bodily injury] that the measure of an injured person's rights under the State Board of Adjustment Act is equivalent to that afforded by a common law action.)". Not only is recovery severely restricted under the

Board Adjustment procedure, the relief available compensates only persons injured by the state of Alabama and offers no relief to Ms. Burnett who was injured as a result of negligence committed by a Florida governmental agency.

The trial court was justified in finding that Alabama law with respect to governmental liability was repugnant to Florida public policy and should not be applied in the courts of this state. While other reasons support the trial and district court's choice of law rulings, public policy considerations alone dictate application of Florida law with respect to sovereign immunity. See Beattey, 613 So. 2d at 54 (court declined to apply Bahamian law in wrongful death case where "[a]pplication of Bahamian law would seem repugnant to Florida public policy where there is no recovery allowed for wrongful death in Bahamian law, under which a party may recover only funeral expenses."); Wal-Mart Stores, 567 So. 2d at 921 (court applied Florida owner liability law under the dangerous instrumentality doctrine to contribution claim, even though Georgia law applied in underlying tort action, where "application of Georgia law to the issue of contribution seems to us repugnant to Florida public policy.").

The result DOC urged below discriminates against nonresidents in a manner wholly inconsistent with legislative intent. The statutory framework for waiving governmental immunity in Florida makes no distinction between injuries that occur in this state and those that occur across state lines, nor

does the statute discriminate against nonresidents. Rather, the statute waives governmental immunity "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." § 768.28(1), Fla. Stat. (1989). Private persons are liable for injuries caused by their negligence regardless of the location of the injury or the domicile of the victim. There is no reason to treat governmental entities differently. Section 768.28 was enacted to waive governmental immunity that previously prevented recovery of damages by persons injured through breaches of common law duties of care. Trianon Park, 468 So. 2d at 917. There is no indication that the legislature intended for the waiver to be applied in a manner that invidiously discriminates against nonresidents.

B. The district court erred by holding that DOC owed no duty of care to plaintiff.

1. Sovereign immunity statute

The district court held that DOC, as a matter of law, owed no legal duty to exercise reasonable care for Burnett's safety based upon McGhee and its specific holding "that DOC could not be held liable for the criminal conduct of the escapees." McGhee, 653 So. 2d at 1093. The McGhee court in turn relied upon the first district's earlier holding in State, Department of Corrections v. Vann, 650 So. 2d 658 (Fla. 1st DCA 1995)(case

number 85,415 in this court). In Vann, Donald David Dillbeck escaped from custody at the Quincy Vocational Center and murdered Faye Lamb Vann while she was parked outside Gayfer's department store at the Tallahassee Mall. Plaintiff alleged in that case that DOC allowed Dillbeck to escape "by improperly classifying the prisoner (including the failure to follow their own rules and procedures in the method of classification), by failing to properly supervise the prisoner, and by failing to warn the public of the prisoner's escape." Vann, 650 So. 2d at 659. DOC appealed a judgment in favor of Vann's estate and the district court addressed the issue "whether the State of Florida, Department of Corrections, may be held liable as a result of criminal acts of an escaped prisoner." Id. Finding no common law duty between DOC and the decedent, the court reversed the judgment and certified to this court the same question of great public importance certified in the present case.

Citing Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985), the Vann court correctly confirmed that governmental liability requires consideration of two distinct issues:

> (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) [W]hether the alleged action is one for which sovereign immunity has been waived.

Vann, 650 So. 2d at 660.[5]

The Vann court's finding of no common law duty rested on the following general principle:

> A governmental duty to protect its citizens is a general duty to the public as a whole, and where there is only a general duty to protect the public, there is no duty of care to an individual citizen which may result in liability.

Vann, 650 So. 2d at 660, citing Everton v. Willard, 468 So. 2d 936, 938 (Fla. 1985). The Vann court then reasoned that "the only duty which existed was a general duty owed to the public not to allow a prisoner to escape" and, thus, DOC was insulated from liability for injuries or deaths of citizens at the hands of those whom DOC carelessly allowed to escape. Vann, 650 So. 2d at 662. For the reasons that follow and for the reasons cited by Judge Ervin in his well-reasoned dissenting opinion in McGhee, Vann's rationale is faulty and should be disapproved.

Vann's analysis ignores the fundamental basis for this state's limited waiver of sovereign immunity: "Section 768.28, Florida Statutes [(1989)], waives governmental immunity from tort liability 'under circumstances in which the state or [an] agency or subdivision, if a private person, would be liable to the

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[5] In Vann, the court found no common law duty and therefore never addressed the sovereign immunity issue. A similar result was reached by the court in the present case, but, additionally, no issue of sovereign immunity (under Florida law) was raised by DOC on appeal. McGhee, 653 So. 2d at 1095 n.4.

claimant, in accordance with the general laws of this state.' § 768.28(1), Fla. Stat. [(1989)]." Department of Health and Rehabilitative Services v. B.J.M., 20 Fla. L. Weekly S188, S189 (Fla. April 27, 1995). Section 768.28(5), Florida Statutes (1989), also provides that "[t]he 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." Thus, duty in the context of governmental tort liability may be founded upon "a common law or statutory duty of care . . . that would have been applicable to an individual under similar circumstances." Kaisner v. Kolb, 543 So. 2d 732, 734 (Fla. 1989). See also Butler v. Sarasota County, 501 So. 2d 579 (Fla. 1986)(analyzing duty owed by county, as operator of swimming facility, from same perspective as "private owner" of swimming facility). Because section 768.28 imposes governmental liability to the same extent as private individuals, Judge Ervin correctly recognized that "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." McGhee, 653 So. 2d 1094.

2. Restatement analysis

Judge Ervin's opinion in McGhee notes this court's reference in Trianon Park to Restatement (Second) of Torts § 315 (1964) for

"the general common law rule that there is no duty to prevent the misconduct of a third person. Trianon Park, 468 So. 2d at 917. Section 315 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.

Restatement (Second) of Torts § 315 (1964)(emphasis supplied). To apply section 315(a), the comment to this section refers the reader to §§ 316-319 for the rules applicable to "relations between the actor and a third person which require the actor to control the third person's conduct." Restatement (Second) of Torts § 315, comment c. (1964).

Section 319, entitled "Duty of Those in Charge of Person Having Dangerous Propensities," squarely addresses the issue before this court and 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 (Second) of Torts § 319 (1964)(emphasis supplied).

As Judge Ervin's McGhee dissent recognizes, Florida cases involving private parties have adopted the exception under

sections 315(a) and 319 to impose liability for the failure to control the conduct of third persons. This court specifically applied section 319 to impose liability against a private party for the criminal conduct of a person who escaped from its control in Nova University, Inc. v. Wagner, 491 So. 2d 1116 (Fla. 1986).

In Nova, two youths who had exhibited violent propensities escaped from Nova University's Living and Learning Center, a residential rehabilitation facility which accepted children with behavioral problems. After remaining at large for several days, the youths beat two young children, killing one and leaving the other seriously injured. The parents of the two young children sued Nova University and its director for negligently allowing the youths to escape and inflict harm on the two young children who were members of the general public unconnected to Nova University or the residential facility. The trial court entered summary judgment for defendants based upon a finding that Nova University owed no duty to plaintiffs as a matter of law. The district court of appeal reversed and certified a question of great public importance, which this court rephrased 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.

In answering the rephrased certified question in the affirmative, this court quoted and relied upon Restatement (Second) of Torts § 319 (1964) and held:

> 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. If the private Nova University facility owes a duty of care to third persons to avoid foreseeable attacks committed by dangerous individuals in its custody, DOC owes a concomitant duty to third persons, such as plaintiff at bar, in the same manner because the limited waiver of sovereign immunity subjects DOC to liability for the escape of prisoners in its custody to the same extent as private parties under similar circumstances. § 768.28(1) and (5), Fla. Stat. (1989). See also Garrison Retirement Home Corp. v. Hancock, 484 So. 2d 1257 (Fla. 4th DCA 1985)(following sections 315(a) and 319 of the Restatement, court held that private retirement home owed duty of care to roofing company worker who was on retirement home's premises to inspect roof and was struck by vehicle operated by elderly retirement home resident whom retirement home failed to supervise and to prevent, if necessary, from operating vehicle).

Following Nova University, Judge Ervin's dissent correctly concluded that section 319 applied "to the relationship between DOC and the escapees in this case, thus DOC's duty of care is encompassed by section 315(a) of the Restatement." McGhee, 653 So. 2d 1095. The same conclusion was reached by Judge Gerald Wetherington and Donald Pollock in their comprehensive article on Florida governmental tort liability:

> Persons who assume custody of others create a special relationship necessitating special precautions. Similarly, a relationship involving the state's right or ability to control a third person's conduct creates an exception to the general rule of custodial liability stated in Restatement section 315. The Restatement indicates that there is no tort duty to control the conduct of a third person for protection of others. However, if a governmental entity enters this special custodial relationship, the entity may not be immune when it negligently performs operational level activities. Thus, the entity may be liable for negligently supervising inmates, or releasing a mental patient without adequate evaluation.

Wetherington and Pollock, Tort Suits Against Governmental Entities in Florida, 44 U. Fla. L. Rev. 1, 71 (1992)(footnotes omitted)(emphasis supplied).

3. This court's decisions

As Judge Ervin indicates in McGhee, this court's previous governmental liability decisions do not preclude a finding that DOC owed a common law duty in this case to plaintiff. McGhee, 653 So. 2d at 1096-97. The Vann opinion suggests that "courts of this state have determined that the state is not liable for

injuries resulting from the criminal acts of escapees" and specifically quotes the following from Department of Health and Rehabilitative Services v. Whaley, 574 So. 2d 100, 102-03 n.1 (Fla. 1991): "'[T]he Department of Corrections has no specific duty to protect individual members of the public from escaped inmates.'" Vann, 650 So. 2d at 658. The entire footnote which contains the quoted statement provides:

> 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.

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

A close inspection of the facts and legal theories upon which the claim in Reddish was based indicates that the above-quoted dicta does not apply to the case at hand. In Reddish v. Smith, 468 So. 2d 929 (Fla. 1985), plaintiff claimed damages against DOC for injuries he sustained when abducted and shot by an escaped prisoner three months after the escape. Plaintiff claimed that DOC and its agents, including Reddish, negligently reclassified the prisoner to minimum custody status and that Reddish himself acted willfully and in bad faith by using the prisoner's services for personal gain. The trial court dismissed on sovereign immunity grounds and based on lack of foreseeability due to the lapse of time between escape and injury. The district court reversed. Smith v. Department of Corrections, 432 So. 2d 1338 (Fla. 1st DCA 1983).

This court quashed the district court's decision and held that the claim was barred by sovereign immunity because the classification and assignment of prisoners was a planning-level decision. (Here, the complaint was not based upon classification of the inmates but rested upon admitted operational-level negligence of DOC employees.) In dicta, the Reddish court discussed DOC's liability if operational-level negligence had been involved. Noting first that a governmental agency's liability is coextensive with that of a private person for the same conduct, the court found that the activity involved in the claim, classification and reassignment of prisoners, "is an inherently governmental function not arising out of activity normally engaged in by private persons," and, therefore, liability could not be imposed. Reddish, 468 So. 2d at 932. The court also concluded that no cause of action had been stated against Reddish and that, as a matter of law, there was no causal connection between the transfer of the prisoner and his escape some eighteen months later. Reddish, 468 So. 2d at 933

Reddish is not dispositive of the present case because that decision was based on sovereign immunity. Here, the question is common law duty of care, the first prong in Trianon Park's two-step approach, which requires an analysis of duty before the issue of sovereign immunity is considered. Also, in Department of Health & Rehabilitative Services v. Yamuni, 529 So. 2d 258, 261 (Fla. 1988), this court receded from that portion of the

court's Reddish opinion which held that DOC could not be liable because private persons do not engage in prisoner classification activities. Thus, the quoted statement from the Whaley footnote was, at best, dicta which should not furnish controlling precedent in this case. See State v. Florida State Improvement Commission, 60 So. 2d 747 (Fla. 1952)(inessential language in the court's opinion is obiter dicta and should not control).

4. District court decisions

The Vann court also relied upon three district court decisions to support its holding that DOC owes no duty of care: 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). Vann, 650 So. 2d at 661. Ms. Burnett respectfully submits that Judge Ervin correctly assessed these opinions as "incorrectly decided as a matter of law" because none of the cases addresses Restatement sections 315(a) and 319. McGhee, 653 So. 2d 1097.

Parker v. Murphy also is distinguishable procedurally. In that case, the district court affirmed a summary judgment in favor of the Sheriff of Taylor County in an action brought for injuries sustained by plaintiffs at the hands of an escaped prisoner. The opinion indicates quite clearly that the summary judgment and the district court's affirmance thereof were based on sovereign immunity grounds, not on the issue of legal duty.

In this case, sovereign immunity was not an issue because DOC clearly was guilty of operational level negligence. See McGhee, 653 So. 2d 1095 n.4. The Parker court's statement that no legal duty was owed to plaintiff absent a special relationship with the sheriff was dicta.

In George, although the court held that DOC's supervision of a prisoner's community control does not create a common law duty of care, the court appears to blur the distinction between legal duty and sovereign immunity. The Bradford case suffers from the same infirmity. There, plaintiff sued Dade County for alleging negligence of the public safety department for failure to execute an arrest warrant on an individual who had escaped from the county's mental health program, for failure to investigate the patient's disappearance and for failure to insure that the escaped patient received her medication and treatment. The allegations pertaining to the county's failure to arrest the patient and investigate her disappearance clearly involved discretionary law enforcement activities for which no liability attaches and which are not implicated in the present case. See Everton v. Willard. Moreover, while the district court affirmed the Bradford judgment because it found no common law duty to the plaintiff who was assaulted by the escaped mental patient, the case was decided at the trial court level on sovereign immunity grounds, not duty, and several of the case relied upon by the district court for its finding of no duty actually were sovereign

immunity decisions. Bradford, 522 So. 2d at 96-97. Compare Belevance v. State, 390 So. 2d 422 (Fla. 1st DCA 1980)(court finding no immunity in favor of state hospital for its negligent release of patient confined under Baker Act).

5. DOC's position

The district court below held that DOC under no circumstances owes a duty of care to members of the general public to protect them from harm committed by escaped prisoners. Interestingly, DOC took a different position concerning the escape which resulted in Burnett's injuries and McGhee's death. Quoting from its reply brief filed in the district court in McGhee, Judge Ervin noted the following concession made by DOC:

> "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."

McGhee, 653 So. 2d 1098.

DOC, thus, has conceded that a duty of care arises to protect members of the public who reside in the immediate search and recapture perimeter around the prison or near the area from which the prisoners escaped. The distinction raised by DOC, however, between the duty owed to citizens in the search and recapture perimeter and the duty owed to citizens residing outside that area raises a factual issue of forseeability for determination by the trier of fact, rather than an issue of legal

duty to be decided by the court as a matter of law. Therefore, by conceding that a duty of care is owed to a limited segment of the general public, DOC has effectively acknowledged in this case that it owes a legal duty to protect members of the general public from harm committed by escaped prisoners. The time and distance parameters imposed upon that legal obligation should be left to the jury to decide based upon traditional principles governing proximate cause.

DOC regulations lend further support to its concession that a duty is owed to the general public. Section 945.04, Florida Statutes (1989), broadly mandates that the "Department of Corrections shall be responsible for the inmates and for the operation of, and shall have supervisory and protective care, custody, and control of, all buildings, grounds, property of, and matters connected with, the correctional system." DOC also is obligated by statute to classify prisoners according to an objective classification scheme. § 944.1905, Fla. Stat. (1989). In furtherance of that obligation, DOC regulations create certain "custody levels" which establish "restrictions required to ensure that an inmate remains within the control of the Florida Department of Corrections." Fla. Admin. Code Rule 33-1.001(19).[6] DOC regulations specifically provide that "[t]he

[6] The "close custody" classification assigned to Bruner and Woolard, required DOC to maintain these inmates within an armed perimeter and under constant armed supervision. Fla. Admin. Code Rule 33-1.001(19)(d).

function of the [inmate] classification system is the maintenance of security and order for the protection of the general public, staff, and inmates." Fla. Admin. Code Rule 33-6.0011 (emphasis supplied). Additionally, the regulations which define the goals and objectives of the DOC classification system specifically address public safety. See Fla. Admin. Code Rule 33-3.006(1)(a)("to maintain institutional security and order so that the general public, staff, and inmates are protected to the greatest extent possible"); Fla. Admin. Code Rule 33-3.006(2)(a)("to establish a custody classification level that minimizes risk to the general public, staff and other inmates").

"A construction given to a statute by the agency charged with its administration is highly persuasive with the court." Bryan v. State Board of Medical Examiners of Florida, 381 So. 2d 1122, 1123 (Fla. 1st DCA 1979), affirmed, 398 So. 2d 1354 (Fla. 1981). DOC's construction of the statutes which make it responsible for inmate custody and classification, emphasizing protection of the general public, is consistent with a legal duty being imposed in this case, and DOC's construction should be given considerable weight.

6. "Zone of risk" analysis

As Judge Ervin notes in McGhee, DOC argued that it was free from liability based upon a "zone of risk" analysis. In McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992), 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." McCain, 593 So. 2d at 502. Similarly, with reference to the duty owed by a governmental entity, this court also said:

> 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 risks poses.

Kaisner v. Kolb, 543 So. 2d at 735.

In McGhee, DOC argued that it was not foreseeable that Ranger McGhee would be killed in the exact place and in the precise manner in which the crime was committed by inmates Bruner and Woolard. DOC specifically argued that plaintiff's decedent was outside the "zone of risk" because he was killed by the escaped inmates "more than 300 miles from the place of escape, across two state lines and 46 hours following the escape." McGhee, 653 So. 2d at 1098. DOC's foreseeability analysis is suspect, however, because it confuses foreseeability in the context of legal duty (a question of law) with foreseeability in the context of proximate causation (a question of fact). See McCain, 593 So. 2d at 502. The question of defendant's legal duty as an element of the negligence cause of action "focuses on whether the defendant's conduct foreseeably created a broader "zone of risk' that poses a general threat of harm to others." McCain, 593 So. 2d at 502 (emphasis supplied). A legal duty arises "whenever a human endeavor creates a generalized and

foreseeable risk of harming others." McCain, 593 So. 2d at 503 (emphasis supplied). Foreseeability as it relates to proximate cause "is concerned with the specific, narrow factual details of the case, not with the broader zone of risk the defendant created." McCain, 593 So. 2d at 502. Unlike the issue of legal duty, the question of foreseeability in the proximate cause context is a question of fact for the jury. McCain, 593 So. 2d at 504.

To satisfy the test of proximate cause, plaintiff does not have to prove foreseeability of the exact nature and extent of the injury in the precise manner of its occurrence. Rather, it is essential only that some injury occur in a generally foreseeable manner as a likely result of the negligent conduct. McCain, 593 So. 2d at 503 ("it is immaterial that the defendant could not foresee the precise manner in which the injury occurred or its exact extent")(emphasis the court's). The question below, therefore, was not whether DOC could have foreseen that Bruner and Woolard would have abducted Burnett under the precise circumstances in which the incident occurred, but whether it was foreseeable to DOC that someone would be injured or killed if these dangerous inmates with histories of violent criminal activity were allowed to escape. That aspect of foreseeability was a fact issue, not a question of law for the court to decide.

Under the stipulated facts, the trial court found that Burnett's abduction by Woolard and Burnett was a readily

foreseeable consequence of DOC's negligence (R 430-32). DOC stipulated that "it was reasonably foreseeable to the Defendant [DOC] that Dempsey Alexander Bruner and/or John Fred Woolard would commit violent crimes of the type committed on the Plaintiff, Marie Burnett, in that these inmates had a history of committing violent crimes, including rape, kidnapping, sodomy, assault, battery, and escape." (R 105). DOC also knew that Bruner was born in Brewton, Alabama, located a short distance from Bonifay, and that Bruner had previously been arrested in Brewton for raping an elderly white women (R 97,99). It was entirely foreseeable, as the trial court found, "that if inmates Bruner and Woolard escaped from custody of the DOC in Holmes County, they would travel to Brewton, Alabama, and it was foreseeable that they would probably rob, kidnap, and rape an older white woman[7] in Brewton, Alabama, during the course of their escape." (R 430). That finding should not be disturbed.

Judge Ervin's opinion in McGhee notes DOC's reliance upon the test formulated by the Louisiana Supreme Court in Wilson v. State, Department of Public Safety and Corrections, 576 So. 2d 490 (La. 1991):

> Custodians of prisoners have a duty to manage the affairs of the prison so as not to create an unreasonable risk of harm to the public. This duty does not encompass all harm inflicted by escapees. Although prison authorities have a duty to prevent inmates from escaping, that duty is intended to protect persons from being harmed by escaping

[7] Ms. Burnett was fifty-five years of age and white (R 430).

> inmates while they are in the process of escaping. The duty is not intended to protect persons from harm inflicted by inmates who have already escaped and who subsequently commit tortious acts in the furtherance of their own pursuits. The state is not the insurer of the safety of its citizens. To recover against a custodian, a plaintiff must prove that the custodian was negligent in the management of the prison, that this negligence facilitated the escape, that the actions of the escapee caused the harm complained of, and that the risk of harm encountered by the particular plaintiff falls within the scope of the duty owed by the custodian.
>
> * * *
>
> In resolving the scope of the duty issue, improper emphasis has occasionally been placed on foreseeability or 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 (emphasis supplied).

The court in Wilson held that state prison officials were liable for injuries sustained by two members of the general public who were assaulted by two escaped prisoners, even though the incident took place thirteen days after the escape. Although DOC urges that its liability should be limited to the search and recapture perimeter surrounding Bonifay, the Louisiana Supreme Court in Wilson steadfastly refused to draw an arbitrary line between the occurrence of the injury and its time and distance from the escape. Instead, the controlling factor under Louisiana law is "whether the offense occurred during, or as an integral

part of, the process of escaping." Wilson, 576 So. 2d at 493. While the injury in Wilson occurred within fifteen miles from the prison and within the prison's search perimeter, the court was quick to caution that "arbitrary cut-off points . . . serve neither the interests of plaintiffs nor those of the State." Wilson, 576 So. 2d at 494.

Ms. Burnett adopts Judge Ervin's application of the Wilson test to the facts at bar:

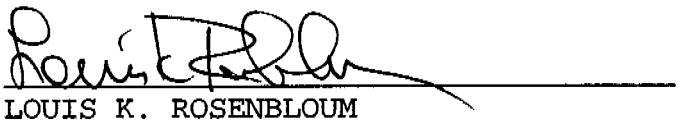
> In applying the above test to the instant case, it appears that the injuries suffered by appellee's decedent transpired during an integral part of the inmates' process of escape, as the facts disclose that they occurred while the two escapees were continuing their flight from custody. Because I conclude, 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 DOC.

McGhee, 653 So. 2d at 1099.

CONCLUSION

The certified question should be answered in the affirmative. The decision below should be quashed with directions to the district court on remand to address the remaining issue presented for review.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Laura Rush, Esquire, Assistant Attorney General, Office of the Attorney General, The Capitol - Suite Pl - 01, Tallahassee, Florida 32399-1050 and to Loren E. Levy, Esquire, Post Office Box 10583, Tallahassee, Florida 32302 by mail this 30th of June, 1995.

LOUIS K. ROSENBLOUM

Appendix Part 1

DEPARTMENT OF CORRECTIONS, Appellant,

v.

Carrie Marie BURNETT, Appellee.

No. 94–2091.

District Court of Appeal of Florida, First District.

April 13, 1995.

Victim injured as result of criminal acts of escaped convict sued Department of Corrections for negligence. The Circuit Court, Leon County, Ralph L. Smith, J., awarded damages, and Department of Corrections appealed. The District Court of Appeal, Wolf, J., held that: (1) Florida law applied to determine whether Department of Corrections could be held liable, and (2) there was no statutory or common-law duty of Department of Corrections toward victim.

Reversed; question certified.

Ervin, J., filed concurring and dissenting opinion.

1. States ⇐112.2(4)

Florida law would apply to determine whether Florida Department of Corrections could be held liable as result of alleged negligence by Department of Corrections which occurred in Florida as result of criminal acts of escaped convicts.

2. States ⇐112.2(4)

Florida's Department of Corrections (DOC) had no common law or statutory duty to citizen injured by escaped convict and, thus, victim could not recover damages from DOC in negligence action.

Robert A. Butterworth, Atty. Gen., Laura Rush, Asst. Atty. Gen., Tallahassee, for appellant.

Louis K. Rosenbloum and Virginia M. Buchanan of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., Pensacola, for appellee.

WOLF, Judge.

The Department of Corrections (DOC) appeals from a final judgment awarding damages in a negligence action in favor of the appellee. The appellant raises three issues on appeal. As a result of our disposition, it is only necessary for us to address two issues: (1) Whether the trial court erred in determining that the law of Florida rather than the law of Alabama applies in determining whether DOC can 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.

[1, 2] This case is controlled by *Department of Corrections v. McGhee*, 653 So.2d 1091 (Fla. 1st DCA 1995). As in *McGhee*, we find that the trial court did not err in applying Florida law in determining whether the Florida Department of Corrections can be held liable as a result of alleged negligence occurring in Florida; however, we find that no common law or statutory duty exists in favor of the appellee, and reverse the final judgment.

We certify the same question which has been certified in *McGhee* and in *State of Florida Dep't of Corrections v. Vann*, 650 So.2d 658 (Fla. 1st DCA 1995), as being 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., concurs and dissents with written opinion.

ERVIN, Judge, concurring and dissenting.

I concur with the majority's disposition of the first issue, but I dissent as to its reversal of the final judgment based upon the second point, for the same reasons stated in my concurring and dissenting opinion in *Department of Corrections v. McGhee*, 653 So.2d 1091 (Fla. 1st DCA 1995). I also concur with the majority in certifying a question to the

Florida Supreme Court as one of great public importance; however, I would modify the question as I have proposed in my concurring and dissenting opinion in *McGhee*.

The majority's disposition of the second issue rendered moot its consideration of appellant's third issue, *i.e.*, whether the trial court erred in failing to apportion fault among both negligent and intentional tortfeasors, pursuant to section 768.81, Florida Statutes (1989). In that I would, as stated, affirm as to the second issue, I would reverse as to the third point for the identical reasons advanced in my concurring and dissenting opinion in *McGhee*.

James Estill EVANS, Appellant,

v.

STATE of Florida, Appellee.

No. 94–01646.

District Court of Appeal of Florida, Second District.

April 19, 1995.

Defendant was convicted in the Circuit Court for Polk County, Joe R. Young, Jr., J., of three counts of engaging child in sexual activity, and he appealed. The District Court of Appeal held that: (1) although probation condition barring defendant from possessing, carrying, or owning firearms did not require oral pronouncement, oral pronouncement was required as to portion of condition relating to weapons and destructive devices; (2) condition barring excessive use of intoxicants had to be stricken due to trial court's failure to announce it in open court; (3) condition barring defendant from visiting places where intoxicants were unlawfully sold, dispensed, or used was valid as more precise definition of general prohibition and did not have to be orally pronounced; and (4) imposition of "cost/fine" had to be stricken due to lack of citation to statutory authority.

Reversed and remanded.

1. Criminal Law ⇐995(8)

No oral pronouncement was required for general probation condition barring defendant from possessing, carrying, or owning firearms inasmuch as such conduct by person convicted of felony was prohibited by statute and condition constituted general probation condition; however, oral pronouncement was required for portion of condition barring defendant from possessing, carrying, or owning weapons and destructive devices. West's F.S.A. § 790.23.

2. Criminal Law ⇐995(8)

Probation condition barring excessive use of intoxicants had to be stricken since trial court failed to announce it in open court, and thereby prevented defendant from having opportunity to object to its imposition.

3. Criminal Law ⇐995(8)

Probation condition barring defendant from visiting places where intoxicants were unlawfully sold, dispensed, or used did not have to be orally pronounced inasmuch as it was valid as more precise definition of general probation.

4. Costs ⇐314

Absent citation to statutory authority, imposition of "cost/fine" on defendant had to be stricken.

James Marion Moorman, Public Defender, and Joseph F. Bohren, II, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Dale R. Tarpley, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

The appellant, James Estill Evans, challenges the trial court's judgments and sentences for three counts of engaging a child in sexual activity. We affirm the appellant's conviction, however, two of the appellant's

APPENDIX PART 2

CERTIORARI, APPEAL OF A NON-FINAL ORDER PURSUANT TO RULE 9.130, OR APPEAL OF A FINAL ORDER?

BARFIELD and VAN NORTWICK, JJ., concur.

DEPARTMENT OF CORRECTIONS, Appellant/Cross Appellee,

v.

Linda MCGHEE, Appellee/Cross Appellant.

No. 93-3757.

District Court of Appeal of Florida, First District.

April 13, 1995.

Negligence action was brought against Department of Corrections by widow of man killed in Mississippi by Florida escapees. Judgment for plaintiff was entered in the Circuit Court, Leon County, P. Kevin Davey, J., DOC appealed. The District Court of Appeal, Wolf, J., held that: (1) Florida rather than Mississippi law applied to the issues of sovereign immunity and duty, and (2) DOC could not be held liable for criminal conduct of escapees.

Reversed with direction, and question certified.

Ervin, J., filed concurring and dissenting opinion.

1. Torts ⇐2

Under both Florida and Mississippi choice of law rule for tort cases, focus of significant contacts analysis is as to the particular issue which is to be decided rather than the case as a whole. Restatement (Second) of Conflict of Laws § 146.

2. States ⇐112.2(2)

In negligence action against the Florida Department of Corrections arising when escaped Florida prisoners killed plaintiff's decedent in Mississippi, Florida rather than Mississippi law applied to the issues of sovereign immunity and duty. Restatement (Second) of Conflict of Laws § 146.

3. Prisons ⇐10

Department of Corrections could not be held liable for criminal conduct of escapees.

Robert A. Butterworth, Atty. Gen., Laura Rush, Asst. Atty. Gen., Tallahassee, for appellant/cross appellee.

Jack W. Shaw, Jr. of Osborne, McNatt, Shaw, O'Hara, Brown & Obringer, P.A., Jacksonville, for Florida Defense Lawyers Ass'n, 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, AL, 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, Judge.

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*, 650 So.2d 658 (Fla. 1st DCA 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.

[1] 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).

[2] 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.

[3] 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., concurs and dissents with written opinion.

ERVIN, Judge, 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*, 650 So.2d 658 (Fla. 1st DCA 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 732 (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, because the facts clearly show, as discussed *infra*, that the DOC's conduct was operational.

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).

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

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

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

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 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*, 650 So.2d at 661. 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

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.

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.

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]

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."

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."

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 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 wheth-

er 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 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

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.

> 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.*, 249 Kan. 348, 819 P.2d 587 (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 McGhee 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*, 124 N.J. 90, 590 A.2d 222 (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*, 124 N.J. 90, 590 A.2d 222 (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.

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.

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).