IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC02-132

NELSON ROBLES and ANA ISAB- :
EL ROBLES, individually and as par-
ents of MARLON ROBLES, a minor, :

Petitioners, :

vs. :

METROPOLITAN DADE :
COUNTY, etc.,
:
Respondent.
_____________________________ :

ON PETITION FOR REVIEW OF A DECISION
FROM THE THIRD DISTRICT COURT OF APPEAL

MAIN BRIEF OF PETITIONER

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INTRODUCTION

This main brief is filed on behalf of the plaintiff appellants, Nelson Robles and Ana Isabel Robles, individually and as parents of Marlon Robles, a minor ("Robles"). The defendant appellee is Metropolitan Dade County ("County").

STATEMENT OF THE FACTS

In November 1995, a man later identified as Nicholas Sang boarded and commandeered a school bus carrying thirteen children with varying disabilities. Mr. Sang threatened the driver, an adult aide, and a parent on board, suggesting he was armed and potentially carrying a bomb, although neither a weapon nor bomb were ever visible or present in fact (R. 313-5).

At Mr. Sang's direction, the bus was driven from the Palmetto Expressway and Miller Drive up to the 836, and subsequently across to Miami Beach toward Joe's Stone Crab Restaurant. The police were advised of the bus "highjacking" and began monitoring its movement on the Palmetto. Negotiations by cell phone were ongoing between Metro-Dade and Mr. Sang on the trip over to Miami Beach. During the drive from the Palmetto to Joe's Stone Crab, the adult aide and parent were released (R. 313-5).

Officer Joe Derringer was a police "sharpshooter" stationed near Joe's Stone Crab to observe the bus on its way toward the restaurant. When the bus passed within thirty feet of Officer Derringer and stopped momentarily, Officer Derringer fired his rifle through a closed bus window, striking Mr. Sang and spraying glass and metal into the interior of the bus. Marlon Robles was one of the disabled children riding on the bus. He was struck in the head and body by flying glass and metal, causing the loss of vision in one eye (R. 313-5).

Michael Cosgrove is an experienced expert in police procedures, special response teams, SWAT units and crisis negotiation (T. 1-82). He testified, "this shooting was reckless and inconsistent with customary police practices." (T. 26). The bus had already traveled some distance and for an extended time under police

observation without incident or harm to any passenger; no weapon or bomb had been observed by any of the police officers, participants, or civilians involved; and negotiations were ongoing (T. 26-7).

The angled shot from a distance into the bus through glass and metal was anything but a “clean shot.” Marlon Robles was in the seat next to the window. Mr. Sang was either standing in the aisle or sitting in the aisle seat next to Marlon Robles (T. 31). It was highly likely and certainly foreseeable to Officer Derringer that children on the bus would be seriously injured when Officer Derringer discharged his firearm from a distance into the bus as it passed by him (T. 27-8, 30).

Had Mr. Sang had a weapon, or a bomb, he had ample unconstrained time to retaliate after being shot at. Over four minutes passed from the time Officer Derringer fired into the bus until the bus could be stopped and other police officers board it (T. 29). Depending on the type of bomb and the triggering device, the very act of shooting Mr. Sang could have caused a bomb to detonate automatically (T. 28).

When Officer Derringer made his unilateral decision to fire into the bus, Mr. Sang had already been on the bus for nearly an hour, a time when a large police contingency was actively involved and orderly negotiations were proceeding (T. 42-7). There was no compelling reason for Officer Derringer to fire when he did (T. 46). The

lack of any coordination caused other police officers who heard the shot to mistakenly believe that it was Mr. Sang that had opened fire (T. 41-2). The situation spun out of control as the bus moved away from Officer Derringer's position. Although he was unarmed, Mr. Sang was shot three times and killed by the officers who later rushed aboard the bus (T. 47). Officer Derringer's indiscriminate use of deadly force without backup or contingency plan was especially reckless.

STATEMENT OF THE CASE

Robles brought this action against Miami Dade County for the negligence of Officer Derringer in the reckless discharge of his firearm into the bus full of children as it passed his position, and in failing to have uniform standards and guidelines for the use of deadly force in a hostage situation (R. 1-44). Officer Derringer was given unbridled discretion to fire at will, without established backup in place or a settled contingency plan.

An unresolved motion for summary judgment was pending through trial and motions for directed verdict were denied at trial. The trial resulted in a hung jury, after which Miami Dade renewed its motion for summary judgment and motion for directed verdict. Relying on City of Pinellas Park v. Brown, 604 So.2d 1222 (Fla. 1992), and Seguine v. City of Miami, 627 So.2d 14 (Fla. 3d DCA 1993), the trial court

granted summary judgment post-trial (R. 313-8). The Third District affirmed, adopting portions of the trial court's order as its own. This Court accepted review.

The district court's express reliance upon City of Pinellas Park v. Brown, 604 So.2d 1222 (Fla. 1992), is a misapplication of the law and is reviewable by this Court. The district court's decision also conflicts with Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912, 920 (Fla. 1985).

ISSUE ON APPEAL

WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THERE WAS SUBSTANTIAL COMPETENT EXPERT TESTIMONY THAT THE POLICE POLICIES WERE INADEQUATE AND THE OFFICER'S MISCONDUCT WAS RECKLESS.

SUMMARY OF ARGUMENT

The police have always been held accountable for their handling of firearms during the course of their employment to enforce compliance with the law. Cf. Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912, 920 (Fla. 1985); Cleveland v. City of Miami, 263 So.2d 573, 578 (Fla. 1972); Scott v. City of Opa Locka, 311 So.2d 825, 826-27 (Fla. 3d DCA 1975). Officer Derringer's reckless discharge of his firearm into a bus full of children was an operational decision

subject to traditional tort liability, not a discretionary executive planning level public policy decision subject to sovereign immunity. Cf. City of Pinellas Park v. Brown, 604 So.2d 1222 (Fla. 1992); Kaisner v. Kolb, 543 So.2d 732, 737 (Fla. 1989); City of Miami v. De La Cruz, 784 So.2d 475, 478 (Fla. 3d DCA 2001).

ARGUMENT

The standard of review of a summary judgment in a negligence case is well settled. See, e.g., Moore v. Morris, 475 So.2d 666 (Fla. 1985) ("A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law"). Summarily granting the County sovereign immunity was an error of law reviewable as such de novo.

Shortly before deciding this case, the Third District addressed discretionary versus operational police actions in City of Miami v. De La Cruz, 784 So.2d 475, 478 (Fla. 3d DCA 2001), providing this analysis of the law:

> Officer Jimenez's actions of chasing a suspect through a crowd of people, on foot, were operational in nature and not immune from suit. In *City of Pinellas Park v. Brown,* 604 So.2d 1222 (Fla.1992), the supreme court found that the method chosen by police officers engaging in hot pursuit is an operational function that is not immune from liability if accomplished in a manner contrary to reason and public safety. *See also Kaisner v. Kolb,* 543 So.2d 732, 735-36 (Fla.1989) (holding that: "[w]here a defendant's

> conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." (citations omitted)). Although *City of Pinellas Park* involved a high-speed vehicular chase, we see no logical reason why the same analysis should not be applicable to the high-speed foot chase in this case.

There is likewise no logical reason why the same analysis should not apply to the police pursuit of Mr. Sang and the school bus he commandeered.

A recent federal decision on point is Lewis v. City of St. Petersburg, 260 F.3d 1260 (11th Cir. 2001), reversing in part, Lewis v. City of St. Petersburg, 98 F.Supp.2d 1344 (M.D. Fla. 2000). In Lewis, police officers shot through the windshield of a suspect's vehicle and killed him. Accepting the same argument and logic advanced by the County in this case, the trial court erroneously reasoned:

> The decision made [by the officers] to use deadly force . . . is exactly the type of discretionary decision which is protected by governmental immunity. On a daily basis, law enforcement officers encounter situations that require split second decisions to be made. A decision concerning whether to use deadly force is one of those split-second decisions that must be made. A law enforcement officer's decision to use deadly force, like a decision to provide or not provide police protection, is a discretionary decision that rests at the very heart of an officer's ability to protect all members of a society, including himself and other officers. [98 F.Supp.2d at 1351].

The Eleventh Circuit reversed. The officers were not exercising a "discretionary" function, but were engaged in an "operational" task. "In this case, the officers, having decided to stop Lewis, had an obligation to proceed with reasonable care." Lewis, 260 F.3d at 1265.

Governmental immunity derives entirely from the doctrine of separation of powers and protects the sovereign in the discretionary exercise of its power. See, Kaisner v. Kolb, 543 So.2d 732, 737 (Fla. 1989):

> [T]he term "discretionary" as used in this context means that the governmental act in question involved an exercise of executive or legislative power such that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning. [citation omitted]. An "operational" function, on the other hand, is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented.

Officer Derringer's decision to shoot at Mr. Sang as the bus passed by was not a "discretionary" public policy planning level decision entitled to sovereign immunity. His decision to shoot was an "operational" implementation of County policy, a secondary decision recklessly made. There is tort liability for this breach of the duty of due care in the handling of firearms. See, Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912, 920 (Fla. 1985):

> The lack of a common law duty for exercising a discretionary police power function must, however, be distinguished from existing common law duties of care applicable to the same officials or employees in the operation of motor vehicles or the handling of firearms during the course of their employment to enforce compliance with the law. In these latter circumstances there always has been a common law duty of care and the waiver of sovereign immunity now allows actions against all governmental entities for violations of those duties of care.

City of Pinellas Park v. Brown, 604 So.2d 1222 (Fla. 1992), holds the police accountable when their actions pose an unreasonable risk of harm to innocent bystanders. The decision fully supports Robles' claim in this case against the County for the reckless conduct of its police force. The trial court and the district court erred in granting the County immunity from liability based upon Brown, and a "Kaisner exception" as described therein.

> We agree that the actual execution of a hot-pursuit policy is entitled to a high degree of judicial deference consistent with reason and public safety. *Kaisner* specifically noted that special deference is given to pressing emergencies, and that certain police actions may involve a level of such urgency as to be considered discretionary and not operational. *Kaisner*, 543 So.2d at 738 n. 3. However, this does not mean that state agents can escape liability if they themselves have created or substantially contributed to the emergency through their own negligent acts or failure to adhere to reasonable standards of public safety.

> To fall within the *Kaisner* exception, the serious emergency must be one thrust upon the police by lawbreakers or other external forces, that requires them to choose between different risks posed to the public. (FN8) In other words, no matter what decision police officers make, someone or some group will be put at risk; and officers thus are left no option but to choose between two different evils. It is this choice between risks that is entitled to the protection of sovereign immunity in appropriate cases, because it involves what essentially is a discretionary act of executive decision- making.
>
> FN8. . . . What the police may not do is themselves needlessly exacerbate the danger to the public. Any danger a suspect poses to the public *solely on his or her own* cannot be imputed to the police who earlier have failed to make an arrest. [604 So.2d at 1226-7; emphasis by this Court].

The County is not entitled to the Kaisner exception because Officer Derringer needlessly exacerbated whatever danger Mr. Sang may have posed to the children on the bus, by shooting at him through the closed bus window. The trial court and the district court overlooked footnote eight.

Both Kaisner v. Kolb and City of Pinellas Park v. Brown, involved actionable operational activities in pressing emergency situations entitled to special deference – not complete immunity. The so called Kaisner exception is dictum found in both Kaisner and Brown. Kaisner, in footnote three merely speculates that an official response "to a serious emergency is entitled to great deference, and *may* in fact

reach a level of such urgency as to be considered discretionary (e.s.)." Kaisner gives no example of such an extreme emergency and contains no citation. Later, Brown cites Kaisner for this exception, but again gives no example and no other citation. This Court in Brown does however give an example of entitlement to special deference, an example more onerous than the facts found here.

> *Deference* will be shown to the *reasonable* decisions of law officers to maintain pursuit of certain offenders who are *reasonably* thought to be violent or to pose a danger to the public at large. *What is required is for police to use reasonable means in light of the nature of the offense and threats to safety involved.* For example, a high-speed chase is likely to be justifiable if its object is a gang of armed and violent felons who probably will harm others. [604 So.2d at 1227, e.s.].

Thus police must still use reasonable means, even when dealing with a gang of armed and violent felons who pose a probable danger to the public. Mr. Sang was mentally ill and unarmed. Here it is for the jury to decide whether shooting into the school bus was reasonable, in light of the threat to safety involved.

Both Brown and Kaisner hold that special deference is to be given in pressing emergencies. "[D]eference will be shown to police conduct when officers must choose between two different risks that both will adversely affect public safety." Brown, 604 So.2d at 1227-8. But special deference means nothing more than liberality

in the standard of care expected in an emergency situation. A pressing emergency and a choice of risk does not *per se* release the police from its duty of due care, or immunize police from tort liability. It is here where the district court was guilty of a misapplication of this Court's decision in Brown.

Car chases and police shootings are by their very nature "emergency" situations exposing the general public to danger – balanced against the countervailing danger to the general public from the criminal at large. Once the discretionary decision is made to pursue or otherwise engage the criminal, the operational implementation of the decision remains subject to traditional tort concepts.

Officer Derringer was not engaged "in a discretionary act of executive decision-making" when he opened fire. Discretionary executive decision-making occurred, if at all, when the police learned of the bus highjacking and decided to intervene. Everything thereafter was purely operational and subject to existing common law standards of reasonable care for the given circumstances. "Intervention of the courts in this case will not entangle them in fundamental questions of public policy or planning." Kaisner, 543 So.2d at 737-8.

For nearly one hour the police openly followed the bus and engaged in a dialogue via cell phone with Mr. Sang to negotiate the safe release of the children and

driver. Notably, the adult aide and parent were released without incident. The situation was headed toward a controlled, peaceful resolution when Officer Derringer, on his own accord, recklessly fired into the bus full of children. Objective, reasonable man negligence standards apply.

In its order granting summary judgment, the trial court justified Officer Derringer's actions as follows:

> At that time Officer Derringer observed Mr. Sang looking directly at him and making a sudden unexpected move with his hands. At that point, Officer Derringer feared for his own life and the life [sic] of the children on the bus and fired his weapon at Mr. Sang. [R. 315].

Officer Derringer's self-serving, uncorroborated testimony of his subjective fear raises jury issues of credibility inappropriate for resolution on summary judgment. Mr. Sang had been looking at police officers for nearly an hour and had been talking to them on a cell phone. The children had been on the bus with Mr. Sang for an hour without suffering physical harm.

Continuing fear for the children's well-being was no doubt present throughout the bus trip. But it was Officer Derringer who needlessly exacerbated the danger posed to the children by shooting at Mr. Sang through the closed window of the school bus. From the safety of his selected vantage point, any reactionary

subjective fear Officer Derringer may have had for his own life was irrational at best, if not purely hysterical, and wholly inappropriate for a trained police sharpshooter. His fears cannot justify his shooting into the bus full of children.

Although the police had been actively involved in resolving the situation for some time, the County tries to rationalize the shooting as a legitimate response to a sudden, unanticipated emergency. Even so,

> The presence or absence of a sudden emergency situation is a question of fact ordinarily to be decided by the jury. See *Scott v. City of Opa Locka*, 311 So.2d 825, 826-27 (Fla. 3d DCA 1975). So, too, is the issue of whether, under the circumstances, the defendant reacted to the situation in a prudent manner. *Cleveland v. City of Miami*, 263 So.2d 573 (Fla. 1972).

Wallace v. National Fisheries, Inc., 768 So.2d 17, 18-9 (Fla. 3d DCA 2000).

Both Scott and Cleveland coincidentally involve police shootings of innocent bystanders. Here, the County was entitled to an appropriate jury instruction on "sudden emergency" (as was given at trial), not a directed verdict or a summary judgment. See, Scott v. City of Opa Locka, 311 So.2d 825, 826-27 (Fla. 3d DCA 1975) (officer returning fire at fleeing felon shoots bystander; jury instructed on sudden emergency, "If you find that the officer did not act as a reasonable prudent police officer should act under the existing circumstances, then you should find for the

plaintiff"). See also, Cleveland v. City of Miami, 263 So.2d 573, 578 (Fla. 1972) ("It was up to the jury to determine whether the police officers acted as reasonable men under the emergency situation of being faced with possible sniper fire").

Here, as in Scott and Cleveland, it is for a jury to determine whether Officer Derringer acted as a reasonable man, a reasonable prudent police officer under the existing circumstances.

CONCLUSION

The Third District decision should be quashed, with direction to return the case to the trial court for trial on the merits.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served upon Thomas H. Robertson, Esquire, Assistant County Attorney, Office of the County Attorney, Miami-Dade County, Stephen P. Clark Center, Suite 2810, 111 N.W. First Street, Miami, Florida 33128-1993; and Charles B. Patrick, Esquire, Charles B. Patrick, P.A., 1648 South Bayshore Drive, Miami, Florida 33133, this 30th day of September, 2002.

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CERTIFICATE OF COMPLIANCE

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By__________________________

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