IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC02-132

NELSON ROBLES and ANA ISABEL ROBLES, individually and as parents 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

JURISDICTIONAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Others

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INTRODUCTION

This jurisdictional 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 CASE AND FACTS

Robles adopts by reference the District Court opinion.

SUMMARY OF ARGUMENT

The Third District holds that the County was summarily entitled to sovereign immunity against a claim of negligent discharge of a firearm by one of its

police officers. The District Court found as a matter of law that the decision to fire at a suspect in a school bus full of children was a choice between evils and as such was a discretionary act of executive decision making. 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 Decision of the District Court is also in direct conflict with 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.

JURISDICTIONAL ARGUMENT

Misapplication of a decision of this Court creates a conflict reviewable under Article V, Section 3(b)(3), Florida Constitution. See, Florida Department of Transportation v. Juliano, 801 So.2d 101, 103 (Fla. 2001); Vest v. Travelers Insurance

Company, 753 So.2d 1270, 1272 (Fla. 2000). See also, Arab Termite and Pest Control v. Jenkins, 409 So.2d 1039 (Fla. 1982) (misapplication of the rule announced in *Wackenhut v. Canty* regarding punitive damages); Spivey v. Battaglia, 258 So.2d 815 (Fla. 1972) (summary judgment ruling that unsolicited hug was an assault as a matter of law rather than a question of fact was a misapplication of assault/negligence precedent in *McDonald*); Pinkerton-Hays Lumber Company v. Pope, 127 So.2d 441 (Fla. 1961) (subjective application of the objective test of foreseeability was a misapplication of the law announced in *Cone*).

The police have always been held accountable for their handling of firearms during the course of their employment to enforce compliance with the law. See, Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d at 920, (quoted above at page 2); 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.

The District Court held as a matter of law that sovereign immunity bars Robles' claim that the police officer acted unreasonably when he fired into a school bus full of children, in a subjectively perceived emergency situation of being faced with an individual who might possibly be armed. To paraphrase this Court in Spivey v.

Battaglia, 258 So.2d at 817, "This is an unreasonable conclusion and is a misapplication of the rule in . . ." City of Pinellas Park v. Brown.

The officer's negligent (presumed for purposes of summary judgment and supported by expert testimony) 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 at 1227 (Fla. 1992); Kaisner v. Kolb, 543 So.2d 732, 737 (Fla. 1989). 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 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.].

Police must still use reasonable means, even when dealing with 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.

CONCLUSION

This Court should accept jurisdiction and on the merits quash the decision of the District Court.

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By 
James C. Blecke
Fla. Bar No. 136047

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 25th day of January, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with font requirements.

By _____
James C. Blecke
Fla. Bar No. 136047

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2001

NELSON ROBLES and ANA ISABEL ROBLES, individually and as parents of MARLON ROBLES a minor,

Appellant,

vs.

METROPOLITAN DADE COUNTY,

Appellee.

CASE NO. 3D01-347

LOWER TRIBUNAL NO. 96-20690

Opinion filed December 19, 2001.

An appeal from the Circuit Court for Dade County, Phillip Bloom, Judge.

Deutsch & Blumberg and James C. Blecke; Charles B. Patrick, for appellants.

Robert A. Ginsburg, Miami-Dade County Attorney, and Thomas H. Robertson, Assistant County Attorney, for appellee.

Before COPE, FLETCHER and RAMIREZ, JJ.

COPE, J.

This is an appeal of a summary final judgment in a personal injury action arising out of a school bus hijacking. A police

officer shot the hijacker and flying debris hit one of the children, causing the child to lose the eyesight in one eye.

The parents brought suit against Miami-Dade County on their own behalf and on behalf of the minor child. They alleged that the police officer was negligent in deciding to shoot the hijacker at that time. The trial court entered summary judgment in favor of the County and the plaintiffs have appealed.

We entirely agree with Judge Bloom that the County was entitled to summary judgment under the facts of this case. As explained by Judge Bloom's order:

> 1. In November of 1995 a man later identified as Nicholas Sang boarded a school bus and commandeered the school bus, in effect, hijacking it for his own purposes. At the time of commandeering the school bus, he made threats to the driver and to an adult aide and to a parent on board the school bus. Based on these threats, the adults on the school bus believed that Mr. Sang was armed and that he was potentially carrying a bomb or other explosive device.
>
> 2. At some point thereafter the police were notified of the bus hijacking, including the information concerning Mr. Sang being armed and the possible presence of an explosive device on the school bus. At the start of the hijacking there were 13 children with varying disabilities and 3 adults on board the bus; and at the end there were 10 children and 1 adult, not including the hijacker.
>
> 3. During the course of the bus hijacking, the bus drove from the Palmetto expressway and Miller Drive up to [State Road] 836 and subsequently across to Miami Beach where it went to the location of Joe's Stonecrab Restaurant.
>
> 4. During the time that the bus was driving from the Palmetto Expressway onto [State Road] 836 and over to the Joe's Stonecrab location, the hijacker released the bus

aide and the one parent held on the bus. Both of these people relayed to police that Mr. Sang had threatened them and one indicated that Mr. Sang was potentially armed with an explosive device.

5. Prior to the bus arriving at Joe's Stonecrab, Officer Joe Derringer, a police sharpshooter, set up at a location near the entrance to the restaurant so that he could observe the actions of Mr. Sang. After the bus arrived at Joe's Stonecrab it continued down the street to the location where Officer Derringer was set up and [stopped] within thirty feet of Officer Derringer. 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 life and the life of the children on the bus and fired his weapon at Mr. Sang.

6. As a result of having fired the shot, Mr. Sang was struck by the bullet. Plaintiff Marlon Robles was struck by glass or metal, which was debris thrown off by the gunshot and he was injured in his eye.

7. There is no contradiction concerning the facts of how this event occurred and the only conflicting testimony is the opinions of the experts as to whether or not the actions of Officer Derringer constituted negligence.

8. According to the testimony of Plaintiffs' expert, Michael Cosgrove, Officer Derringer's decision to shoot was negligence and he should not have fired his gun. Cosgrove agreed that there was nothing improper concerning Officer Derringer's choice of location, weapon or any other action on the part of Officer Derringer except his decision to fire his weapon at Mr. Sang. Cosgrove's testimony further asserted that the circumstances facing the police officer constituted and were a serious emergency which had been thrust upon the police by the lawbreaker, Mr. Sang; and that at the time of firing his weapon, Officer Derringer had to choose between different actions, each of which posed a potential threat to the public.

The Supreme Court of Florida in the case of City of Pinellas Park v. Brown, 604 So. 2d 1222 (Fla. 1992) set forth the standard that "certain police actions may involve a level of such urgency as to be considered

discretionary and not operational." City of Pinellas Park, 604 So. 2d at 1227. The Court went on to explain that the circumstances which would allow sovereign immunity to occur were such that 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. 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." Id. at 1227.

Affirmed.