w/o o/c.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION,

Petitioner,

vs. CASE NO. 64,464

PATRICIA L. BRYAN, as personal representative for JOSEPH DAVID BRYAN, Deceased,

Respondent.

_____/

ANSWER BRIEF OF RESPONDENT

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INTRODUCTION

Respondent, Patricia L. Bryan, will use the same references for the parties and the record on appeal as that used by petitioner, DBR.

STATEMENT OF THE CASE AND FACTS

Bryan adopts the statement of the case and facts set forth in the initial brief of petitioner at pages 2-7.

POINT I

DBR DOES NOT ENJOY SOVEREIGN IMMUNITY IN THIS CASE

Contrary to DBR's contention, the issue here is not one of an appellate court failing to follow the "trend" of the law. Rather, the First District's opinion is bottomed on this Court's decision in Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979). DBR asserts in its brief that the First District's opinion fails to follow Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982), and its companion cases. The First District, however, by no means ignored this Court's most recent decisions in the area of sovereign immunity. The appellate court opined:

> Unlike a number of recent cases, we do not deal here with a governmental entity's maintenance of traffic controls or its creation of a 'known dangerous condition' on government-owned property or property on which the governmental entity has a right-of-way or easement. See City of St. Petersburg v. Collom, [419 So.2d 1082 (Fla. 1982)]; Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982); Ingham v. State, Department of Transportation, 419 So.2d 1081 (Fla. 1982); Perez v. Department of Transporta-

tion, ____ So.2d _____ (Fla. 1983) (8 FLW 255)... .

The First District's conclusion that DBR does not enjoy sovereign immunity in this case was premised almost entirely upon Commercial Carrier and a common sense reading and construction of Chapter 399, Florida Statutes (1979).

While the appellate court noted that it found the application of the four-prong test set forth in Commercial Carrier to be not particularly well-suited to the facts of this case, the court nevertheless applied that test to its satisfaction as follows:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective? Assuming that this question asks whether Chapter 399 elevator inspections constitute a basic governmental policy, program or objective, we are inclined to answer this question in the affirmative. (2) Is the questioned act, omission, or decision essential to the realization or the accomplishment of that policy, program or objective as opposed to one which would not change the course or direction of the policy, program or objection? We believe that, regardless of whether this question contemplates (a) negligent inspection or (b) non-negligent inspection as the questioned act, omission or decision the question should be answered in a negative, and

> that, instead, it is one which would not change the course or direction of the policy, program or objective. Compare Bellevance v. State, 390 So.2d 422, 424 (Fla. 1st DCA 1980). (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? Most assuredly, in the day-to-day handling of inspections, judgment calls will have to be made by those conducting the inspections. However, we do not believe that the elevator inspections contemplated by Chapter 399 involve the kind of policy decisions or judgments to which this question is addressed. We, therefore, answer this question in the negative. (4) Does the governmental agency involved possess the requisite constitutional, statutory or lawful authority and duty to make the challenged act, omission or decision? We answer this question in the affirmative with the understanding that, properly translated, the question is whether DBR had the authority to inspect the elevators.

Very simply, application of the Commercial Carrier test to the facts of this case compels the conclusion that the umbrella of sovereign immunity does not cover DBR here. DBR's contention that the First District did not conduct the further inquiry, it was "required" to do is unavailing. This Court's decision in Commercial Carrier made it clear that no such further inquiry is required. This Court opined:

> If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

Commercial Carrier, supra at 1019, quoting from Evangelical United Bretheran Church v. State, 407 P.2d 440 (1965).

In finding that DBR's alleged wrongdoing was operational in nature, the First District relied upon a common sense reading of pertinent provisions of Chapter 399, the substance of which is set forth below (emphasis supplied):

1. The division shall adopt an elevator safety code. Section 399.02(2).

2. The division only shall have the power to grant exceptions or to permit the uses of other devices or methods as may be provided by the Elevator Safety Code. Section 399.02(3).

3. The owner or his duly appointed agent shall be responsible for the safe operation and proper maintenance of the elevator . . . after it has been approved by the division and placed in service. Section 399.02(6)(b).

4. Elevators, dumbwaiters, and escalators installed before July 1, 1971, may be used without being rebuilt to

comply with the requirements of the Elevator Safety Code; provided, however, all such elevators shall be maintained in a safe operating condition and shall be subject to inspections and tests required by Section 399.08. Section 399.03(3)

5. Every inspector shall forward to the division a full report of each inspection made of any elevator . . . showing the exact condition of the said elevator. Section 399.06(1).

6. If any elevator be found which, in the judgment of an inspector, is dangerous to life and property, . . . such inspector may require the owner or user of such elevator to discontinue its operation, and the inspector shall place a notice to that effect conspicuously on or in such elevator . . . [Where] an elevator has been placed out of service, the owner or user of such elevator shall not again operate the same until repairs have been made and authority given by the division to resume operation of the said elevator. Section 399.06(2).

7. A certificate shall be issued by the division where inspections and tests as required by Section 399.05 show that elevators are installed in accordance with the requirements of this chapter. Section 399.07(1).

8. Elevators as defined under Section 399.01 shall be inspected by an inspector at least one each calendar year. Section 399.08(1).

9. Whenever the division shall, from inspection of an elevator, determine that in the interest of the public safety such elevator or any part or appliance thereof, is out of order and in an unsafe condition contrary to the requirements of this chapter, the division shall have the power to order the discontinuance of the use of any such elevator. . . . Section 399.08(2).

10. The division shall certify the inspection of each elevator which, after inspection, is judged to be in conformity with the requirements of this chapter. Section 399.08(3).

11. It shall be the duty of the division to enforce the provisions of this chapter. Section 399.10.

The aforementioned statutory duties and responsibilities of DBR are self-explanatory. It cannot be contended seriously by DBR that its duties are effectively only that oversight. Rather, DBR has numerous mandatory duties pursuant to Chapter 399, including that it must insure that all elevators are in a safe operating condition. DBR's contention that

it should not be "burdened" with the duty of properly inspecting "every one of the tens of thousands of elevators in the State of Florida" simply ignores the plain reading of Chapter 399 and attempts to confuse the issue here with protestations that "the sky is falling."

DBR's reliance upon Neumann v. Davis Water and Waste, Inc., 433 So.2d 559 (Fla. 2d DCA 1983), Everton v. Willard, 426 So.2d 996 (Fla. 2d DCA 1983), and Carter v. City of Stuart, 433 So.2d 669 (Fla. 4th DCA 1983) is misplaced.

Neumann, Everton, and Carter, are all "police power" cases. None of the three decisions turned on the question of whether the state agency violated a statutory duty to inspect and certify. On the other hand, the First District's opinion here is replete with references to various portions of Chapter 399, wherein DBR was statutorily required to insure that this elevator was in a safe operating condition.

For example, Neumann is readily distinguishable from this case. In affirming the lower court's dismissal of the complaint against DER, the Second District reasoned:

> The most important factor to consider is that by imposing rules and regulations and deciding when and where or what to expect, DER is exercising the police

> power of the state, a purely governmental function which historically has enjoyed immunity from tort liability [citations omitted]. If we were to hold DER liable here we would, by analogy be requiring a law enforcement officer to be posted on every street corner. Anytime a crime or other violation of law resulted in injury to person or property, a judge or jury would have to second guess the reasonableness or adequacy of the police action.

(Emphasis supplied.)

On the contrary, Chapter 399 does not permit DBR to "decide when and where or what to inspect." Rather, as specifically noted by the appellate court, Chapter 399 requires DBR to inspect all elevators each calendar year.

Everton is no different from Neumann. Everton involved a decision by a deputy sheriff to release an intoxicated motorist. Again, this "police power" concern is essentially like that which was the subject of Neumann. In Neumann, as noted above, the court, in affirming the dismissal of the complaint, opined that to do otherwise would "be requiring a law enforcement officer to be posted on every street corner." The decision in Everton may be similarly described.

Carter merely dealt with a city's alleged failure to enforce an ordinance governing dangerous dogs running

at large. The ordinance was to be enforced by the impoundment of such a dog by an officer of the City of Stuart or by a city police officer. Again, like Neumann and Everton, Carter involved a "police power" concern.

Neumann, Everton, and Carter are each "police power" cases wherein no statutory duty to act was at issue. This case is markedly different. Accordingly, there is simply no basis for DBR to contend that the three cases are governing here.

DBR's contention that Trianon Park v. City of Hialeah, 423 So.2d 911 (Fla. 3rd DCA 1983) is different from this case is without merit. DBR contends that its elevator inspectors are under no duty to insure the safety of the elevators they inspect. By making such a bold statement, DBR completely ignores the plain meaning of Chapter 399, and the First District's emphatic finding of duty on its part. Further, to contend that elevator inspectors need not be concerned with the safety of elevators, necessarily causes one to wonder just what it is they are supposed to do.

DBR seems to believe that the statute at issue in Trianon is so different than Chapter 399 that the result

reached by the Third District is not persuasive. However, DBR overlooks Section 533.80(3), Florida Statutes (1981), which statute provides in pertinent part:

> At its own option each enforcement district or local enforcement agency may promulgate rules granting to the owner of a single-family residence one or more exemptions from the State Minimum Building Codes relating to (a) addition, alteration, or repairs performed by the property owner upon his own property, provided any addition or alteration shall not exceed 1,000 square feet or the square footage of the primary structure, whichever is less; (b) addition, alteration or repairs by a nonowner within a specific cost limitation set by rule, provided the total cost shall not exceed $5,000 within any 12-month period; (c) building and inspection fees.

(Emphasis supplied.)

Thus, the fact that DBR or the City of Hialeah building inspectors need not strictly enforce each and every provision of the applicable code is simply not dispositive of this case.

Finally, Bryan respectfully believes this Court should not rely upon the dissenting opinion in the case of the Manors of Inverrary, XII Condominium Association,

Inc. v. Atreco-Florida, Inc., 438 So.2d 490 (Fla. 4th DCA 1983), which is discussed in detail in DBR's brief.

Bryan refers this Court to the recent case of Huhn v. Dixie Insurance Company, ____ So.2d ____ (Fla. 5th DCA, May 17, 1984), wherein the Fifth District Court of Appeal reached a decision that it believed to be in direct conflict with Everton. In Huhn, the issue was whether the City of Daytona Beach should enjoy sovereign immunity for the actions of its police officers who stopped a visibly intoxicated driver who was operating his motor vehicle in a careless and reckless fashion, but who did not arrest or otherwise detain the driver. Rather, the police permitted him to continue operating the motor vehicle such that shortly thereafter and while still intoxicated, he ran into and caused injury to an innocent third party. The court determined that sovereign immunity did not shield the City of Daytona Beach and reversed the trial court's dismissal of the complaint, reasoning:

> In deciding which of several available methods he could use to get Collins off the streets, this was not the exercise of a discretionary governmental function. Rather the officer was implementing policies established by the legislature of the State of Florida for the protection

of the citizens of this state. The determination of strategy and tactics for the deployment of police powers does require the exercise of discretionary governmental functions and in such cases immunity should be the rule. However, a police officer who actually stops a visibly intoxicated driver can not be furthering any legitimate governmental policy when the officer decides to not enforce the law, and turns the driver loose. Collins was intoxicated and visibly unfit, because of his alcohol consumption, to be operating a motor vehicle, and the police officer who stopped him observed and knew of this condition. On the basis of this knowledge, there was no 'policy-making, planning or judgmental governmental function' to be performed by the police officer. Although the police officer had some discretion in how he would handle the matter, his duty was plain (and operational) -- he could not turn this drunken driver loose on the streets. An intoxicated and impaired driver on the street is an 'accident looking for a place to happen.' The danger involved to everyone on the streets when an intoxicated driver is on the loose is so apparent and obvious that everyone should know of it. We are not dealing with a claim of liability because of the <u>failure</u> to the police to apprehend a drunken driver who later causes injury to some one lawfully using the streets. Rather, we deal with a situation where the driver was stopped and his drunken and unfit condition was apparent to the officer. Under these circumstances, it can hardly be argued that the ultimate accident and injury was not foreseeable. (emphasis in original.)

The court opined further:

> Because the complaint alleged that the police officers knew Collins to be intoxicated yet failed to detain or arrest him, there was little room for discretion which would warrant a finding of immunity. The legislature has enacted statutes designed to keep intoxicated drivers from operating motor vehicles, and it is the responsibility and duty of the police department to carry out such policies. The citizens of this state would be illserved if we were to afford police officers immunity when they encounter drivers who unquestionably are impaired to the point where they cannot operate a vehicle safely, yet fail to detain or arrest such individuals or otherwise get them off the streets. At that point the police officer is merely implementing policy by enforcing the laws, and cannot be said to be exercising a discretionary governmental function.

Just as the police officers in Daytona Beach have duties and responsibilities pursuant to statute, so does each and every elevator inspector employed by DBR. DBR elevator inspectors exercise no discretion in determining whether a violation of the elevator code exists. For example, the elevator inspector needs only determine that the side emergency exit door obstructs access to the elevator - he then automatically determines that a violation of the elevator

code exists. While DBR seeks to place the blame on "owners" or other third parties, the simple fact is that owners of elevators are simply not sophisticated as to the inner workings of elevators. As such, owners and others rely upon DBR and its elevator inspectors to conduct timely and accurate elevator inspections. The subject elevator was inspected several months prior to the accident by DBR, yet no violations of the elevator code were noted. In fact, many violations of the elevator code existed at that time, as is set forth in detail in the amended complaint. The First District found these elevator inspections to be operational in character. The First District's decision should be affirmed.

POINT II

THE FIRST DISTRICT WAS CORRECT IN REVERSING THE TRIAL COURT'S DISMISSAL OF THE AMENDED COMPLAINT

The opinion of the First District sets forth in great detail the facts alleged by Bryan in her amended complaint, together with many pertinent provisions of Section 399. DBR's protestations aside, the First District categorically concluded that DBR owed a duty to the decedent and that the amended complaint contains sufficient factual allegations such that a jury could properly conclude that DBR had breached its duty to the decedent. The First District specifically reasoned:

> There can be no question that DBR had the duty to periodically inspect the subject elevator to determine whether it was in safe condition and to order that its operation be discontinued if determined unsafe. Moreover, an obvious purpose for such inspections and certifications was to protect the users, including decedent, from unreasonable risk of injury caused by an unsafe elevator. As previously indicated, since the subject elevator was installed prior to July 1, 1971, Section 399.03(3), provided that it could be used 'without being rebuilt to comply with the requirements

> of the Elevator Safety Code.' However, this does not mean that DBR was excused from inspecting and testing pre-1971 elevators to assure safe operation condition inasmuch as such was expressly required by Section 399.03(3).

An examination of that which was before the trial court and the case law with respect to dismissals of complaints compels the conclusion that the First District properly reversed the trial court's dismissal of the amended complaint.

On June 24, 1981, plaintiff filed the complaint against DBR and others (R-1-24). By order dated October 15, 1981, the lower court dismissed the complaint as to DBR without prejudice (R-34-35).

On October 16, 1981, plaintiff filed an amended count IX against DBR (R-36-46). DBR answered amended count IX on October 26, 1981 (R-47-53).

It later became clear to plaintiff, however,, that the complaint required amending to, inter alia, add additional parties. At a hearing on January 22, 1982, the following colloquy was reported:

> MR. DUFFY: Now, one thing, Your Honor, and this is in the nature of Ore Tenus Motion For Leave to Amend is that in connection with the motions to dismiss

the punitive damages counts, certain of these relate back to the main body of the complaint. And what we would ask is -- and since we're going to have to amend to add in the insurance carriers, we would ask for permission from the Court to amend as to the entire complaint in filing them.

THE COURT: I will tell you now not only will that be granted, but it will be required. There is no way for me to through this file in an intelligent fashion, which is already three volumes full, wherein [sic] one file I've got an amendment to Count this, and in another [sic] file I've got an amendment to Count something else.

I realize that that's an imposition, but whenever there is an amendment, especially in the basic pleadings, like an amendment to a cross-claim or counter-claim or third party action, or to the prime complaint, I will request and I won't say require, but I will take an extremely dim view of anything that is not the complete pleading, so that it can be marked and it can be easily examined. And I'm sure that that's the same with all counsel. Nothing is more frustrating than to have to keep in mind five or six different pleadings and trace your way through them.

So anytime there is an amendment, I would be deeply appreciative if it would be just a complete recounting of the complaint with all counts. And that will keep it in one basic documents, and then everybody will know what was the complaint. When we get several months down the road, we won't have

to refer to two or three or four documents to try to reconstruct what the complaint is upon which issue will finally be joined.

MR. DUFFY: And in the court of doing that, the reason I raised this, is because I may want to make some modifications in it pertaining to defendants other than Otis and Montgomery, and ask permission from the Court to do that.

THE COURT: Such as?

MR. DUFFY: Well, such as -- really, the only thing we need to do is give them a better specification as to what we believe to be the negligence here. And a little bit more of a statement as to that since the initial complaint was followed through on the amendments, I think we have a better feel for what the --

THE COURT: I don't think you're going to find me getting a bad case of heartburn on something that clarifies this case.

MR. DUFFY: Okay.

MS. SCOTT: How does that affect the remaining defendants, though, who have already answered what he's already plead?

THE COURT: I think you would want to examine that any maybe file an answer to the amended complaint. And if you do, then I would really appreciate it if you would follow the same type of pleading senario. And that is, although you may only change two or three elements of your answer, then I would like to get a complete regurgitation of the

answer, especially when you get down to pre-trial levels.

THE COURT (cont'd): And that is, you say, okay, where did we finally end up with the final pleadings in this case with respect to the complaint, the respective answers of all the parties, cross-claims and the like. And you know, just say here is the final answer of the Board of Regents, instead of saying, well they answered the first complaint over here and then there was some modifications, so somewhere in this multi volumes is something called a supplemental answers to amended complaint. And then you've got to find it. So, if there are any changes in the complaint to which you desire to respond -- you may find that well, with respect to that paragraph,, we filed a denial of it. Looking at it, we still deny it. You know, they may file something that you admit, and with review of it, you still admit it. You may not want to or need to change it. I would think right off the top of my head that you may be thinking more in terms perhaps of affirmative defenses than actual admissions or denials with respect to what might be forthcoming in an amended complaint. And if you do that, then I still would like to have, as I say, a regurgitation of the answer, and then the incorporation of whatever additional affirmative defenses you might want. So we can get out with one basic response of your client and will know exactly what position they're assuming.

MS. SCOTT: Thank you.

(R-217-221). (Emphasis supplied.)

Thus, the trial court, upon an inquiry counsel for DBR as to how DBR should respond to the amended complaint, was of the view that "you would want to examine that and maybe file an answer to the amended complaint." (R-219).

On March 18, 1982, plaintiff filed the amended complaint, which was substantially redrafted and restructured with information discovered since the filing of the complaint (R-56-115). Rather than answering again, DBR chose to move to dismiss the amended complaint (R-116-118), apparently of the view that the amended complaint alleged different facts and a somewhat different cause of action that than previously set forth in amended count IX (R-163).

At a hearing on May 4, 1982, the trial court announced its intention to dismiss the amended complaint with prejudice as to DBR. By order filed May 11, 1982, the court held:

> [t]he Department of Business Regulation's motion to dismiss the Amended Complaint for failure to state a cause of action for negligence be and the same is hereby granted, without reaching the issue of sovereign immunity raised by the Defendant, and the Amended Complaint is hereby dismissed with prejudice as to the Defendant, State of Florida Department of Business Regulation.

(R-167-168).

Prior to the entry of that order on May 7, 1982, plaintiff filed a Motion For Leave To Amend as to DBR (R-158-162). DBR responded on May 10, 1982 (R-163-166).

On May 20, 1982, plaintiff filed a Motion for Rehearing and Supplement to Motion for Leave to File Second Amended Complaint as to DBR (R-169-197). Attached thereto was a proposed second amended complaint which, as to DBR, was in substantially the same form as amended count IX. As set forth above, DBR had previously answered amended count IX. DBR responded to plaintiff's Motion for Rehearing on May 25, 1982 (R-198-200).

By order filed June 10, 1982, the lower court refused to consider plaintiff's proposed second amended complaint as to DBR (R-201).

In view of the law regarding liberality in granting leave to amend complaints, the appellate court correctly reversed the trial court's order denying plaintiff leave to amend as to DBR.

Rule 1.190, Florida Rules of Civil Procedure, provides in pertinent part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served. . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires.

Florida court have consistently held that leave of court is to be freely granted so that cases may be resolved on the merits. Ellis v. State, 436 So.2d 342 (Fla. 1st DCA 1983); Joseph Bucheck Construction Corporation v. W. E. Music, 420 So.2d 410 (Fla. 1st DCA 1982), pet. for rev. denied, 429 So.2d 6 (Fla. 1983). In Affordable Homes, Inc. v. Devil's Run, Limited, 408 So.2d 679, 680 (Fla. 1st DCA 1982), the court reversed a trial court's dismissal of an amended complaint with prejudice, opining:

> However, the trial court abused its discretion in dismissing the Complaint with prejudice. Generally, the trial court will give leave to amend a deficient complaint unless there has been an abuse of the complaint privilege, or the complaint shows on its face that there is a deficiency which cannot be cured by amendment.

It can hardly be said that plaintiff abused the amendment privilege as to DBR. Even if the amended count

IX should "count" as an attempt by Bryan, it is nevertheless clear that the trial court abused its discretion by refusing to even consider the second amended complaint. In Orange Motors of Coral Gables, Inc. v. Rueben H. Donnelly Corporation, 415 So.2d 892, 895 (Fla. 3d DCA 1982), the Third District Court of Appeal reversed a trial court's dismissal of a second amended complaint reasoning:

> Amendments to pleadings should be freely allowed . . . until the privilege has been abused. While it has been held that three attempts to amend the complaint are enough, see Alvarez v. DeAguirre, 395 So.2d 213 (Fla. 3d DCA 1981), the plaintiff has amended his complaint as to this defendant only one time. We find that there would be no prejudice at this early stage in the proceedings in allowing the plaintiff another opportunity to amend." (Emphasis supplied.)

See Florida Gas Company v. Arkla Air Conditioning Company, 260 So.2d 220 (Fla. 1st DCA 1982) (three attempts to amend are enough; dismissal upheld because plaintiff given four attempts to state a cause of action); Highlands County School Board v. K. D. Hedin Construction, Inc., 328 So.2d 90 (Fla. 2d DCA 1980) (dismissal with prejudice reversed because plaintiff given only one opportunity to amend.)

In short, Bryan submits that there was no abuse of the amendment privilege and, very simply, the trial court abused its discretion in precluding a further amendment of the complaint as to DBR.

The First District's order reversing the trial court should be affirmed.

CONCLUSION

DBR is not entitled to sovereign immunity here. In addition, the amended complaint states a cause of action against DBR in negligence.

The decision of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to David M. Maloney, Esq., Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida 32301, E. Harper Field, Esq., Post Office Box 1879, Tallahassee, Florida 32302, William Hall, Esq., Assistant State Attorney, Suite 1502, The Capitol, Tallahassee, Florida 32301, and Bruce S. Bullock, Esq., Suite 703, Blackstone Building, Jacksonville, Florida 32202, and Vincent Philip Nuccio, Esq., 3839 West Kennedy Boulevard, Tampa, Florida 22609, this 4th day of June, 1984.

Attorney