IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION,

Petitioner,

vs.

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

Respondent.

CASE NO. 64,464

INITIAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

INTRODUCTION

The Petitioner, Department of Business Regulation, Appellee in the District Court of Appeal, and Defendant in the trial court, will be referred to as DBR or Petitioner. Respondent, Patricia L. Bryan, Appellant in the District Court of Appeal, Plaintiff in the trial court, will be referred to as Bryan, Respondent or Plaintiff.

References to the Record-On-Appeal will be designated by "(R-)" and will contain the appropriate page number.

The Citation of the opinion of the District Court of Appeal is Bryan v. State, Department of Business Regulation, 438 So.2d 415 (Fla. 1st DCA 1983).

STATEMENT OF THE CASE AND FACTS

The following statement accepted by DBR in its Answer Brief in the District Court of Appeal was made by Bryan in her Initial Brief below:

"This is a wrongful death action originally brought against several defendants, one of which DBR, is now before this Court because of the lower court's dismissal of the Amended Complaint with prejudice (R-201).

On the evening of October 25, 1979, Bryan and Timothy E. Schomer ("Schomer"), students at Florida State University and residents of Smith Hall, entered elevator no. 2270 ("the elevator") at the third floor of Smith Hall, intending to travel to the ninth floor (R-58). Bryan and Schomer were the only passengers in the elevator (R-58).

After going first to the lobby level in an apparent response to an earlier call, the elevator proceeded upward to the ninth floor. As the elevator passed the sixth floor landing, it stalled at a point approximately six feet above the hall floor (R-3, 59). Neither Bryan nor Schomer had pushed the stop button on the elevator's control panel (R-3).

The legal cause of the elevator's abrupt stalling was alleged as follows: As the elevator passed the sixth floor, Bryan leaned forward while holding onto the car's handrails, one of which was attached to both the left wall and the left.

side emergency-exit door, while the other was attached to the elevator's rear wall (R-59). The forward movement caused the left handrail to move slightly inward and away from the left wall. However, the exit door was not latched so it moved away from the left wall and slightly inward with the handrail (R-59). The emergency-exit door's inward movement broke the electrical contacts located in the elevator's electrical circuit box on the other side of the left wall and the elevator abruptly stalled (R-59).

Bryan and Schomer waited several minutes for the elevator to begin moving again. Periodically, the car made brief movements upward and downward, but never for more than a few seconds. (R-59). The emergency-exit door appeared to be completely closed when in fact it was not. Thus, the elevator sporadically moved by virtue of brief remaking and rebreaking of the electrical contacts when the exit door moved slightly inward or outward (R-59).

When it appeared that the elevator could not be restarted, Bryan opened the car doors and hoistway doors and attempted to exit from the stalled elevator (R-60). However, he lost his balance as he hit below on the sixth floor landing, which caused him to fall backward through the hoistway opening beneath the elevator and down approximately seventy feet into the elevator pit (R-60). Bryan sustained massive injuries from which he died the following day, October 26, 1979, at Tallahassee, Memorial Regional Medical Center (R-60).

On June 24, 1981, Patricia L. Bryan, as personal representative of Bryan's estate, filed her Complaint against Otis Elevator Company, the designer, manufacturer, and installer of the elevator; The Board of Regents, State of Florida, the owner and operator of Smith Hall and the elevator; Montgomery Elevator Company, under contract with the Board of Regents to maintain the elevator in a safe working condition; and DBR, an agency of the State of Florida required by law to inspect the elevator (R-1-22).

On July 24, 1981, DBR filed its motion to dismiss or for more definite statement (R-23-24). By Order dated October 15, 1981, the lower court dismissed the Complaint as to DBR without prejudice (R-34-35).

Plaintiff filed Amended Count IX against DBR on October 16, 1981 (R-36-46). DBR answered Amended Count IX on October 26, 1981 (R-47-53).

On January 22, 1982, a hearing was held before the lower court at which it became clear that plaintiff would be required to amend the Complaint by adding additional parties (R-217-221). The court below granted plaintiff's ore tenus motion for leave to file an amended complaint as to all defendants (R-54-55).

Plaintiff filed the Amended Complaint on March 18, 1982 (R-56-115). DBR moved to dismiss or strike the Amended Complaint, or for a more definite statement, on April 7, 1982 (R-116-118).

At a hearing on May 4, 1982, the lower court announced that it would dismiss the Amended Complaint with prejudice only as to DBR. DBR was dismissed with prejudice by Order filed May 11, 1982 (R-167-168).

On May 7, 1982, after the lower court's oral ruling but before its written Order dismissing DBR with prejudice, plaintiff filed a Motion for Leave to Amend as to DBR (R-158-162), in an effort to more artfully plead as to DBR, since DBR had, in fact, previously answered Amended Count IX (R-47-53). DBR responded on May 10, 1982 (R-163-166).

Further, on May 22, 1982, plaintiff filed a Motion for Rehearing and Supplement to Motion for Leave to File Second Amended Complaint as to DBR, wherein plaintiff sought review of the lower court's dismsisal of the Amended Complaint with prejudice as to DBR. Attached thereto was a Proposed Second Amended Complaint (R-169-197). DBR responded on May 25, 1982 (R-198-200).

By Order filed June 10, 1982, the lower court denied Plaintiff's Motion for Leave to Amend as to DBR and also denied Plaintiff's Motion for Rehearing and Supplement to Motion for Leave to File Second Amended Complaint as to DBR (R-201). It is this Order from which Bryan appeals. Bryan's Notice of Appeal was timely filed on June 24, 1982 (R-253-255)."

Bryan's Initial Brief, First
District Court of Appeal,
p. 2-5.

The main briefs below addressed whether the dismissal of the Amended Complaint by the trial court, for failure to state a cause of action, was proper. The First District ordered that supplemental briefs be filed addressing another issue: whether DBR was entitled to an affirmance of the trial court's order of dismissal for governmental immunity from the negligence alleged in the Amended Complaint, i.e., whether DBR enjoys sovereign immunity in this case.

The court issued its Opinion on September 12, 1983. Bryan v. State, 438 So.2d 415 (Fla. 1st DCA 1983). The pertinent facts are stated in the Opinion. Id. at 416-417. The court concluded that the Amended Complaint was sufficient to state a cause of action in negligence against DBR. Id. at 419. Further, the court concluded, based on the test in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), that DBR was not entitled to sovereign immunity:

> [7] After thoroughly reviewing Commercial Carrier and its progeny, it is apparent to us that the elevator safety inspections and certifications required by the applicable statutory provisions for the protection of elevator users cannot reasonably be held to be the kind of policy-making, planning or judgmental governmental functions which our Supreme Court says are excepted from the legislature's broad waiver of sovereign immunity mandate expressed in Section 768.28.
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> 438 So.2d at 421.

DBR petitioned this court to accept discretionary jurisdiction for conflict with three decisions of other district courts: Everton v. Willard, 426 So.2d 996 (Fla. 2nd DCA 1983); Neumann v. Davis Water and Waste, Inc., 433 So.2d 559 (Fla. 2nd DCA 1983); and Carter v. City of Stuart, 433 So.2d 669 (Fla. 4th DCA 1983). On April 23, 1984, this Court accepted jurisdiction and dispensed with oral argument.

This brief will address both the issue of sovereign immunity, upon which this Court's discretionary jurisdiction is exercised, and the other issue addressed by the First District: Whether the Amended Complaint was properly dismissed by the trial court for failure to state a cause of action in negligence.

ARGUMENT

INTRODUCTION

This case is among the second wave* of cases to reach this court presenting sovereign immunity issues in the wake of Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). The first wave of cases, numbering six, led to a trilogy of opinions in 1982: Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982); Ingham v. State, 419 So.2d 1081 (Fla. 1982); and City of St. Petersburg V. Collom, 419 So.2d 1082 (Fla. 1982).

In this brief DBR will argue that the First District, in its opinion below, failed in its application of Commercial Carrier, because in applying the four-pronged test borrowed from Evangelical United Brotheren Church v. State, 67 Wash. 246, 407 P.2d 440 (1965), it did not

* Among the cases are Trianon Park Condominium Association, Inc. v. City of Hialeah, 423 So.2d 911 (Fla. 3rd DCA 1983), now pending before this Court, Sup.Ct. Case No. 63,115; Neumann v. Davis Water and Waste, Inc. 433 So.2d 559 (Fla. 2nd DCA 1983), rev. den. 441 So.2d 632, (Fla. 1983); The Manors of Inverrary XII, Condominium Association, Inc. v. Atreco-Florida, Inc., 438 So.2d 490 (Fla. 4th DCA 1983), rev. dism. ___ So.2d ___, Everton v. Willard, 426 So.2d 966 (Fla. 2nd DCA 1983), now pending before this Court, Sup.Ct. Case No. 63,440; and Carter v. City of Stuart, 433 So.2d 669 (Fla. 4th DCA 1983), Sup. Ct. Case No. 64,001.

conduct the further inquiry required to establish that the state governmental entity is not immune from suit.

This brief will also argue that the First District ignored the trend of this court, expressed in Neilson, Ingham and Collom, to restrict the legislature's waiver in section 768.28(1), Florida Statutes of sovereign immunity for governmental liability for torts. Further, this brief will attempt to reconcile the conflict, upon which this Court's jurisdiction is based, between the First District in this case, which fails to follow the Nielson trilogy trend, and the Second and Fourth Districts, which in DBR's view, do observe the trend in Neumann v. Davis Water and Waste, Inc., 433 So.2d 559 (Fla. 2nd DCA 1983) rev.den. 441 So.2d 632, (Fla. 1983), Everton v. Willard, 426 So.2d 966 (Fla. 2nd DCA 1983); and Carter v. City of Stuart, 433 So.2d 669 (Fla. 4th DCA 1983).

This brief will also address the approach of the Third District in Trianon Park Condominium Association, Inc. v. City of Hialeah, 423 So.2d 911 (Fla. 3rd DCA 1983), now pending before this court, and the approaches of the three opinions written by the Fourth District in The Manors of Inverrary XII Condominium Association, Inc. v. Atreco Florida, Inc., 438 So.2d 490 (Fla. 4th DCA 1983). This case shares with those two cases the aspect that the alleged governmental tort is

negligence in inspection, in this case state inspection of an elevator, in Trianon and The Manors of Inverrary, municipal inspections of buildings. The brief will argue that a decision by this court in Trianon, that the City of Hialeah enjoys sovereign immunity for building inspections, will mandate a reversal of the First District in this case.

This brief will try to weave into the argument, the many themes within the issue of sovereign immunity, primarily DBR's discretionary exercise in this case of police power, the constitutional separation by powers doctrine as a fundamental basis for restricting the legislative waiver of sovereign immunity for torts, an analysis of the waiver statute, itself, and the application of the "discretionary-judgmental-planning" v. "non-discretionary-implementation-operational" dichotomy.

Finally, the brief will analyze the pertinent parts of Chapter 399, Florida Statutes, the "Elevator Law," and will conclude, even if Trianon is affirmed by this court, that the trial court properly dismissed the complaint. The conclusion will rest, not on sovereign immunity, but on the amended complaint's failure to state a cause of action in negligence. The amended complaint does not state a cause of action, nor should it have, because the Legislature did not place on DBR, the duty to ensure the safety of elevators in Florida. That duty remains on the elevator owner or his agent and the "Elevator Law" so states.

POINT I

DBR ENJOYS SOVEREIGN IMMUNITY IN THIS CASE.

A. Commercial Carrier

A preliminary question before the Supreme Court in Commercial Carrier, was the scope of the waiver of sovereign immunity in Section 768.28, Florida Statutes:

> (1) Actions at law against the state or any of its agencies or subdivisions to recover damages against the state or its agencies or subdivisions for injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.
>
> (5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period prior to judgment. . . . [e.s].

While the governmental defendants argued that there is no waiver under the statute where any governmental functions were involved because private individuals do not perform governmental functions, the private plaintiffs argued that the waiver is total because, unlike the Federal Tort Claims Act, there is no express exception for discretionary acts.

Citing to several decisions of other jurisdictions, including Weiss v. Fote, 7 N.Y.2d 579, 200 N.Y.S. 2d 409, 167 N.E. 2d 63 (1960), and to its own decision in Wong v. City of Miami, 237 So.2d 132 (Fla. 1970), this Court struck a middle ground, based on the constitutional scheme of separation of powers:

> [9] So we, too, hold that although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain 'discretionary' governmental functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance.

The Court then adopted the analysis of Johnson v. State, 69 Cal.2d 782, 73 Cal.Rptr. 240, 447 P.2d 352 (1968) which distinguishes between immune "planning," and non-immune "operational" levels of decision-making by governmental agencies. To assign to each governmental function its place under one type of function or the other this Court "commended" the test of Evangelical United Bretheren v. State, above. Commercial Carrier at 1022.

It is the test of Evangelical United Bretheren as set forth in Commercial Carrier that the First District applied in this case. In so doing, however, the First District misapplied the test as fully explained in Commercial Carrier.

This Court commended the test as a preliminary one unless all four questions of the test can be answered affirmatively. If so, the inquiry ends and the governmental

entity is found immune. If not, however, i.e., if any of the four questions is answered in the negative, then further inquiry is necessary. Among the factors which might be considered in inquiring further are those listed in Bellavance v. State, 390 So.2d 422 (Fla. 1st DCA 1980):

> 'the importance to the public of the function involved, the extent to which government's liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages.' Lipman v. Brisbane Elementary School District, 55 Cal.2d 224, 230, 11 Cal.Rptr. 97, 99, 359 P.2d 465, 467 (1961).

Bellavance, at 424.

The First District, while recognizing that "further inquiry," may be necessary, Bryan, above at 420, did not conduct further inquiry. The Court began by criticizing the test, "such test has not proved to be of significant help in a number of cases . . ." Id. The Court then, nonetheless, applied the test and answered two of the four questions in the negative. But instead of conducting further inquiry the First District again criticized the test as to its usefulness, this time in this case, "To us, the effort involves the application of the the proverbial square peg to the round hole," Id. The Court then found the action alleged to be negligent to be non-immune "operational-level" activity implementing that policy," id., rather than immune "planning-level" activity.

Had the First District conducted further inquiry perhaps its quick conclusion after application of the four-pronged test would have been different. For example, in this case DBR did not own, operate or maintain the elevator. The other defendants, who are going to trial, fall into those categories: the Board of Regents, Otis Elevator Company and Montgomery Elevator Company. Thus, the factor that there were remedies available to the plaintiff other than a suit against DBR, the inspector of the elevator, should have been considered, i.e., there is a remedy through tort suit for damages against the owner, operator, designer, manufacturer, installer and maintainer of the elevator.

The First District may have been right to the extent that the Commercial Carrier test is of little value where police power functions are at issue. This aspect of the case will be elaborated upon further in this brief. Before leaving Commercial Carrier, however, it should be pointed out that the seeds of doubt as to the usefulness of the test, which come to fruition in the Nielson trilogy, were planted in the Commercial Carrier opinion, itself.

The majority opinion by Justice Sundberg discussed the difficulty in determining whether a governmental act was discretionary and therefore protected by immunity because of separation of powers or was ministerial, and therefore, not protected:

> A semantic test for identification of discretionary governmental functions which should continue to enjoy immunity was attempted and then disavowed in California, whose statute contains a discretionary exception. For a time, the lower appellate courts in California labored unsuccessfully to develop a dictionary definition of "discretion' which established liability for minor discretionary actions but preserved immunity for high-level decisions. Disavowal of this definitional approach came in Johnson v. State, 69 Cal. Rptr. 240, 447 P.2d 352 (1968), where the California Supreme Court recognized that all governmental functions, no matter how seemingly ministerial, can be characterized as embracing the exercise of some discretion in the manner of their performance. [f.n. omitted.]

The Court then quoted from Johnson, above, to explain the "planning-operational" dichotomy as a means of determining immunity.

> We recognize that this interpretation of the term 'discretionary' presents some difficulties. For example, problems arise in attempting to translate this concern for the court's role in the governmental structure into an applicable touchstone for decision. Our proposed distinction, sometimes described as that between the 'planning' and 'operational' levels of decision-making (cf. Dalehite v. United States, supra, 346 U.S. 15, 35-36, 73 S.Ct. 956, [97 L.Ed. 1427]), however offers some basic guideposts, although it certainly presents no panacea. Admittedly, our interpretation will necessitate delicate decisions; the the very process of ascertaining whether an official determination rises to the level of insulation from judicial review requires sensitivity to the considerations that enter into it and an appreciation of the limitations on the court's ability to reexamine it.

The point of these quotes from Commercial Carrier is that this Court was aware, as were the federal and other state courts from hard experience, that it is exceedingly difficult to determine which governmental actions should be immune because of their discretionary nature and which not. Given that the inquiry is set in the context of "separation of powers," it becomes even more delicate. The task for the courts in these case-by-case undertakings, is not just to determine immunity in the case at bar but to prevent the unwarranted intrusion, unwitting or otherwise, of the judicial branch into the executive or legislative arena.

It will be argued in Section B. below that the emphasis of this Court shifted between 1979, the time of the decision in Commercial Carrier, and 1982, when the Court decided the Nielson cases. In 1979, immunity was the exception rather than the rule. Department of Transportation v. Nielson, 419 So.2d 1071 at 1079 (Sundberg, J., dissenting). In 1982, this Court led by the three opinions of Justice Overton, joined by Justices Boyd, Alderman and McDonald, held, over the dissent of Justice Sundberg, that "discretionary decisions which implement the entity's police power . . . are judgmental . . . functions," id. at 1077, and therefore immune. The impact on this case of the Nielson trilogy is discussed next.

B. The Neilson Trilogy

"The rule (immunity) is now the exception, and the exception (liability) is the rule; 'everything has changed, yet nothing has changed.'" Neumann, above, at 562, citing to Collom v. City of St. Petersburg, 400 So.2d 507, 508 (Fla. 2nd DCA 1981), aff'd., 419 So.2d 1082 (Fla. 1982). But, is the rule still the exception?

Justice Sundberg seemed to think that Commercial Carrier had made it so:

> From the holding of the case, then it is apparent that a finding of immunity is the exception rather than the rule. This conclusion flows not merely from the express language of the decision, but was necessarily required because unlike the Federal Tort Claims Act there is no express exemption within the provisions of section 768.28 for discretionary acts of governmental agencies or their employees. The judicial gloss supplied by this Court should be narrowly rather than expansively invoked. [Footnote omitted.]
>
> Neilson, (Sundberg, J., dissenting) at 1079.

But Justice Sundberg also seemed to think that this court had extended immunity to any judgmental discretionary act on the part of the governmental entity:

> Furthermore, the exemption from waiver of immunity engrafted upon section 768.28 by Commercial Carrier concerns not all [as this decision has it] but only certain 'discretionary' governmental functions. Only 'planning level' functions, requiring basic policy decisions, were intended to be exempt

> from the legislature's waiver of governmental immunity, not all discretionary acts carried out by government.
>
> Id.

In fact, the majority in Neilson, composed of Justices Boyd, Alderman and McDonald and Justice Overton, as the author of Neilson, make it clear that where judgment is involved, at least insofar as the police power is concerned, immunity attaches.

In Neilson, the first opinion of the trilogy, this Court distinguished between decisions relating to the installation of traffic control methods and devices or the establishment of speed limits (the case in Neilson), which are immune governmental functions because they are judgmental, and the failure to properly maintain an existing traffic control device, (the case in Commercial Carrier), which is a non-immune operational function. In addition to the judgmental nature of the former functions, the Court also stressed in Neilson that they were being carried out as exercises of the entity's "police power."

> In our view, decisions relating to the installation of appropriate traffic control methods and devices or the establishment of speed limits are discretionary decisions which implement the entity's police power and are judgmental, planning-level functions.
>
> Neilson, at 1077.

In Collom, the third of the trilogy, the Court ruled that the government remains immune for defects inherent in plans for improvements approved by governmental entities because the defect is the result of planning. But the Court held,

> [T]hat when a governmental entity creates a known dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger. The failure to fulfill this operational-level duty is, therefore, a basis for an action against the governmental entity.
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> Collom at 1083.

Analogizing to this case, the inspection of an elevator and the decision whether to enforce a violation of elevator law, requires the exercise of judgment just as was required in the decisions in Neilson. Such a decision may take place at several levels, all of which involve discretion: first, does a violation of the elevator code exist; second, if so, how should it be handled, through seeking voluntary compliance or some other means; third, should formal charges be brought and the resources necessary to sustain the charges be comitted. Furthermore, just as in Neilson, the inspection of elevators is an exercise of the police power. By comparison to Neilson, DBR should not be exposed to liability in this case.

Further, Collom harkened back to the separation of powers basis of the decision in Commercial Carrier:

> [2] We approve the decisions of the Second District Court of Appeal in both Collom and Mathews. We reject, however, the broad language of governmental liability set forth in Collom, and followed in Mathews, because this language implies governmental entities. Adopting the district court's reasoning would permit the judicial branch to substantially interfere with the functioning of the legislative and executive branches of government. For the reasons expressed in our Neilson decision, defects inherent in the overall plan for an improvement, as approved by a governmental entity, are not matters that in and of themselves subject the entity to liability.
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> Collom, at 1085, 1086.

As will be more fully argued in Part II of the Argument section of this brief, the legislative scheme in the elevator law places responsibility for elevator safety on the owners and operators of elevators. The legislature, from a reading of all the pertinent provisions in the Elevator Law, intended that DBR, through its inspections, serve simply to back up the elevator owners and to serve as a safety net through which some dangerous conditions might slip but in which many would be caught. The legislature did not intend to expose the state to liability for negligent elevator inspections. Thus, to subject DBR to suit in this case will not only allow judge and jury to scrutinize the elevator inspector's

judgment as to whether or not a violation existed but will constitue a judicial incursion on a legislative judgment thereby posing "separation of powers" problems.

The problems with liability in this case are further revealed by the recent cases with which Bryan was found to conflict: Carter, Everton and Neumann.

C. Conflict with Carter, Everton, and Neumann.

The Petitioner's jurisdictional brief in this case sets out the conflict with Carter and Everton and Neumann, the cases which served as the jurisdictional basis for this case being in this Court. A brief summary of those cases and the dcisions there by the Second and Fourth Districts and analogies to this case will show why the First District should be reversed and why sovereign immunity is enjoyed by DBR.

In Carter v. City of Stuart, 433 So.2d 669 (Fla. 4th DCA 1983), the Fourth District found the decision of a dog catcher not to impound a Pit Bull which had shown previous vicious propensities to be discretionary and therefore immune. The decision was made despite that the dog had bitten more than one person and that the "Impoundment Officer had actually gone out to the Pennington property in response to complaints about Bee-Hound, the offending dog, but decided not to impound the animal." Id. (Downy, J., specially concurring at 670.

Moreover, the Carter court found immunity even though the "dog" ordinance maintained that dogs be impounded if they are found running unrestrained or if they bite any person without provocation. Accord Elliott v. City of Hollywood, 399 So.2d 507 (Fla. 4th DCA 1981). Judge Downy cited to Everton,

below, as additional authority because the impoundment officer's decision was a discretionary one inherent both in the nature of enforcement and in the implementation of basic planning level activity, just as the Everton police officer's decision.

In Everton v. Willard, 426 So.2d 966 (Fla. 2nd DCA 1983), a deputy sheriff, after stopping a drunk driver, cited him for a traffic violation, but allowed him to drive away even though he knew he had been drinking. Shortly thereafter the intoxicated driver was in an accident in which others were killed or seriously injured.

The court analyzed Commercial Carrier and Nielson, and drawing its support mainly fron Nielson concluded:

> We believe that merely because an activity is "operational", it should not necessarily be removed from the "category of governmental activity which involves broad policy or planning decisions." Id. at 1022. We believe that though Deputy Parker's activities were clearly operational, they also involved basic governmental policy and the implementation thereof as emphasized by the court in Nielson. Certainly, law enforcement is basic to government. Failure to adequately maintain or even to install adequate traffic control devices might eventually result in a certain amount of chaos as regards our transportation system. However, failure to maintain good adequate, and reasonable law enforcement would not just be chaotic, it would be disastrous. Absolutely essential to a good, adequate and reasonable system of law enforcement as we now know it in its own operation level activities is the discretion of a law enforcement officer under the circumstances of a particular case to decide whether or not to detain or arrest someone.
>
> Everton at 1001, 1002.

Just as in Everton and Carter, the elevator inspector, and perhaps his superiors, must exercise discretion when inspecting elevators and dealing with elevator law violations. First, the inspector must use judgment in deciding whether a violation exists or not. If one is found, then the elevator authorities must decide whether to enforce or not. These police power decisions are judgment calls, and as such, according to the Fourth and Second Districts, immune from tort liability.

In Neumann v. Davis, 433 So.2d 559 (Fla. 2nd DCA 1983), a child drowned at an unfenced sewage treatment plant. the Department of Environmental Regulation (DER) was alleged to have required that the plant area to have been fenced and to have negligently failed to inspect the plant for compliance. If the duty existed for DER to police the operation of a sewer plant, the Court held the agency to be immune from suit for breach of it. The Court wrote," we perceive the pure exercise of the police power to be the clearest illustration of where to allow tort liability would strike at the very foundation of the power to govern." Id. at 502.

The Court also declined to apply the Commercial Carrier test. Instead, the Court followed this Court's reasoning in the Nielson trilogy, by contrasting Collom to the facts of the case:

> [5] DER did not design, construct, own, operate or maintain the sewage treatment plant. Therefore, the accident was not caused by a direct operational act of government or its employees. Compare City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982) (governmental entity created known dangerous condition); Department of Transportation v. Kennedy, 429 So.2d 1210 (Fla. 2nd DCA 1982) (negligent maintenance of state road right-of-way). We further point out that the record on appeal discloses the existence of pending claims against the owners, constructors, designers, persons charged with supervision and maintenance, and Manatee County. Hence, appellant has remedies other than suit against DER. Cf. Johnson, 447 P.2d at 357.
>
> Neumann at 563.

This case is analagous. DER did not design, install, own, operate of maintain the elevator. Therefore the accident leading to Bryan's death was not caused by a direct act of DBR or its employees. Moreover, as argued earlier, Bryan has claims pending against the owners, installers, designers, and maintainers of the elevator.

Everton, Carter and Neumann should also be contrasted to Trianon and The Manors of Inverrary, two building inspection cases, which, despite that they involve the exercise of police power, are decided against sovereign immunity.

D. Trianon

The Third District Court of Appeal took an approach different from the Carter, Everton and Neumann approahces in Trianon Park v. City of Hialeah, 423 So.2d 911 (Fla. 3rd DCA 1983). In Trianon the Court was faced with the City of Hialeah's negligence in approval of building plans, building inspection and issuance of a certificate of occupancy.

Just as the First District in this case, the Trianon court answered the first and fourth tests of Commercial Carrier in the affirmation but the second and third tests in the negative, and therefore found the city inspections to be operational and not immune. Trianon is pending before this Court now. If Trianon is reversed the First District should be reversed, too.

If Trianon is not reversed, however, then this Court should still reverse the First District, not on the basis of sovereign immunity but on the basis explained in Part II of this argument section of this brief: that, unlike Trianon, the inspectors in this case are under no duty to ensure the safety of what they inspect and, unlike the building code in Trianon, the Elevator Law expressly states that the owner of the elevator is responsible for safe operation and proper maintenance of the elevator.

Before arguing Part II, the most recent inspection case, The Manors of Inverrary, and particularly Judge Anstead's dissent, is worth examining.

E. The Manors of Inverrary

Three opinions are written in The Manors of Inverrary XII Condominium Association, Inc. v. Atreco-Florida, Inc., 438 So.2d 490 (Fla. 4th DCA 1983). The case, like Trianon, involved alleged negligent building inspection. The opinion of the court, written by Judge Downey, adopted the reasoning of Trianon, and found no immunity but certified the question to this court. Judge Glickstein wrote a special concurrence which critized the Commercial Carrier test and recommended instead another.

The most provocative of the three, however, is written by Chief Judge Anstead, in dissent:

> By our holding today we have made governmental units virtual insurers of the quality of construction of private development projects. I do not believe that this was the intent of the legislature in abrogating the defense of sovereign immunity. Furthermore, even if it is conceded that our supreme court in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), has specifically overruled its prior decision in Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967), barring governmental liability for negligent building inspectors, I do not believe such liability extends to the circumstances presented here.
>
> Manors of Inverrary (Anstead, C. J., dissenting, at 495, 496).

Chief Judge Anstead thought that the Commercial Carrier court had erroneously characterized Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967) as a decision based on sovereign immunity. Rather, Modlin was based on the lack of a specific duty. Manors of Inverrary, at 496.

The dissent also met the argument employed by the First District in this case, that one who voluntarily undertakes to inspect is therafter charged with a duty to do so with reasonable care:

> Similarly, I do not believe a governmental body that conducts inspections for its own benefit and the benefit of its citizens, owes any duty to the building owner to see that such inspections are properly conducted. Indeed, it is the building owner who has the obligation to see to it that his building is constructed in accordance with the governmental building code.
>
> Manors of Inverrary, (Anstead, C. J., dissenting) at 498.

The basis of this opinion was Judge Anstead's belief that the legislature did not intend to waive sovereign immunity pursuant to Section 768.28, Florida Statutes, to the extent that courts should forego careful analyses of whether the governmental entities involved owe a duty when they undertake to inspect:

> After Commercial Carrier, and its rejection of Modlin, courts have appeared to lose sight of the requirement of the existence of a duty in considering liability, and have, instead, directed most of their attention to the difficult task of determining whether the action involved was 'discretionary' or 'operational' in accord with the nebulous standard set out in the case of Evangelical United Bretheren Church v. State, 67 Wash.2d 246, 407 P.2d 440 (1965), and adopted in Commercial Carrier.
>
> Absent some reconsideration by the supreme court, the legislature, while there are still some members around who are aware of their intent in enacting section 768.28, should act to clarify its intent in passing this legislation. I would be suprised to learn that the legislature intended to make governmental bodies responsible for repairs to buildings to bring them up to building code compliance or to incorporate the case law of the State of Washington as enunciated in 1965 as the controlling law for the State of Florida. In any event, state and local governmental bodies are entitled to a clearer statement of their potential liabilities than is presently being provided in the case by case application of the Washington decision.

Id. at 499.

Undertaking such an analysis, as is done in the next part of this brief, should lead this Court to conclude, that while DBR has a duty to inspect elevators, it has no duty to ensure the safety of elevators. That duty rests with the owner of the elevator.

POINT II

THE FIRST DISTRICT ERRED IN REVERSING THE TRIAL COURT'S DISMISSAL OF THE AMENDED COMPLAINT.

The Amended Complaint alleged the Department of Business Regulation had a duty under Chapter 399, Florida Statutes (1979), to seal elevator no. 2270 on the Florida State University campus on the basis of the following allegations (R-56-75):

> Paragraph 42(f)
> At the time of the accident, no hoistway key was in a break-glass receptable at the first floor landing.
>
> Paragraph 42(g) No. 3 and No. 9
> The side exit door of elevator 2270 could be opened from the inside with other than the designed tool.
>
> Paragraph 42(g) No. 5 and 13
> No square tip wrench for the outside locking mechanism or key for the inside lock on the exit door latch were in break-glass receptacles.
>
> Paragraph 42(g) No. 7
> The distance between elevators was more than 2 feet, 6 inches.
>
> Paragraph 42(g) No. 10
> The handrails were one piece.
>
> Paragraph 42(h) - (l)
> The audible alarm bell was inside the hoistway while no janitor was on the premises, no elevator operator was present, and no telephone was in the elevator car.
>
> Paragraph 42(m)
> DBR did not require posted warnings that elevators could stall.

Paragraph 47 - 48
DBR did not require a longer platform guard which, while not required by the elevator code, would not have been precluded by the code or statutes.

The complaint alleges such duties based solely upon the provisions of Chapter 399, Florida Statutes (1979). The trial court correctly dismissed the complaint since there devolved upon DBR no duty, under the statutes, to report the alleged conditions as rendering the elevator dangerous to operate, nor any duty to do the acts alleged in the complaint. Further, the ultimate facts alleged in the Amended Complaint failed to establish that DBR was the legal cause of Joseph Bryan's injuries. Dismissal was proper since, as a matter of law, the allegations would be legally inadequate, even if proven, upon which to hold the Department of Business Regulation liable.

Nor was a cause of action for negligence per se alleged in the Amended Complaint. To state a cause of action for negligence per se, the plaintiff must allege the violation of a provision of law to which the defendant is legally required to adhere. Further, a cause of action for negligence per se requires allegations of ultimate fact which establish that the violation of a provision of law was the proximate or legal cause of the injury. The Amended Complaint in this cause failed in both respects.

A.

THE AMENDED COMPLAINT FAILED
TO STATE A CAUSE OF ACTION FOR NEGLIGENCE

Negligence has been defined as "conduct which falls below a standard established by the law for the protection of others against unreasonable risk of harm; and "[i]n light of the recognizable risk, the conduct, to be negligent, must be unreasonable." Prosser, Law of Torts, 4th Ed. 1971 §31 at page 146. The elements of negligence may be stated as:

> 1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
>
> 2. A failure on his part to conform to the standard required. These two elements go to make up what the courts usually have called negligence; but the term quite frequently is applied to the second alone. Thus it may be said that the defendant was negligent, but not liable because he was under no duty to the plaintiff not to be.
>
> 3. A reasonable close causal connection between the conduct and the resulting injury. This is what is commonly known as 'legal cause,' or 'proximate cause.'
>
> 4. Actual loss or damage resulting to the interests of another. . .

Prosser, Law of Torts, 4th Ed. 1971 §30 at page 143.

In order for the injury to be said to result or arise from the failure to perform a legal duty, the injury must be the reasonably forseeable, natural, and probable result of the breach of duty. The breach of duty must be the proximate, not remote, cause of the injury; and, the law does not impose liability merely because it is possible to trace a connection between the breach of legal duty and the injury. The mere possibility of such causation is not enough and where the matter is one of speculation or conjecture or where the probabilities are evenly balanced, the court must direct a verdict for the defendant. Prosser, Law of Torts, 4th Ed. 1971 §41 at page 241. When, and only when, a plaintiff has properly plead ultimate facts substantiating each and every element of negligence should a defendant be required to plead and defend against a complaint. The Department of Business Regulation submits that none of the well plead allegations of the Amended Complaint states a cause of action for negligence against DBR and dismissal was proper.

The initial inquiry in any negligence action is whether the defendant was under any legal duty to do or refrain from doing certain acts. The second inquiry is, of course, whether the defendant breached that duty.

In this action, duty if it exists at all, exists by virtue of the provisions of Chapter 399, Florida Statutes (1979). The Department of Business Regulation Bureau of

Elevator Inspection is a creature of statute and is governed solely by Chapter 399. DBR can have only those duties and liabilities conferred on it by statute. See City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493 (Fla. 1973).

Since determination of the presence of legal duty is clearly a question of law for the court to decide, the trial court properly examined Chapter 399 to determine whether the necessary element of legal duty could be alleged. Chapter 399.10, Florida Statutes (1979), states, "[i]t shall be the duty of the division to enforce the provisions of this chapter." A reading of Chapter 399 discloses that the chapter provides for the following (A-1-5):

> 399.02(2) The division shall adopt an elevator safety code the same as or similar to the latest revision of the 'American Standard Safety Code for Elevators, Dumbwaiters and Escalators,' which is hereinafter referred to as the 'Elevator Safety Code.'
>
> 399.02(3) The division only shall have the power to grant exceptions or permit the uses of other devices or methods as may be provided by the Elevator Safety Code.
>
> 399.02(6)(b) The owner or his duly appointed agent shall be responsible for the safe operation and proper maintenance of the elevator, dumbwaiter, escalator, moving walk, endless belt man lift, or powered lift for sewage pump station after it has been approved by the division and placed in service. The owner or his agent shall make periodic inspections, maintain in proper working order all parts of the elevator

installation, and make and be responsible for all tests and inspections which the division may require. However, if the responsibilities referred to above are specifically transferred by the terms of a lease, the responsibilities of the owner of the equipment may be assigned to a tenant or lessee who is the user of the equipment. (e.s.)

399.03(3) 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 s. 399.08.

399.03(4) Elevators, dumbwaiters and escalators, moved from one shaft to another, shall conform to the requirements of the Elevator Safety Code.

399.03(10)(a) Damaged or defective parts shall be wholly or partially replaced at the discretion of the division; broken parts subject to bending, tension, or torsional stresses, and parts upon which the support of the car depends, shall not be welded.

399.03(10)(b) Ordinary repairs or replacement on existing installations may be made with parts equivalent in material, strength and design to those replaced. Such repairs and replacements need not conform to the requirements of this chapter.

399.06(1) Every inspector shall forward to the division a full report of each inspection made of any elevator, as required to be made by him under the provisions of s. 399.05, showing the exact condition of the said elevator. If this report indicates that the said elevator is in a safe condition to be operated, the division shall issue a certificate of operation for a capacity

not to exceed that named in the said report of inspection, which certificate shall be valid for 1 year after the date of inspection unless the certificate is suspended or revoked by the division. No elevator may legally be operated on or after January 1, 1948, without having such a certificate conspicuously posted thereon; where there is an elevator cab it shall be posted conspicuously therein.

399.06(2) If any elevator be found which, in the judgment of an inspector, is dangerous to life and property, or is being operated without the operating certificate required by s. 399.07 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. Such notice shall designate and describe the alteration or other change necessary to be made in order to insure safety of operation, date of inspection, and time allowed for such alteration or change. Such inspector shall immediately report all facts in connection with such elevator to the division. In the event a certificate has been issued for such elevator, the said certificate shall be suspended and not renewed until such elevator has been placed in safe condition. In such case, 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. (e.s.)

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

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

> 399.08(2) Whenever the division shall, from inspection of any 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 and to compel the person, firm, or corporation having control or possession or use thereof to discontinue such use until such elevator or part of or appliance thereof, has been satisfactorily repaired or replaced so that the said elevator is in a safe and proper condition as required by this chapter.
>
> 399.08(3) The division shall certify the inspection of each elevator which, after inspection, is judged to be in conformity with the requirements of this chapter. This certification shall be in the form of an endorsement of the certificate required in s. 399.07, and shall include the date of the inspection and the name of the inspector.

It is clear that while the Department of Business Regulation was required to adopt an elevator code, it was accorded the power to grant exceptions to that code and to permit uses of other devices or methods in elevators than may be provided for in the code. Elevators installed prior to 1971 may be used without being rebuilt to comply with the elevator code so long as they are in safe operating condition. Repairs or replacement of parts on elevators installed prior to 1971 may be made with parts which do not conform to but are equivalent to the requirements set out in Chapter 399.

DBR is required to inspect yearly and, if in the inspector's judgment the elevator is dangerous to life or property or in an unsafe condition, the inspector may require

the owner to discontinue operation. However, if in the judgment of the inspector, the elevator is in a condition not contrary to Chapter 399 nor unsafe to be operated, the inspector shall issue a certificate to the owner.

Chapter 399 places no duties on DBR or its inspectors to require or post any warnings in elevators. Chapter 399 places no duty on DBR to require modifications to elevators in any manner not specified in Chapter 399. Chapter 399 places no duty on DBR to require strict adherence to the elevator code. To the contrary, DBR and its inspectors are accorded discretion to allow exceptions to the elevator code and to permit nonconforming repairs.

The legislature specifically places responsibility for safe operation and maintenance of elevators on the owner or the owner's agent; and, a reading of Chapter 399 discloses clear intent that DBR not be burdened with the duty of operating, maintaining, or being strictly liable for the safety, even against unauthorized use, of every one of the tens of thousands of elevators in the State of Florida. Since the enforcement of strict compliance with the elevator code by DBR is not mandated by statute, allegations that DBR permitted exceptions to the elevator code failed to state any breach of legal duty by DBR.

In the instant case, Chapter 399 is clear -- the inspector must determine if the elevator is, in his judgment, unsafe to operate or dangerous to life or property. Even if it was alleged that an inspection made July 11, 1979, revealed conditions from which the inspector should have

concluded the elevator might stall, there is nothing alleged or found in the realm of common sense to make the extraordinary leap to the conclusion that a stalled elevator is unsafe to operate or dangerous to life or property. Nor was DBR's inspector under any statutory duty to so conclude. This being so, the trial court was correct in concluding the Amended Complaint (and the Proposed Second Amended Complaint) could not state a cause of action for negligence. Dismissal was, therefore, proper and should be affirmed.

B.

THE AMENDED COMPLAINT AND PROPOSED SECOND AMENDED COMPLAINT FAILED TO STATE A CAUSE OF ACTION FOR NEGLIGENCE PER SE

The Amended Complaint and the Proposed Second Amended Complaint assert that DBR should be held liable to the plaintiffs for Joseph Bryan's death on the basis of negligence per se. However, the essential elements necessary first, to prove negligence per se and second, to establish liability based upon negligence per se are absent. Dismissal of the Amended Complaint and denial of leave to file the Proposed Second Amended Complaint on this ground were, therefore, not error.

First, plaintiff's bare conclusory assertion of negligence per se is based apparently upon the allegations of DBR's breach of Chapter 399 or the elevator code. However, this assertion fails to consider the clear language of Chapter 399 which accords DBR the authority to allow exceptions to the code and which requires DBR only to determine, in the best judgment of the inspector, that the elevator is not unsafe to operate nor dangerous to life or property.

Nowhere in Chapter 399 is DBR required to enforce strict compliance with the elevator code. Rather, Chapter 399 specifically grants DBR the power and discretion to allow variances from the code, as previously discussed. The fact that DBR was required by statute to adopt an elevator code is not a basis for holding that enforcement of strict compliance with that code is intended.

The Amended Complaint and Proposed Second Amended Complaint fail to allege any elevator code provisions or statute which was required to be enforced and considering the clear language of Chapter 399, how such violation could constitute negligence per se. Secondly, plaintiff's Amended Complaint fails to state the additional element of actionable negligence per se.

The broad classification of negligence founded on the violation of a statute or rule can be divided into its component categories:

> The first category consists of 'strict liability' statutes which are 'designed to protect a particular class of persons from their inability to protect themselves . . .' 281 So.2d at 201. The court held that a violation of this type of statute was negligence per se.
>
> The second catetory consists of 'violation[s] of any other statute which establishes a duty to take precautions to protect a particular class of persons from a particular type of injury.' Id. The court held that a violation of this type of statute was also negligence per se but it did 'not necessarily mean that there [was] actionable negligence.'

Boles v. Brackin, 411 So.2d 280 at 281 (Fla. 1st DCA 1982), under review, S.Ct. Case No. 61,978, quoting DeJesus v. Seaboard Coastline Railroad, 281 So.2d 198 (Fla. 1973).

The per se negligence attempted to be alleged against DBR by plaintiffs in the instant case is clearly not of the first category. Even if DBR were under any duty to require

strict compliance with the elevator code without exception (which they are not), the Amended Complaint and Proposed Second Amended Complaint still fail to sufficiently allege the remaining elements of proof necessary to render such negligence per se actionable as described in the second category.

The Amended Complaint alleged DBR failed to require compliance with the elevator code, although the allegations are not clear, in these respects: 1. One-piece handrail obstructed the emergency door, 2. The distance from the emergency door to the adjoining car emergency door exceeded two feet six inches, 3. There were obstructions in the hoistway between elevators, 4. The alarm bell was located outside the hoistway and no janitor, mechanic, or engineer was on the premises and no telephone was in the car, 5. The emergency door lock was able to be opened with other than the specially designed key, 6. No hoistway or emergency door key was present in a break-glass box or on the premises.

However, these allegations are legally insufficient to form a basis for actionable negligence per se, even if the conditions were present on the day of the last inspection prior to the accident, since the complaint fails to establish how these provisions are designed to protect users of the elevator against injury suffered in their own unannounced, unassisted, unauthorized escape attempt resulting in a fall.

Rather, the handrail obstruction provision, the two foot six inch distance provision, and the hoistway obstruction provision are, on their face, obviously aimed at protecting against a passenger being trapped in an elevator with escape personnel unable to get in the emergency door and unable to protect the passenger who is exiting from the side emergency door and having to travel more than a short distance in the open elevator shaft to enter the adjoining emergency door in the adjacent car. There are no allegations that the injury occurred under these circumstances and it clearly did not.

The alleged provision requiring the alarm bell to be outside the hoistway and the requirement of personnel on the premises or the presence of a telephone in the elevator car, even if such could be proved to be required by the elevator code, are obviously provisions intended to protect against a trapped passenger being unable to summon assistance with the alarm bell and being unable to be assisted out of the elevator by proper personnel. However, the Amended Complaint reveals that the alarm bell was never rung and no personnel were ever summoned for assistance. The Amended Compalint, as well as the Proposed Second Amended Complaint, therefore, failed to establish how the alleged code provisions were intended to protect against the injury received by Joseph Bryan when he jumped from the elevator and fell down the hoistway.

Similarly, the Amended Complaint fails to allege facts or circumstances indicating that noncompliance with the alleged provisions requiring keys on the premises in a break-glass box were designed to protect against unassisted escape attempts. To the contrary, the provision is clearly designed to provide escape personnel with a key to enable them to enter the hoistway in order to rescue passengers. It is clear in this case that Joseph Bryan made no attempt to summon escape personnel. Therefore, this allegation can provide no basis for a claim based upon negligence per se.

In order for negligence per se to constitute actionable negligence, the additional element of proximate cause of the injury by the violation of a rule or statute is required. The Amended Complaint and the Proposed Second Amended Complaint failed to allege any ultimate facts demonstrating that violation or noncompliance with the elevator code was the proximate or legal cause of Joseph Bryan's accident. The sequence necessary to be established in order to tie any code violations to the injuries received by Joseph Bryan is too tenuous, indirect, and improbable that such a sequence provides a legally insufficient basis upon which a jury could find that DBR's alleged negligence per se was in any way the proximate cause of Joseph Bryan's injruies or death. Therefore, the allegation of an action based upon negligence per se against the Department of Business Regulation was properly dismissed and, therefore, should be affirmed.

CONCLUSION

DBR enjoys sovereign immunity in this case. The First District misapplied the Commercial Carrier test. It may be that Commercial Carrier no longer has validity in police power cases in light of the Nielson trilogy. In any event, taking into consideration the elements, in the face of Section 768.28, Florida Statutes, for the continued existence of sovereign immunity in some tort cases, such as the separation of powers, there are vital reasons some of a constitutional nature, for finding DBR immune from suit. Moreover, when the Second District's approach to the issue is compared to the First District's it is clear that there is conclict which requires reconciliation.

The Second District's approach should be approved by this Court. DBR did not own, operate, install, design or maintain the elevator. Therefore, there is no direct operational act by DBR which contributed to the death of the decedent. The inspection by DBR necessitated the exercise of judgment on the part of the elevator inspector, judgement which should be insulated from the scrutiny of judge and jury.

The Fourth District has followed the approach of the Second District as to some judgmental enforcement decisions but did not follow the approach as to building inspections.

Instead it followed the Third District's approach in Trianon, a case now pending before this Court. There is confusion in the Fourth District, as evidenced by its split in approach in Carter and The Manors of Inverrary, and as evidenced by the three opinions in the latter case. Chief Judge Anstead's opinion in that case is commended to this Court as answering the First District's rationale in this case.

If Trianon is reversed, the First District should be reversed in this case, too. If not, this Court should still reverse because the complaint does not state a cause of action in negligence. Whether sovereign immunity applies, then, or not, the trial court was correct in dismissing the Amended Complaint and the First District's reversal should, itself, be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner was furnished by U. S. Mail to all counsel of record listed below this 14th day of May, 1984.

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