IN THE SUPREME COURT OF
THE STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, et al.,

Petitioner,

vs.

PATRICIA L. BRYAN,

Respondent.

CASE NO. 64,464

FIRST DISTRICT COURT OF APPEAL
DOCKET NO. AN-24

PETITIONER'S BRIEF ON JURISDICTION

DAVID M. MALONEY
Deputy General Counsel
Department of Business Regulation
725 South Bronough Street
Tallahassee, Florida 32301
(904) 488-7365
Attorney for Petitioner

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STATEMENT OF THE CASE AND FACTS

This brief presents argument of the Florida Department of Business Regulation ("DBR") as to why the Court should exercise discretionary jurisdiction to review a decision of the First District Court of Appeal on the basis of conflict with decisions of other district courts on the same question of law. The decision for which review is sought is Bryan v. State of Florida, Department of Business Regulation, First District Case No. AN-24, op. filed September 12, 1983 [8 F.L.W. 2241]. The decision of the First District was to reverse an order of the trial court dismissing a complaint against the Department of Business Regulation.

The facts alleged in the complaint are found in the opinion below. This is a summary of those factual allegations assumed true for purpose of reviewing the complaint's dismissal: Joseph Bryan, a student at Florida State University jumped from an elevator car stopped between floors in a campus dormitory. The car had stopped after Bryan had leaned forward causing a side handrail to move, thereby causing an emergency door to move, thereby breaking electrical contacts. After jumping, Bryan fell down the hoistway, sustained head injuries and died the next day.

The mother of the decedent, Patricia Bryan, brought suit against the elevator company that designed, manufactured

and installed the elevator; the elevator company which maintained the elevator; the Board of Regents, as owner and operator of the dormitory; and the Department of Business Regulation.

Bryan's case against DBR is for negligence in performance of inspection of the elevator pursuant to Chapter 399, Florida Statutes. DBR moved to dismiss both for failure to state a cause of action in negligence and on the basis that it was immune from suit under principles of "sovereign immunity." The trial court granted dismissal for failure to state a cause of action, and, therefore, did not reach the issue of sovereign immunity.

Bryan appealed the dismissal. The Court called for supplemental briefs on the sovereign immunity question. In its opinion, the Court found,"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." DBR had argued and will argue before this Court if the case is accepted, that unlike other "inspection" cases, due to the statutory scheme of Chapter 399, Florida Statutes, DBR does not have a "duty" to ensure the safety of elevators. In DBR's view that duty is clearly placed by the statute on the owner of the elevator. Be that as it may, the Court found otherwise. Thus, the Court concluded the Complaint stated a cause of action in negligence.

The Court then addressed the issue of sovereign immunity. The Court applied the four-pronged test of Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979) to determine whether elevator inspections by DBR are non-immune "operational-level" or immune "judgmental, planning-level" functions. If all four of the Commercial Carrier questions are answered in the affirmative a function is immune. If one of the four is answered in the negative, "further inquiry" may be required. Commercial Carrier, at 1019. The Court answered two of the four Commercial Carrier questions in the negative. In conducting further inquiry the Court then turned to Trianon Park Condominium Association, Inc. v. City of Hialeah, 423 So.2d 911, 913 (Fla. 3rd DCA 1983). The Court found elevator safety inspections not "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 [the waiver statute.]" Bryan, at p. 11 [8 F.L.W. 2243].

In this brief, DBR will argue that this decision by the Court conflicts 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 (4th DCA Fla. 1983).

ARGUMENT

I.

WHETHER THE DECISION OF THE FIRST DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE SECOND DISTRICT IN EVERTON AND NEUMANN AND THE DECISION OF THE FOURTH DISTRICT IN CARTER.

In Trianon, the Third District found municipal inspections of city buildings and enforcement of the city's building code to be "purely ministerial action," not involving "the exercise of discretion and expertise." Trianon, above, at 913. The First District, in essence, agreed with Trianon and found the same in relation to DBR and elevators, i.e., the Court found DBR's inspection of elevators and enforcement of the elevator statute to be purely ministerial and not to involve discretion. The First District agreed with the Trianon approach despite its express acknowledgement, in answering the third question of the Commercial Carrier test, that elevator inspections and enforcement of the elevator statute involve the exercise of discretion and judgment:

> (3) Does the act, ommission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? [the third question of the Commercial Carrier test.] 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. (e.s.)

Bryan Slip Opinion at 9. [8 F.L.W. 2243]

This decision expressly and directly conflicts with the decisions in Everton, Neumann and Carter.

In Everton, a deputy sheriff stopped a motorist for a traffic violation. The deputy observed that the motorist had been drinking. Yet, the deputy exercised his discretion not to charge the motorist with a driving offense related to intoxication and allowed the motorist to drive on. Minutes later the motorist was in an accident in which another driver was killed and a passenger seriously injured. A subsequent suit founded on negligence was dismissed by the trial court. The dismissal was appealed.

After applying the Commercial Carrier test without affirmative answers to all four questions, the Court conducted the "further inquiry" commanded by Commercial Carrier. The Court stated, "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.' (Citation omitted.)" Everton, above, at 1001. Plainly, a patrolling police officer functions at an "operational" level. But decisions as to what action to take in situations "on the street," necessarily involve discretion. The Second District, therefore, affirmed dismissal and found

sovereign immunity present." When that discretion is exercised, neither the officer nor the employing governmental agency should be liable in tort for the consequences of the exercise of that discretion." Everton, above, at 1004.

Likewise in Carter, above, the Fourth District found governmental immunity from tort for failure to enforce an ordinance requiring a city to impound dangerous dogs, when the city knew of a dog's vicious propensities. The Court found immunity because the decision whether to enforce the ordinance was discretionary. Accord, Elliott v. City of Hollywood, 399 So.2d 507 (Fla. 4th DCA 1981).

The analogy to this case is exact. Just as the police officer in Everton and the dog-catchers in Carter, the elevator inspector is at the lowest rung of the discretionary ladder. While the inspector may be operating and implementing policy, that implementation necessarily involves discretion and judgment. Everton and Carter hold that, whether characterized as "operational" or not, such activity is immune from suit. In conflict, Bryan, following the Trianon lead, holds otherwise.

There is also an analogy with Neumann, above. In Neumann the Department of Environmental Regulation, ("DER"), had required an area to be fenced. DER failed to inspect to determine if the area had been fenced. A complaint against DER alleged that negligence in failing to properly inspect and ensure compliance with the fencing requirement resulted in the drowning of a three-year-old child. The Second District found DER immune:

> DER did not design, construct, own, operate, or maintain the sewage treatment plant.
>
> * * *
>
> The most important factor to consider is that by imposing rules and regulations and deciding when and where or what to inspect, DER is exercising the police power of the state, a purely governmental function which historically has enjoyed immunity from tort liability.
>
> Neumann, at 563.

So it is in this case. DBR did not design, construct, own, operate, or maintain the dormitory elevator. In inspecting it, DBR exercised the police power of the state. The Second District would have held DBR immune from suit under Neumann. In conflict with Neumann, the First District in Bryan did not find sovereign immunity.

II.

IF THIS COURT FINDS CONFLICT, IT IS APPROPRIATE TO EXERCISE JURISDICTION SINCE SIMILAR ISSUES ARE NOW UNDER CONSIDERATION IN TRIANON.

DBR suggested that the First District certify this case as one containing a question of great public importance. The Court did not do so. In contrast, the Third District certified the question in Trianon and the Fourth District certified the question in Carter.

Trianon was argued before this Court last month. Trianon promises to settle the question of this case if the City of Hialeah is found immune from suit for discretionary enforcement of its building code and exercise of that aspect of its police power. Should the Trianon case be decided differently, this case would still need to be addressed because of DBR's argument that, unlike other inspection cases, it is under no statutory duty to ensure elevator safety. In any event, with regulatory authority over every elevator in Florida this case will have a major impact on the law of this state. Furthermore, as Everton, Carter and Neumann illustrate, the issue in this case recurs in numerous other police power areas. This Court's attention and time would be well spent in resolving the conflict between this case and the decisions of the Second and Fourth District.

CONCLUSION

This case, to the extent it holds discretionary enforcement of the elevator inspection statute and exercise of the state's police power over elevators to be non-immune "operational" activity, conflicts with Everton, Carter, and Neumann, decisions of the Second and Fourth District. This Court should resolve the conflict because of the importance of the issue in numerous areas of police power exercise. Furthermore, a similar issue is pending before this Court in Trianon. This Court should have the benefit of this case's perspective in deciding the important issue of sovereign immunity in safety inspections and discretionary exercise of the police power. The Petitioner requests this Court to take jurisdiction to review the decision below.

Respectfully submitted,

DAVID M. MALONEY
Deputy General Counsel
Department of Business Regulation
725 South Bronough Street
Tallahassee, Florida 32301
(904) 488-7365
(Attorney for Petitioner)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing PETITIONER'S BRIEF ON JURISDICTION was furnished by U. S. Mail to all counsel of record listed below this 7th day of November, 1983:

Brian S. Duffy, Esquire
Post Office Drawer 1170
Tallahassee, Florida 32302-1170

E. Harper Field, Esquire
Post Office Box 1879
Tallahassee, Florida 32302

Joseph A. Linnehan, Esquire
Assistant State Attorney
Suite 1502, The Capitol
Tallahassee, Florida 32301

Doug Childs, Esquire, and
Bruce S. Bullock, Esquire
Suite 703 Blackstone Building
Jacksonville, Florida

Vincent Philip Nuccio, Esquire
3839 West Kennedy Boulevard
Tampa, Florida 33609

David M. Maloney