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

BRIEF OF PATRICIA L. BRYAN ON JURISDICTION

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PATRICIA L. BRYAN

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STATEMENT OF THE CASE AND FACTS

Respondent, Patricia L. Bryan ("Respondent"), takes issue with the characterization of the pertinent factual allegations made by the State of Florida, Department of Business Regulation ("DBR"). Rather, Respondent refers this Court to pages 23 of the unanimous opinion of the First District Court of Appeal, appended to DBR's Brief on Jurisdiction, wherein the District Court of Appeal sets forth the requisite facts in great detail.

POINT I

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF THE SECOND DISTRICT IN EVERTON AND NEUMANN AND THE DECISION OF THE FOURTH DISTRICT IN CARTER.

This Court need not be reminded that the exercise of its discretionary jurisdiction is appropriate here only if DBR demonstrates to the satisfaction of this Court that the opinion in the court below expressly and directly conflicts with a decision of another District Court of Appeal or the Supreme Court on the same question of law. Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. Petitioner respectfully submits that the requisite express and direct conflict does not appear in any of the three decisions cited by DBR for this Court's consideration. Accordingly, the Supreme Court should decline to exercise its discretionary jursidiction.

Petitioner would note at the outset that each of the three allegedly conflicting opinions were brought specifically to the attention of the First District Court of Appeal prior to the issuance of its opinion. Both Everton v. Willard, 426 So.2d 966 (Fla. 2d DCA 1983) and Neumann v. Davis Water and Waste, 433 So.2d 559 (Fla. 2d DCA 1983) were argued by DBR in its supplemental brief. In addition, Carter v. City of Stuart, 433 So.2d 559 (Fla. 4th DCA 1983) was brought to the First District's attention by DBR in a Notice of Supplemental Authority.

Both Neumann and Carter were specifically mentioned by the First District in its opinion, yet the lower court chose not to give the construction of the two cases which DBR now seeks to impose upon this Court. In addition, Respondent further submits that the First District's unquestioned knowledge of the three alleged conflict cases is particularly instructive in view of the appellate court's refusal to certify this case to the Supreme Court as one passing upon a question of great public importance. Obviously, then, the First District failed to see the "direct and express conflict" which DBR here contends exists.

Neumann, Everton, and Carter are all "police power" cases. None of the three alleged conflict 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. Even a cursory reading of the three "police power" cases compels the conclusion that there can be no express and direct conflict with this case, which involves a statutory duty to inspect and certify elevators.

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 inspect, 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 lower 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 Stuart police officer. Again, like Neumann and Everton, Carter involved a discretionary "police power" concern.

In conclusion, 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's contention that the three alleged conflict cases expressly and directly conflict with the case at bar.

This Court should decline to exercise its discretionary jurisdiction.

POINT II

THIS COURT SHOULD NOT EXERCISE JURISDICTION SIMPLY BECAUSE SIMILAR ISSUES ARE NOW UNDER CONSIDERATION BY THE SUPREME COURT IN TRIANON.

The fact that Trianon Park Condominium Associates, Inc. v. City of Hialeah, 423 So.2d 911 (Fla. 3d DCA 1983) is before this Court should not be controlling as to whether the Supreme Court decides to exercise its discretionary jurisdiction herein. Although the decision in Trianon was quoted with approval to buttress the unanimous opinion of the First District Court of Appeal, nowhere in the opinion did the First District state that its opinion was based upon Trianon or dependent on the ultimate outcome of that particular soverign immunity case.

DBR correctly points out that, in denying its Motion for Rehearing, the First District Court of Appeal declined to certify this case as one passing upon a question of great public importance. The failure to certify does not create a jurisdictional issue for this Court. However, DBR apparently believes that simply because other district courts of appeal have certified other cases to this Court, the First District Court of Appeal erred in not doing so here. DBR's contention is without merit.

It was settled long ago that it is up to the District Court of Appeal, and that court only, as to whether a question should be certified to the Supreme Court as one passing

upon a question of great public importance. In Rupp v. Jackson, 238 So.2d 86, 88 (Fla. 1970), this Court opined:

> It cannot be denied that the constitutional language carries with it the implication that a "question" must be certified to be "of great public interest," and that it is this certified question which then acts as a vehicle to bring the entire decision before this Court. In considering an answer to this proposition, care should be given to separate this issue from the issue of whether we will review the propriety of the District Court's decision to certify, or withhold certification, in a case. It is firmly established that this is a matter wholly within the province of the deciding District Court.

(Emphasis supplied.)

Further, it is abundantly clear that the First District is willing, in a proper case, to find express and direct conflicts and certify questions of great public importance to this Court. See e.g., University Hospital Building, Inc. v. Gooding, 419 So.2d 1111 (Fla. 1st DCA 1982). Clearly, then, the lower court was well within its discretion to decline to certify this case to the Supreme Court. That decision should not be revisited herein.

Finally, Respondent notes that the trial of this law suit is set for July 1984. The First District Court of Appeal has now determined that DBR is a proper defendant in the suit. Because it is imperative that discovery proceed in an orderly fashion as to all defendants, Respondent has also moved for an order from this Court vacating the stay pending review and for the issuance of the mandate immediately.

CONCLUSION

Respondent respectfully submits that no conflict giving rise to jurisdiction is presented. This Court should decline to exercise its discretionary jurisdiction. It is appropriate and just that the exercise of jurisdiction be denied so that the case before the trial court can proceed in an orderly fashion and without any further delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail this 28th day of November 1983, to all counsel of record as listed below.

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