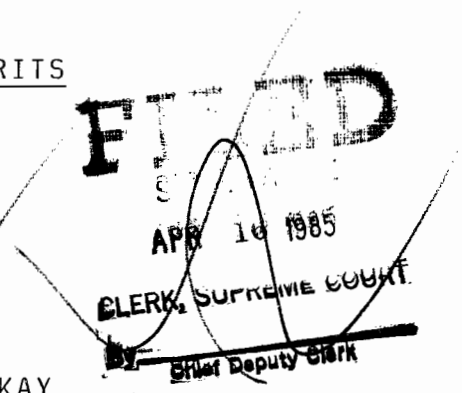
IN THE SUPREME COURT OF FLORIDA

NADINE M. JOHNSON, individually and as Personal Representative of the Estate of Scott E. Johnson, deceased,	)	
Petitioner,	)	
vs.	)	CASE NO. 66,656
COLLIER COUNTY,	)	
Respondent.	)	

RESPONDENT'S BRIEF ON THE MERITS



JOHN W. MACKAY
3202 Henderson Boulevard
Suite 204
Tampa, FL 33609
(813) 873-8835

and

RONALD L. NAPIER, P.A.
1570 Shadowlawn Drive
Naples, FL 33942
(813) 793-1333

Attorneys for Respondent
COLLIER COUNTY

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PRELIMINARY STATEMENT

Nadine M. Johnson was the plantiff in the trial court and the Appellant before the Second DCA. She will be referred to as the Petitioner.

Collier County was a defendant in the trial court and an Appellee before the Second DCA. It will be referred to as Collier County, the County or the Respondent.

POINTS ON APPEAL

(As stated by Respondent)

I

WHETHER THERE WAS AN UNDERLYING DUTY OF CARE WITH RESPECT TO THE COUNTY'S INSPECTION

II

WHETHER THE COUNTY WOULD BE IMMUNE FROM TORT LIABILITY IF THERE WAS AN UNDERLYING DUTY OF CARE

III

WHETHER THE COUNTY'S PURCHASE OF LIABILITY INSURANCE WAIVED SOVEREIGN IMMUNITY

SUMMARY OF ARGUMENT

Shortly after the Petitioner filed her Initial Brief this Court issued its decision in Trianon Park. That decision held that in the absence of an underlying common law or statutory duty of care there could be no governmental tort

liability. The decision went on to specifically rule that building inspections conducted to enforce compliance with the law are matters of governance for which there has never been a duty of care.

The Trianon Park decision effectively decided this case. Petitioner suddenly found the keystone of her argument, the Third DCA's opinion in that case, quashed. The other DCA opinions upon which she depends either specifically relied on the Third DCA's opinion or took the same erroneous approach: an operational level vs. planning level analysis, without first considering the issue of an underlying duty of care.

If there was an underlying duty of care the operational level vs. planning level analysis would be appropriate. When that approach is undertaken and the Evangelical Brethren test applied, it becomes apparent that the County's inspection was a planning level function for which there can be no governmental tort liability.

Finally, Petitioner attempts to inject a new issue at this late date. She now contends that the County's purchase of liability insurance had the effect of waiving sovereign immunity. Her argument is unsound for two reasons: she again overlooks the matter of an underlying duty of care, and the statute upon which she relies concerns only operational activities. The County did not undertake any operational activity - it did not own, operate, control or direct anything. It simply conducted an inspection to enforce compliance with the law.

ARGUMENT

I

THERE IS NO UNDERLYING DUTY OF CARE WITH RESPECT TO THE COUNTY'S INSPECTION

Petitioner contends that because the inspection was an operational level activity rather than a planning level function, Collier County is not immune from liability. This Court's recent decision in Trianon Park Condominium Association, Inc. v. City of Hialeah, 10 F.L.W. 210 (Fla. Apr. 4, 1985) makes clear that the operational level vs. planning level dichotomy need not be considered in this case.

Trianon Park involved an allegedly negligent city building inspection conducted pursuant to the police powers. Building owners sued the city for property damages after the roof fell in. The Third DCA ruled that the inspection was an operational level activity, and that by undertaking that activity the city was obligated to act reasonably and responsibly within accepted standards of care. Trianon Park Condominium Association, Inc. v. City of Hialeah, 423 So. 2d 911, 913 (Fla. 3 DCA 1982).

This Court quashed the Third DCA's decision just eleven days ago, explaining that

> In order to subject the government to tort liability for operational phase activities, there must first be either an underlying common law or statutory duty of care in the absence of sovereign immunity. 10 F.L.W. at 212.

While the Court went on to identify the test to distinguish between operational level and planning level activities, it reiterated that

> [the test] need not be applied in situations where no common law or statutory duty of care exists for a private person because there is clearly no governmental liability under those circumstances.
> 10 F.L.W. at 212.

The instant case concerns Collier County's inspection of a temporary electrical system at a construction site to enforce compliance with the building code. Such inspections have been classified "Category II - Enforcement and Protection" activities by this Court, for which there can be no governmental tort liability. 10 F.L.W. at 212, 213.

Trianon Park specifically considered the discretionary power given to regulatory officials such as building inspectors, fire department inspectors, health department inspectors, elevator inspectors, hotel inspectors and environmental inspectors. The Court ruled that

> How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there never has been a common law duty of care.
> 10 F.L.W. at 212.

The Court then examined the petitioner's claim of an underlying statutory duty. It concluded that Chapter 553 (Building Construction Standards) did not create a duty of care.

10 F.L.W. at 213.

Petitioner only briefly addresses the issue of an underlying duty of care. She applies the test adopted by this Court in Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1970), and concludes that Collier County owed a special duty to the decedent. In advancing that argument, she recognizes that the Modlin approach was rejected by this Court in Commercial Carrier Corporation v. Indian River County, 371 So. 2d 1010 (Fla. 1979), and she suggests that the Court reconsider Commercial Carrier. The Court has since reviewed Commercial Carrier in Trianon Park, finding it viable.

Trianon Park devastated Petitioner's argument by leaving her with little or no supporting authority. Her position rests on the Third DCA's erroneous opinion, which was quashed shortly after she filed her Initial Brief. She relies on The Fourth DCA's opinion in The Manors of Inverrary XII Condominium Association, Inc. v. Atreco-Florida, Inc., 438 So. 2d 490 (Fla. 4 DCA 1983). Rather than discussing its holding in detail, the Fourth DCA simply stated:

> Without explaining all facets of appellee's argument, suffice it to say that we are in accord with the recent decision of the Third District Court of Appeal in Trianon Park... [citation]. Virtually all of appellee's arguments were answered in that case.
> 438 So. 2d at 492.

Petitioner also depends on Bryan v. State, Department of Business Regulation, 438 So. 2d 415 (Fla. 1 DCA 1983).

That case expressly relied on the Third DCA's erroneous opinion in Trianon Park. 438 So. 2d at 420. It was decided on the basis of an operational level vs. planning level analysis, and it never addressed the issue of an underlying duty of care.

Additionally, it concluded that elevator inspections could provide a basis for governmental tort liability. 438 So. 2d at 421. We now know that there is no governmental tort liability for elevator inspections, because those inspections are acts of governance for which there is no common law or statutory duty of care. Trianon Park, 10 F.L.W. at 212, 213.

Petitioner draws our attention to Jones v. City of Longwood, 404 So. 2d 1083 (Fla. 5 DCA 1981). That case was relied upon by the Third DCA in its faulty Trianon Park opinion. 423 So. 2d at 913. It overlooked the issue of an underlying duty of care and ruled that a fire department inspection was an operational level activity for which the city could be liable. 404 So. 2d at 1085. It is now clear that fire department inspections do not give rise to governmental tort liability. Trianon Park, 10 F.L.W. at 212, 213.

In its opinion below, the Second DCA recognized that certain essential activities of the government, including the performance of inspections, must remain immune from tort liability, and that to hold otherwise would make the governmental entity and its taxpayers insurers for all construction projects. This Court identified the same danger in Trianon

Park. It reasoned that if it approved the principle of governmental tort liability for building inspections,

> we would also necessarily have to find governmental entities and their taxpayers fiscally responsible for the failure to use due care in carrying out their power to enforce compliance with laws regarding fire department inspections, water and sewer plant inspections, swimming pool inspections, and multiple other governmental inspection programs designed to protect the public.
> 10 F.L.W. at 213.

This Court chose instead to reject governmental liability in cases like the instant one involving inspections designed to ensure compliance with the building code. 10 F.L.W. at 213.

II

EVEN IF AN UNDERLYING DUTY OF CARE DID EXIST THE COUNTY WOULD BE IMMUNE FROM TORT LIABILITY

Even if Petitioner could identify an underlying duty of care, Collier County would still be protected by the doctrine of sovereign immunity. Once it is determined that a duty exists, the operational level vs. planning level analysis comes into play. Trianon Park, 10 F.L.W. at 212.

Florida has adopted a test first set forth in Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P. 2d 440 (1965) to determine if an activity falls within the operational level or the planning level:

> (1) Does the challenged act, omission,

> or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (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? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? Trianon Park, 10 F.L.W. at 212.

If all the questions can be answered in the affirmative, the activity falls within the planning level function and does not give rise to governmental tort liability. Trianon Park, 10 F.L.W. at 212. In the instant case, all questions must be answered in the affirmative:

(1) Even the Third DCA's Trianon Park opinion agreed that building code inspections involve a basic governmental policy. Trianon Park, 423 So. 2d at 913.

(2) The inspections are essential if we are to accomplish the objectives of the building code. Without them there would be no way to ensure that the County's buildings are constructed in accordance with minimum standards.

(3) Inspections require the exercise of policy evaluation, judgment and expertise. The County determines when to inspect, where to inspect and what to inspect. In the absence of that judgment, an inspector would be required on-site at every

construction project.

(4) This Court recognized in Trianon Park that Chapter 553 authorizes activity such as the inspection in the instant case in order to protect by regulation the welfare of society. 10 F.L.W. at 213.

With all the questions answered in the affirmative the County cannot be subjected to tort liability.

III

THE COUNTY'S PURCHASE OF LIABILITY INSURANCE DOES NOT WAIVE SOVEREIGN IMMUNITY

The second issue presented in Petitioner's Initial Brief was never raised in the trial court. It is inappropriate to raise it for the first time on appeal. Dober v. Worrell, 401 So. 2d 1322, 1323-4 (Fla. 1981); East Naples Water Systems, Inc. v. Board of County Commissioners, 457 So. 2d 1057, 1060 (Fla. 2 DCA 1984).

Nor was the issue presented to the Second DCA. Petitioner contends that once this Court has jurisdiction to resolve a certified conflict, it can reach all other issues. The correct rule is that once this Court has exercised its conflict jurisdiction

> it becomes our duty and responsibility to consider the case on its merits and decide the points passed upon by the District Court which were raised by appropriate assignment

of error . . .

Tyus v. Apalachicola Northern Railroad Company, 130 So. 2d 580, 585 (Fla. 1961), quoted in Bould v. Touchette, 349 So. 2d 1181, 1183 (Fla. 1977) [emphasis added].

Respondent respectfully requests that the Court decline to consider this issue. In the event that this request is denied, an examination of the issue follows.

Petitioner contends that §286.28, Florida Statutes waives sovereign immunity for both planning level and operational level activities. Once again she fails to consider the issue of an underlying duty.

While Avallone v. Board of County Commissioners of Citrus County, 10 F.L.W. 478 (Fla. 5 DCA, Feb. 21, 1985) supports the Petitioner, that case is based on Commercial Carrier. This Court noted in Trianon Park that

> the Court's decision in Commercial Carrier . . . did not discuss or consider conduct for which there would have been no underlying duty upon which to establish tort liability in the absence of sovereign immunity. Rather, we were dealing with a narrow factual situation in which there was a clear common law duty absent sovereign immunity. 10 F.L.W. at 212.

Avallone, like Commercial Carrier, deals with a factual situation in which there was a clear common law duty of care. Gloria Avallone was injured when she was pushed from a dock at a public park and swimming area owned and operated by Citrus County. The County had allowed a dangerous condition

to exist on the dock. Had a private person owned and operated the dock, he too would have been subject to tort liability.

In the instant case, Trianon Park makes clear that there is simply no underlying duty of care. The County did not own, operate or maintain the temporary electrical system. There is no analogous situation that would subject a private person to tort liability.

In addition, the statute now relied on by Petitioner waives sovereign immunity only with respect to operations. Specifically, the statute is directed to political subdivisions that own or lease and operate motor vehicles, own or lease and operate watercraft or aircraft, own or lease buildings or properties, or perform operations in the state or elsewhere. Sovereign immunity is waived only as to damages or injuries "resulting therefrom".

In Avallone the County owned and operated a dock, a public park and a swimming area. 10 F.L.W. at 478. In Ingraham v. Dade County School Board, 450 So. 2d 847 (Fla. 1984) the County controlled and directed the middle school at which the plaintiff was injured. 450 So. 2d at 847.

In the instant case, Collier County did not own, operate, control, direct or maintain the construction site or the temporary electrical system. It simply conducted an inspection to enforce compliance with the law. Even if this issue had been properly presented for review, the decision of the Second DCA would stand.

CONCLUSION

The decision of the Second DCA should be approved. The conflicting decisions of the First, Fourth and Fifth DCAs should be disapproved. The Third DCA's conflicting decision has already been quashed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Richard A. Kupfer and J. Terrence Porter by mail this 15th day of April, 1985.

Respectfully submitted,

JOHN W. MACKAY
3202 Henderson Boulevard
Suite 204
Tampa, FL 33609
(813) 873-8835, and

RONALD L. NAPIER, P.A.
1570 Shadowlawn Drive
Naples, FL 33942
(813) 793-1333

Attorneys for Respondent
Collier County