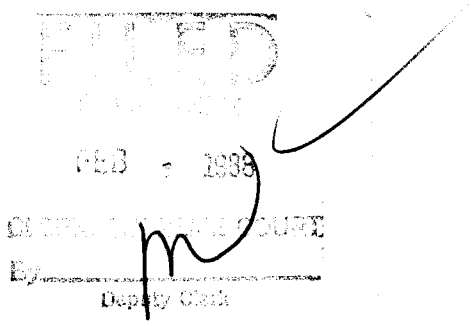
IN THE SUPREME COURT OF FLORIDA

FLETCHER SLEMP and DORA SLEMP Petitioners, vs. CITY OF NORTH MIAMI, Respondent.	Case No. 71,549 (3d DCA No.85-2796)



(On Appeal from the District Court of Appeal of Florida in and for the Third District)

ANSWER BRIEF OF RESPONDENT, CITY OF NORTH MIAMI

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STATUTES AND RULES:

MISCELLANEOUS:

STATEMENT OF THE FACTS AND THE CASE[1/]

The Slemps' brief mischaracterizes their lawsuit and is misleading about the basis for the Third District's decision. The Slemps may now wish to restate their cause of action against the City, but the Third District decision which is under review was based on the actual lawsuit which the Slemps filed, not on other hypothetical claims which the Slemps might have filed.

The Slemps' suit against the City alleged that their home flooded because the City failed to "withdraw" water which accumulated due to heavy rains. (Complaint, paragraphs 6-8.) The Slemps alleged that their damage resulted from the City's failure to drain off rainwater before it flooded the Slemps' property. (Id. at paragraphs 7-10.) The Slemps claimed that the City was liable for failing to maintain its drainage system "so as to keep the streets and residential areas free from excess water." (Complaint at paragraph 10.)

In a key section of the Slemps' brief (at pp. 10-11), the Slemps state that the flooding,

> "***came from the City streets which trapped and funneled the water to its lowest point in front of the Slemps' property *** the accumulation of water [was] created by the City streets *** it

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1/ See the parties' initial briefs to the Third District for a more detailed statement of the facts and the case.

> was the City streets that created the condition for flooding *** the City knew that its streets had the potential to cause flooding *** [etc.]."

Not one of these statements is supported by the Record. This effort to "rephrase" the lawsuit is a tardy response to the acknowledgment by the City and the Third District that property owners do have a cause of action if the owner of an upper estate artificially channels surface waters onto their property. (See footnotes 10 and 11 of the City's Supplemental Brief on Rehearing, and Judge Schwartz' concurring opinion below.) The Slemps, however, alleged no such thing. The Slemps alleged only that their damage had been caused by the City's failure to remove water which had fallen to earth from the sky, not one drop of which had been contributed by the City, and that was the factual predicate to the opinion below. The Third District's opinion was based on the Slemps' complaint, that the City's drainage system had failed to abate a flood caused by naturally occurring rainfall, not a hypothetical lawsuit which the Slemps never filed[2/]. As Judge Schwartz specifically noted in his concurring opinion,

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2/ Not only did the Slemps not allege that the City's streets had channeled water onto their property, but the Slemps never even alleged that the streets were City streets. The Record is devoid of any evidence whatever that the streets were City streets rather than County or State roadways, because that was never presented as an issue below.

> "The only thing the City allegedly did wrong was fail to remove what nature put there." (Emphasis supplied.)

The trial court granted the City summary judgment on the grounds that the City had no duty to remove rainwater and therefore could not be held liable, and the Third District affirmed based on the factual predicate presented to it by both parties. It is too late for the Slemps to try to rephrase their suit.

The Slemps also state at page 7 of their brief that the City did not appeal the trial court's refusal to grant summary judgment on the alternative grounds of "lack of proximate cause", and "therefore" the City "has admitted" that the flooding was actually caused by negligent maintenance of its drainage system. That assertion stands the truth on its head and is an appellate non sequitur. In addition to the Soverign Immunity and "no duty" grounds for summary judgment urged by the City, the City also asserted to the trial court that summary judgment was warranted because the flooding had resulted from extraordinary rainfall which the City's drainage system was not capable of draining off, under any circumstances, and so the flooding was not in fact "caused" by any negligent maintenance of the drainage system. The City submitted unrebutted affidavits and evidence concerning the rainfall during June 1982, South Florida historical rainfall records, and the design capabilities and pumping capacity of the

City's drainage system[3/]. The Slemps did not respond at all to the City's motion and supporting affidavits and exhibits. The Circuit Court granted the City's summary judgment motion on soverign immunity (no duty) grounds and denied the City's motion on the alternative "proximate cause" grounds, but invited the appellate court to review both rulings. (R. 89.) Point II of the City's Brief to the Third District preserved the causation issue, asserting that summary judgment should have been granted on that ground in view of the Slemps' failure to respond to the City's affidavits and exhibits, pursuant to Harvey Builders Inc. v. Haley, 175 So.2d 780 (Fla. 1965); Landers v. Milton, 370 So.2d 368 (Fla. 1979), and other cases (cited in the City's brief) hold-

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3/ As shown by the affidavits and supporting documents which were submitted to the trial court by the City and were unrebutted and accepted as factual by the Third District (in footnote 1), the portion of the City where the Slemps live received over 15 inches of rain in the one week period preceeding June 23, 1982, and 5 inches of rain on June 23 alone (the day their home allegedly flooded). As City Engineer John D'Amanda stated in his affidavit, that rainfall was so heavy that the Dade County historical records reflected such torrential rains only once a decade on average. Moreover, the Slemps' home was built substantially at ground level in a low-lying natural drainage basin and frequently flooded for that very reason. The City Engineer also stated in his affidavit that the City's pumps operating at full capacity were only capable of pumping 15,000 gallons of water per minute, while the 5 inches of rain on June 23rd (on already-saturated grounds) would require the pumping of forty million gallons of water, so that even with the pumps operating at full capacity water would have accumulated on the Slemps' property faster than the City pumps could have removed it.

ing that when a moving party presents evidence to support the claimed non-existence of a material fact, he is entitled to summary judgment unless the opposing party comes forward with evidence which disputes the facts presented by the movant. The City asserted in Point II of its brief that the summary judgment should be affirmed, even if the soverign immunity ruling was erroneous, because the City had made an unrebutted showing of no proximate cause. The City did not have to appeal the Circuit Court's refusal to grant summary judgment on the City's second (alternative) grounds because such an appeal is not required under Parker v. Gordon, 442 So.2d 273 (Fla. 4th DCA 1983); and Stone v. Rosen, 348 So.2d 387 (Fla. 3d DCA 1977)(a summary judgment should be affirmed if correct on any other basis whether or not recognized by the trial court). The Third District may have disregarded that alternative basis for sustaining the summary judgment by the trial court, but it is incorrect for the Slemps to state that the City "admitted" that the Slemps flooding was due to negligent maintenance. Quite the contrary: The City has carefully preserved --and here reiterates-- its unrebutted assertion that the Slemps' flooding was not in fact caused by any maintenance or "operational" deficiency in the City's drainage system.

ARGUMENT

I. UNDER THE FLORIDA CASELAW A CITY IS NOT LIABLE FOR ITS FAILURE TO PROTECT AN INDIVIDUAL FROM NATURALLY-OCCURRING SURFACE WATER, WHETHER THE FAILURE OCCURS ON THE PLANNING LEVEL OR OPERATIONAL LEVEL.

As Judge Schwartz correctly stated in his concurring opinion, if the City of North Miami had done nothing at all the Slemps' home would still have been flooded because the only thing the City was ever accused of doing was failing to remove what nature provided. Not a single drop of water which damaged the Slemps came from the City or its drainage system, and the City has no common law duty to remove water which falls from the skies.

Section 768.28 waived the City's otherwise absolute defense of sovereign immunity from tort claims only for existing traditional tort claims. As the United States Eleventh Circuit recently remarked, Sec. 768.28 represents,

> "*** only a limited abrogation of Florida's immunity; the waiver is limited to traditional torts, i.e., to circumstances in which the state would be liable if it were a private person***. The legislature intended to create sovereign liability for acts or omissions solely within the scope of traditional tort law."

Gamble v. Florida Department of HRS, 779 F.2d 1509, 1514-1515 (11th Cir. 1986).[5/]

This Court held in Trianon that the purpose of Sec. 768.28 was to waive tort immunity with respect to a city's breach of "existing common law duties of care," meaning that a pre-existing common law duty must be found for private parties under the same circumstances before liability could be imposed on a governmental entity. Id. at 917.

Once a government entity builds or takes control of property or an improvement it assumes (at most) the same common law duties as private persons to properly maintain and operate the property so that the property does not harm anyone. However, a government entity may build or take control of property or an improvement without having any common law duty to operate the property so that it always works to achieve its objective, because no such duty exists unless it has been established by statute or by contract.

The City agrees that it has a common law duty to reasonably maintain and operate its pumps and drainage system, as well as all of its other facilities and programs and property, so that they do

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5/ The same point was made last year by this Court in Trianon Park Condominium v. City of Hialeah, 468 So.2d 912 (Fla. 1985). See also Airport Sign Corp. v. Dade County, 400 So.2d 828 (Fla. 3d DCA 1981) ("Sec. 768.28, Florida Statutes (1979) does not create a new cause of action, but provides an additional remedy for causes of action which otherwise exist.")

not cause injury to any person. The Slemps affirmatively alleged, however, that they were damaged because the City failed to protect them from a heavy rainfall. Had the City negligently reversed its pumps and backwashed water into the Slemps' home, the City may well have violated a recognized duty; the same would be true if one of the Slemps had slipped into a City drain which the City had negligently failed to cover. The same may even be true if the City had constructed its streets to artificially channel surface water onto the Slemps property. But none of these things were even alleged to have occurred. Rather, the Slemps specifically alleged that their damage was caused only by the failure of the City's drainage system to remove water which fell to the ground from the heavens. Neither the City nor anyone else in Florida has a common law duty to remove or drain off rainwater. No Florida court has ever stated that a local government or private property owner has a duty to maintain and operate a drainage system so that it succeeds in removing rainwater, just as no Florida court has ever held a government liable because its fire trucks are negligently maintained and therefore fail to put out a fire.

The underlying source of controversy in Trianon, supra, was quite similar to that present here, for in Trianon too the plaintiff's damage had been caused by rainwater. Trianon attempted to hold Hialeah responsible because it failed to catch a builder which had not designed the roof to withstand the rain, and here

the Slemps go even further and seek to hold the city responsible because it did not catch the rain itself. In Florida, heavy rain is as common as shoddy contractors, and shoddy contractors are as common as rain --government can no more be held liable for failing to catch the one as failing to catch the other.

The relevance of Trianon to this controversy is brought into sharp focus by this Court's comment in Trianon, that if the negligent failure to catch a shoddy builder is conceptually the same as negligent fire suppression, then the City could not be subjected to tort liability whether or not such activities occur on the operational or planning levels. This Court stated:

> "There is no governmental tort liability for the action or inaction of government officials or employees in carrying out the discretionary governmental functions [of enforcing the laws and protecting the public safety] because there has never been a common law duty of care with respect to these *** police power functions, and the statutory waiver of sovereign immunity did not create a new duty of care." Trianon, supra, at 921.

There is no principled basis for distinguishing flood prevention from fire prevention, crime prevention, disease prevention, or any other similar police function. See Trianon, supra, at 915[6/].

6/ Trianon argued to this Court that code enforcement activities should be distinguished from a city's efforts to control fire because code enforcement was a statutory duty which had been imposed on municipalities ("unlike fire suppression, there are mandatory duties to be followed during building inspections".) It is certainly impossible to distinguish between fire and flood prevention. See Trianon, supra, at 915-916. Indeed, while cities do have a statutory duty to inspect buildings, no duty is imposed on Florida cities to provide drainage.

In City of Daytona Beach v. Palmer, 469 So.2d 121 (Fla.1985), a city was sued for operational negligence while attempting to fight a fire. This Court held that no common law duty existed to provide fire protection and hence no liability could arise even though the negligence occurred on an operational level (emphasis supplied):

> "To hold the city liable for the negligent decisions of its fire fighters would require a judge or jury to second guess fire fighters in making these decisions and would place the judicial branch in a supervisory role over basic executive branch, public protection functions in violation of the separation of powers doctrine. We distinguish these types of discretionary fire fighting decisions from negligent conduct resulting in personal injury while fire equipment is being driven to the scene of a fire or personal injury to a spectator from the negligent handling of equipment at the scene." Id. at 123.

This is precisely the distinction recognized by the Third District below. This case is logically indistinguishable from a case of damage or injury arising after a police car or fire truck breaks down during an emergency due to negligent maintenance. If a citizen is damaged by fire or a criminal or a rainstorm, the government's failure to alleviate the condition (to arrest the criminal, or the rains, or the fire) cannot be a source of common law tort liability. A pump which does not operate to remove rainwater during a storm is no different from a pump which does not operate to force water onto a fire, or a pump which does not operate to force

gasoline into the carburator of a police vehicle during a riot. In Trianon the City of Hialeah asserted that it was immune from liability because there was no recognized analogous claim under Florida common law against private parties for code enforcement activities, and this Court agreed:

> "[For] there to be governmental tort liability there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct."

In the present case no such underlying common law or statutory duty exists with respect to a city's flood control efforts. The Slemps have cited no Florida statute or caselaw recognizing such a duty and, as shown in Point II below, the courts in other jurisdictions have specifically held that no such duty exists.

It is important to recognize that this Court emphasized in Trianon that the "no duty" finding applies not only to basic judgmental or discretionary govermental functions but equally to operational level activities which arise from basic governmental and police functions which are for the benefit of the general public. Trianon, supra, at 719, citing the Restatement (2d) of Torts, Sec. 288. As the Third District recognized, storm sewers are a basic governmental function because the drainage of surface water by a government is an inherent public-protection "police" function which, under Trianon, is immune from liability. Trianon flatly held that "there has never been a common law duty to individual

citizens for the enforcement of police power functions". See also Hutchinson v.City of Lakewood, 180 N.E. 643 (Ohio 1932), specifically holding that surface water drainage is a basic police function since it is intimately associated with the public health, safety and welfare:

> "The function of public drainage, then, arises under the police power *** for such services are established for the express purpose of preserving the public health ***. The function is purely governmental." Id. at 644.

See also Sioux Falls Construction Co. v. City of Sioux Falls, 297 N.W.2d 454 (1980), agreeing that flood control is a purely governmental function. As both Hutchinson and Trianon noted, once immunity arises with respect to a police power function, the immunity applies equally at the operational level as it does at the planning level.

As shown by the caselaw discussed below and in Point II below, there is no existing common law duty imposed on any landowner, public or private, running in favor of any individual or group, to remove surface water which accumulates as a result of rainfall. To paraphrase this Court in Trianon, there is simply no

common law duty to prevent surface water flooding due to rainfall[7/].

This Court held in Trianon that it would undermine the doctrine of separation of powers for courts to intrude, through the mechanism of tort litigation, into the realm of basic governmental and police functions. Trianon, supra, at 918. The City submits that drainage is among the three or four most basic governmental functions. Especially in South Florida, flood control is as fundamental a governmental and police function as crime control, fire control and disease control. This Court in Trianon specifically stated that a government's decision not to dedicate

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7/ Sec. 768.28 says that city tort liability is to be the same as private tort liability. If Grocer Jones has an awning or employs umbrella-equipped bag boys so customers do not get wet when carrying groceries to their cars but, through Grocer Jones' indifference, the awning and umbrellas become deteriorated and a customer gets wet, on what system of reasoning would a court rule that Grocer Jones had committed a common law tort? It is well established that no landowner has a common law duty to prevent rainwater from running off his land onto a neighbor's land. See, e.g., Seminole County v. Mertz, 415 So.2d 1286 (Fla. 5th DCA 1982). One may, of course, have a contractual duty to remove rainwater or surface watter, but no such allegation was made in this case. Liability may also arise if a landowner (public or private) artificially collects and directs surface water onto the plaintiff's property, as was the case (for example) in City of Muncie v. Sharp, 165 N.E. 264 (Ind. App. 1929), where a city ran drainage pipes in a fashion which artifically diverted and channeled surface water onto the plaintiff's property. The Slemps made no such allegation here, however.

greater resources to one or another such function is a purely discretionary decision with which the courts should not interfere. Id. at 920.[8/]

Courts cannot sensibly decide controversies of this sort simply by reference to abstract principles of law. For such a case to be decided well it must be decided with due regard for historical fact and the practicalities of public administration. (For example, judges must consider the consequences of the Selmps' position in the event of a major hurricane, which would overwhelm every governmental flood control system in South Florida.) For as long as civilization has existed human communities have confronted such threats from the environment. From time immemorial communities have been threatened by plague or harassment by pirates or bandits, or windstorm, conflagration, earthquake, flood, drought, pollutants, and various types of disease

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8/ This Court's comment in Trianon that a government may be liable for failing to maintain its capital improvements reflects, upon review of the cases it cites, that the Court was speaking of damage caused by the improvements themselves. In no such case was a government liable because a service or improvement failed to achieve the ultimate goal of protecting public health, safety or welfare. Justice MacDonald's concurring opinion clarified that distinction by noting that it is one thing when a government's own property directly causes injury, and quite another when the government fails to prevent injuries caused by others or, presumably, by naturally occurring conditions. Id. at 923. This is precisely the distinction recognized by the Third District below.

and infection. Communities have responded to such threats with varied defense measures which work more or less well depending on the financial and intellectual resources available and the political will, but not the vagaries of tort litigation. See Miller v. City of Brentwood, 548 S.W.2d 878 (Tenn. App. 1977), where the court in a similar case held a city not liable for drainage negligence and commented that it was a political rather than legal issue whether to improve a drainage system:

> "In spite of the recent propensity of some courts to undertake to supervise and direct the activities of other branches of government *** there is no authority for compelling a city to construct an artificial drainage system; and it would be a radical, dangerous and undemocratic precedent for the courts to undertake to enter into municipal legislation and administration in any such respect."

In Baldwin v. City of Overland Park, 468 P.2d. 168, 173 (Kan. 1970), the Kansas Supreme Court confronted the very issue now confronted by this Court and held that the city's failure to protect citizens from surface water was not actionable because any deficiency of the public drainage system should be solved through "conserted political action rather than the courts." Given the City's scarce financial resources, the City may lawfully decide not to spend a half-million dollars in new drainage pumps to keep the Slemps dry in 95% rather than 65% of all foreseeable rainstorms, but rather to spend those funds to provide 95% rather than

65% of the City's elderly poor with hot meals. Whether the City's drainage system works 95% of the time, or 65%, or 5%, or 0%, the Slemps have no tort claim against the City. To whatever degree members of a community contribute to a neighbor's defense against floods (or plague or crime, etc.), such a contribution is beneficial to the neighbor, and the fact that such a benefit does not always prevent flooding cannot be "tortious". If judges intrude by punishing the Slemps' neighbors because they made some effort to aid the Slemps, however meager or haphazard, then the Slemps' neighbors will understandably conclude that the "lesson" is to withdraw such aid altogether. Many other South Florida towns and counties have no storm drainage system at all. The Slemps' home floods almost every year, and they are claiming many tens of thousands of dollars from this single flood. Every year there are heavy rains, and the City does not have millions of dollars for a first-rate drainage system. Under such circumstances, any decision other than the Third District's would require the City to shut down its existing system altogether, which would hardly help the Slemps or anyone else. See Carter v. City of Stuart, 468 So. 2d 955 (Fla. 1985), in which the government attempted to control dogs but failed at the operation level to achieve its objective and this Court held the government immune because the courts could not place the government in a situation where it must either dedicate all its resources to a particular objective in order to gua-

rantee success or else abandon the objective altogether. Id. at 957.

In Reddish v. Smith, 468 So.2d 929 (Fla. 1985), the government allowed a criminal to escape and injure the plaintiff. This Court held the government immune from liability. It is worth recalling that the criminal courts and jails are themselves but a form of public drainage[9/]. It is quite impossible to develop a principled distinction between a government's negligence in allowing a dangerous person to evade that particular type of public drainage from a government's negligence in allowing a dangerous natural condition (whether contagion, conflagration, or flood) to evade government control. A government's flood control system, like its crime or drug control programs (the latter designed to halt the "flood" of illicit drugs flowing across our borders), is meant to protect the public from a threat not of the government's making. See Everton v. Willard, 468 So.2d 936 (Fla. 1985), where this Court held that tort liability does not arise when a government negligently allows a drunk driver to injure another person,

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9/ The term applied to the doctrine of self-reliance with respect to surface water is the "common enemy" doctrine, a name more commonly used to describe sociopaths and national enemies.

even if the government's negligence occurs at the operational level. To the same effect see Carter v. City of Stuart, 433 So.2d 669 (Fla. 4th DCA 1983); Butter v. Sarasota County, 501 So.2d 579 (Fla. 1986). (In the latter case, this Court held that liability could arise when a government created a designated but dangerous swimming area which thereby created the circumstances leading to the injury.) Compare Emig v. State Department of HRS, 465 So.2d 1204 (Fla. 1st DCA 1984) with Ellmer v. City of St. Petersburg, 378 So.2d 825 (Fla. 2d DCA 1979), Higdon v. Metropolitan Dade County, 446 So.2d 203 (Fla. 3d DCA 1984), Wong v. City of Miami, 237 So.2d 132 (Fla. 1970) and Kitchens v. Asolo State Theater, Inc., 465 So.2d 566 (Fla. 1st DCA 1985). And compare this case with Matthews v. City of St. Petersburg, 400 So.2d 841 (Fla. 2d DCA 1981), where a city had altered a natural channel and caused (or at least contributed to) a person's death by installing vertical concrete sides which the victim could not climb. As in Neilson v. City of Tampa, 400 So.2d 799 (Fla. 2d DCA 1981), the court in Matthews held the government had created the dangerous condition itself and was therefore liable. To the same effect, see Collom v. City of St. Petersburg, 419 So.2d 1082 (Fla. 1982) where individuals were swept into the storm sewer system built by the City without properly covered drains. The district court's analysis in Collom (400 So.2d 507) is particularly relevant to this case:

> "The availability of funds may well be a valid consideration when a city is deciding just how to meet a threat to public safety. Certainly the government could not be expected to provide facilities for which the electorate refuses to loosen its purse strings***. But this is not to say that the city would be free to adopt an expensive plan for alleviating a problem and then cut costs by eliminating the safety features. That would merely replace one danger with a worse one. No reasonable individual, for example, would install a fine furnace to keep his family from freezing, but economize by building a wooden chimney. Governments are expected to exercise prudence and reason.

Collom, supra, at 509 (emphasis supplied). Contrary to the situation in Collom, here the City of North Miami has not eliminated any safety features nor is that even the alleged source of the Slemps' damage. Nor has the City replaced the danger of flooding with some other danger to the Slemps' property; rather, the Slemps were damaged by the original danger which the City simply failed to eliminate. (The Second District's "wooden chimney" analogy is instructive, for the danger in the wooden chimney is not that the children will freeze, but that a neighbor will broil.) Thus Collom has less to do with this case than do the decisions in Brumley v. Dorner, 83 So. 912 (Fla. 1919) and Seminole County v. Mertz, 415 So.2d 1286 (Fla. 5th DCA 1982), holding that the owner of upper real estate may deal with surface water as he deems fit so long as he does not unreasonably gather and cast the flow upon the subservient estate. See also Payne v. Broward County, 461 So.2d 63 (Fla. 1984) and Hyde v. Florida Department of Transportation, 452 So.2d 1109 (Fla. 2d DCA 1984).

Therefore, the pertinent Florida caselaw supports the Third District's decision in this case, because it holds that governments can not be held liable for the failure of a public health or welfare measure to achieve its objective, whether the failure is due to negligence on the operational or planning level.

II. IN OTHER AMERICAN JURISDICTIONS WHICH HAVE CONSIDERED THE PRECISE ISSUE BEFORE THIS COURT, CITIES WERE HELD NOT LIABLE FOR SURFACE WATER FLOODING ATTRIBUTABLE TO NEGLIGENCE IN THE OPERATION OF DRAINAGE SYSTEMS.

Although there are no Florida decisions on "all fours" with the facts in this case, this precise controversy is not unprecedented in other American jurisdictions. On the contrary, the very issue which now confronts this Court was frequently confronted by courts in sister states, especially during the 1920's and 1930's when local governments first began to operate storm sewers.

In Adams v. City of Omaha, 230 N.W. 680 (Neb. 1930), water overflowed the city drainage system, as a result of heavy rains, and flooded the plaintiff's home. The plaintiff alleged negligence in the city's maintenance program. The court rejected that claim:

> "There is no evidence that an act of the defendant caused the surface water to accumulate and be thrown upon [plaintiff's] premises. For ought that appears, no more watter came to or upon plaintiff's premises than would have naturally reached them if no sewers had been constructed. In fact, the inference is that less water was precipitated upon [plaintiff's] premises than would have been, had no sewers been constructed. The law authorizes, but does not require cities *** to construct storm sewers. If no street sewer had been constructed, plaintiff's damage would not have been less and might have been greater. Plaintiff's plight is no worse because of the insufficiency of the sewer, and it is to be inferred that it is somewhat better."

The court in Adams quoted at some length from the Kansas Supreme Court's decision in City of Atchison v. Challiss, 9 Kan. 603, 611, where the court stated:

> "Now, if a city is not bound to construct a drain of any kind, by what system of reasoning can it be made to appear that if it shall construct a drain it must construct one that shall be sufficient *** Any drain is better than no drain. Any drain instead of being an injury to a party, is, so far as it operates, a positive benefit. If it carries off half the water that fell *** how can that be said to be an injury? Is it not an actual benefit to the extent that it operates? And if a benefit, upon what principle can the city be made liable?" Id. at 611, quoted in Adams, supra, at 681.

The court in Adams concluded that since a city's failure to construct any storm sewer to carry off any surface water cannot be actionable, it logically followed that the construction of a sewer which carries away any part of the water (or, more correctly, carried off some water all of the time) could not be actionable either. Adams, supra, at 682. This is exactly the reasoning applied by Judge Schwartz in his concurring opinion below:

> "The only thing the City allegedly did wrong was fail to remove what nature put there. Since there is no indication that, if the City had done nothing at all, the Slemps would have been in any different position, I thoroughly agree *** that there was no breach of a legally cognizable 'duty'.*** ."

In Buerkel v. Boston, 190 N.E. 788 (Mass. 1934), a suit was brought alleging that plaintiff's property was damaged by flooding

because the city drains had been badly maintained. The court held that the city was under no duty to construct or to maintain drains at all; the court held that the city was under no duty to restrain surface water from falling or running onto plaintiff's land. Just as the Nebraska and Kansas supreme courts had held, the Massachusetts Supreme Court held that the flooding suffered by plaintiff was no worse than if the city had never constructed a drain in the first place, and therefore damage resulting from the failure of the drains to protect plaintiff from flooding was not actionable. Id. at 789.

In City of Globe v. Moreno, 202 P. 230 (Ariz. 1921), the Arizona Supreme Court confronted the same problem and also concluded that cities have no duty to drain off surface water and therefore a city's failure to protect a property owner from such surface water could not be actionable. The Court held that because surface water is a common enemy which every property owner must fight as best he can, the property owner must act to protect himself from surface water and the city had no duty to prevent surface water from accumulating.

In Le Brun v. Richards, 291 P. 825 (Cal. 1930), the California Supreme Court confronted the same issue: The Court held it settled that the owner of higher or dominant real estate has a natural easement in the lower or servient estates to dis- charge all naturally falling surface water onto the servient es- tate,

for "every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it***." Id. at 827. See also Young v. Gott, 250 N.W. 484 (Iowa 1933), to the same effect. In the present case, were it not for the City's drainage system, the Slemps would likely be underwater most of the year because their home was built --mostly at ground level!-- in a natural drainage basis from the everglades into the sea.

Similarly, in Oklahoma City v. Evans, 50 P.2d 234 (Okla. 1935), the Supreme Court of Oklahoma held that because surface water was a common enemy, every property owner was required to fight it as best he could and the city had no duty toward any property owner to control the natural flow of surface water. Id. at 237. The Court emphasized that in the absence of a statutory "duty-to-protect," the plaintiff's damage had been caused by a natural event and not by any wrong of the city. To the same effect, see Town of Auburn v. Chyle, 75 S.W.2d 1039 (Ken. App. 1934), where the court held that a city could not be liable for negligence in its effort to control surface water unless it artificially collected the surface water and diverted it onto the plaintiff's property. To the same effect, see Wright v. City of Oneonta, 1 N.Y.S.2d 295 (N.Y. Sup.Ct. 1937), confirming that the city had no duty to restrain the flow of naturally occurring water: "A municipal corporation is not liable for damages because of an increase in the volume of surface water, so long as the flow

of the water was not diverted from its natural course." Id. at 299. See also City of Louisville v. Leeza, 136 S.W. 223 (Ken. App. 1911); Hutchinson v. City of Lakewood, 180 N.E. 643 (Ohio 1932); Kane v. Burrough of Naugatuck, 182 A. 227 (Conn. 1935), rejecting similar claims where the plaintiff had been damaged by the natural run-off of surface water, not by the city's drainage system which was designed to prevent flooding but failed to do so.

Nor are all of the relevant cases limited to the 1920's or 30's, for the same principles of law reappear in more modern decisions. In McClure v. Town of Mesilla, 601 P.2d 80 (N.M. App. 1979), a plaintiff alleged damages as a result of negligence in the operation of a city drainage system and the court affirmed a dismissal with prejudice. Similarly, in Laurelon Terrace, Inc. v. Seattle, 246 P.2d 1113 (Wash. 1952), the plaintiff's property (like the Slemps) was located in a natural watershed in the city, and as here, heavy rains fell and plaintiff's property was flooded. The court stated that "actionable negligence consists of a duty, its breach, and a resulting injury [and] before a municipality is liable for causing an injury, it must appear that some duty *** has been neglected." The Court held that plaintiff was certainly no worse off than if the city had never constructed a drainage system in the first place and therefore plaintiff's damage was not actionable.

In City of Augusta v. Williams, 57 S.E. 2d 593 (Ga. 1949) and City of Augusta v. Williams, 58 S.E.2d 208 (Ga. App. 1950), a plaintiff alleged negligent failure by a city of maintain its drains. The court specifically held that the maintenance of drains is a governmental function for which no liability can arise. Similarly, in Reid Development Corp. v. Burrough of Verona, 76 A.2d 821 (N.J. Super. 1950), the court held that so long as a town does not artifically divert surface water onto the plaintiff's property, liability cannot arise. And in Wright v. City of Rock Island, 273 N.E.2d 83 (Ill. 3d DCA 1971), the Illinois district court confronted a case similar to the present one, involving heavy rains and a city drainage system which was not functioning, and specifically held that the city could not be liable for failure to successfully drain off heavy rainfall. See also, Gibeau v. Town of Pratt, 42 N.W.2d 286 (Wis. 1950); Wilson v. Ramacher, 352 N.W.2d 389 (Minn. 1984).

In Freeman v. City of Lake Mills, 11 N.W.2d 181 (Wis. 1943), the plaintiff's home allegedly flooded due to negligent maintenance of the city's storm sewer system, and the court held that the city was no different than a private party with respect to surface water and had no duty to maintain its drainage system, only a duty not to artifically collect and divert the water onto the plaintiff's property.

In City of Dallas v. Winans, 262 S.W.2d 256 (Tex. App. 1953), a Texas court likewise held that the city was under no duty to protect any individual from storm waters caused by rain, and that the courts were not permitted to direct cities how to engage in such discretionary governmental functions. Id. at 258. See also Hendrey v. Creel, 297 So.2d 364 (Ala. 1974) (holding that a city had no duty to provide or maintain proper drainage of surface water to prevent flooding); Strauch v. City of Scranton, 49 A.2d 96 (Penn. Super. 1945); City of Texarkana v. Taylor, 490 S.W.2d 191 (Tex. App. 1972) (confirming that the government is immune when performing governmental functions, and the operation of sewers is such a function).

Even a cursory reading of the sister states' decisions cited on pages 4 and 5 of the Slemps brief shows that those decisions either support the Third District or else are not on point. In Malvernia Investment Co. v. City of Trinidad, 229 P.2d 945 (Colo. 1951) in a similar lawsuit, the trial court granted a directed verdict in favor of the city and the Colorado Supreme Court affirmed, commenting that cities are not liable for defective drainage planning and, moreover, are not liable unless "by some act of wrong-doing it has caused water to be cast upon an owner's lands or improvements ***." Id. at 947. State v. Lavander, 365 P.2d 652 (N.M. 1961), involved a mandamus suit by a city to require the state to reimburse the city for water and sewer line

relocation and has no bearing on the issue before this Court. Oklahoma City v. Romano, 433 P.2d 924 (Okla. 1967) involved claims that the city had back-flushed sewage into the plaintiff's property, a proper cause of action which the Slemps never advanced. Likewise, in Henry Clay v. City of Jersey City, 200 A.2d 787 (N.J. 1964) and Sigurdson v. City of Seattle, 292 P.2d 214 (Wa. 1956), drainage systems artificially diverted water on to the plaintiff's property. In Fuller v. City of Rutland, 171 A.2d 58 (Vt. 1951), the Court dealt with personal injuries suffered when the plaintiff fell into an open sewer (and the court actually affirmed the judgment in the city's favor). Similarly in Green v. Town of West Springfield, 81 N.E.2d 819 (Mass. 1948), the plaintiff fell into a sewage excavation, just as in the Florida decision in Collom, supra. In Dowd v. City of Cincinnati, 87 N.E.2d 243 (Ohio 1949), the plaintiff also alleged that his damage had been caused by the city's sewer system, not by naturally-occurring flooding, and the Court correctly held that the city had a duty to keep its sewers in good repair so that the sewers did not "cause damage to private property".

Accordingly, the cases cited by Petitioners do not support Petitioners' position at all. The decisions from sister states actually lend strong support to the Third District's ruling that the City has no common law duty to prevent damage from a flood caused by torrential rains.

CONCLUSION

In this case the Slemps alleged they were damaged not by the City's property but rather by a natural occurrence (rainfall) which the City's drainage system failed to prevent.

There is no logical basis for distinquishing this case from a case of a citizen assaulted by a criminal who through police negligence had evaded (or been released from) police custody. Certainly there is no logical basis for distinguishing this case from a case of a house burning down after a local fire department negligently fails to put out the fire. This case is logically indistinguishable from that of damage or injury arising after a police car or fire truck fails to start during an emergency. If a citizen is damaged by a fire or a flood, the government's "negligent" failure to alleviate the condition (to arrest the rains or the fire) cannot be a source of common law tort liability. A pump which does not operate to remove rainwater is no different than a pump which does not operate to put out a fire.

The principles and cases cited by Petitioners are meant to apply only when it is the government's property which itself causes the damage or injury. Had the Slemps alleged that the City's storm-sewer system (or its streets) artificially pumped or channelled water into the Slemps' home, liability would arise under Trianon for the very reason that once a government entity

builds an improvement, it has a common law duty to properly maintain and operate the improvement so that the improvement does not damage citizens. That is not what the Slemps alleged. The Slemps alleged only that the City storm sewer system, due to negligent maintenance, failed to protect the Slemps from a rainstorm, and the City submits that there is no caselaw in Florida recognizing tort liability when a government fails in that manner to protect the health, welfare or safety of citizens.

Stripped to its essentials, Petitioners want this Court to hold that once a government attempts to ameliorate a public threat (man-made or natural), it is legally bound to succeed no matter the cost: having decided to have police, the police must catch all criminals and prevent all crime, or else the city is liable; having decided to have a fire department, it must arrest all fires or else the city is liable. Having decided to have a Public Health Department, it must eradicate all contagion or else the city is liable. The implication is that the City should close down its drainage system altogether. No other conclusion is possible if one concludes that a city, having decided to build a flood-control system to partially control rainwater, is duty-bound to successfully control all rainwater or else is liable. Particularly in hurricane-prone Florida, the ruling demanded by Petitioners would be contrary to common sense and devastating to all local governments (and ultimately their residents) which made the mistake of

trying to control flooding, to some degree, through artificial drainage systems.

Respondent respectfully requests the Court to affirm the Third District's decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent, City of North Miami, was furnished by mail to THOMAS A. PEPE, ESQ., Attorney for Appellants FLETCHER SLEMP and DORA SLEMP, Penthouse 1230, Douglas Centre, 2600 Douglas Road, Coral Gables, FL 33134, this 29th day of January, 1988.

THOMAS M. PFLAUM, ESQ.

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