IN THE SUPREME COURT OF FLORIDA

LEVADA LEE, etc.

Petitioner,

v.

Case No. 87,071

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL
CASE NOS. 93-1411 and 93-1350

ANSWER BRIEF OF RESPONDENT

Respectfully submitted,

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PRELIMINARY STATEMENT

Petitioner Levada Lee will be referred to herein as "Petitioner." Respondent Department of Health and Rehabilitative Services will be referred to herein as "Respondent" or "DHRS." Amicus Curiae Advocacy Center for Persons with Disabilities, Inc. will be referred to herein as "Amicus Advocacy Center.'' Amici Curiae Academy of Florida Trial Lawyers and the Association for Retarded Citizens will be referred to herein as "Amici Academy/ARC."

References to the record will be made by the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE

Respondent disagrees with Petitioner's Statement of the Case to the extent that the statement is incomplete. DHRS therefore submits the following additional facts pertaining to the case:

Petitioner filed a 3-count negligence complaint against DHRS. (R 617-620) Count I of the complaint alleged that DHRS was negligent in the oversight and supervision of D. L. and that Ms. Lee was subjected to sexual abuse on one or more occasions ax a result of such negligence. (R 618) Count II alleged that DHRS negligently failed to follow its practice of providing at risk females with birth control. (R 618-619) Count III sought damages for the wrongful birth of Ms. Lee's child. (R 620) The trial court granted partial final summary judgment as to Count II on a finding that there was no evidence that DHRS deviated from its birth control policies, and that DHRS policies pertaining to providing birth control to its clients is a discretionary function which is immune from tort liability under the doctrine of sovereign immunity. (R 804-805) The court granted partial final summary judgment as to Count III on a finding that Ms. Lee's child was a healthy, normal child. (R 805)

DHRS on direct appeal argued that (1) the trial court erred in failing to instruct the jury on the correct standard to apply to determine D. L.'s capacity to consent to sexual activity; (2) the trial court erred in denying DHRS' Motion for Directed Verdict in that the court abused its discretion in allowing into evidence the unsupported conclusory testimony of the DHRS abuse

investigator, the testimony of Lee's expert who was not qualified to render an opinion as to D. L.'s mental condition during and after the pregnancy, and the expert's hearsay testimony as to D. L.'s out of court statements; (3) the trial court erred in failing to grant DHRS' Motion for Directed Verdict or Judgment Notwithstanding the Verdict in that there was no prima facie case of negligent supervision established; and (4) the submission of the case tc the jury allowed for an impermissible stacking of inferences.

The district court did not directly address these issues because it concluded that DHRS was immune from tort liability under the doctrine of sovereign immunity as to Petitioner's claim for negligent oversight and supervision of D. L.

STATEMENT OF THE FACTS

Respondent disagrees with Petitioner's Statement of the Facts to the extent that the statement is incomplete. Respondent therefore submits the following additional facts:

Bill Parramore, Sunland-Marianna's residential services director, testified that federal and state standards established the staff to client ratios for the facility in which D. L. was a resident, that Sunland had never been cited for a violation of the regulations pertaining to staffing ratios, and that Sunland was in compliance with state law pertaining to staffing requirements. (R 136,343,365) Parramore testified that at the time that D. L. was a resident of Sunland-Marianna, the institution fully complied with the 1:2 overall staff to client ratio set forth in Rule 10D-38.024, Florida Administrative Code. (R 139,141) Parramore testified that Sunland did not have the ability to provide one-on-one oversight and supervision fcr its residents, and that such strict supervision was never a stated goal of federal or state staffing regulations. (R 343) Parramore testified that the statutory normalization principle and the Bill of Rights of Developmentally Disabled Persons require that Sunland residents have as much freedom as possible. (R 344) Parramore testified that there are no rules or regulations forbidding sexual contact for Sunland residents. (R 356)

Russell Register, D. L.'s social worker at Sunland, testified that the need far one-on-one supervision of residents was discussed during habilitation meetings or a quarterly active

treatment meeting. (R 308) Such supervision was required for "someone who's extremely self-abusive or possibly would even elope, run from the center." (R 308) Register testified that D. L. did not require one on one supervision. (R 308)

Tracy Clemmons, Superintendent of Sunland-Marianna, testified as to how the institution supervised its clients in accordance with the requirements of the narmalization principle and the disabled persons' Bill of Rights. (R 373-375)

Gene Peacock, DHRS abuse investigator, testified that he prepared an abuse report pertaining to the pregnancy of D. L., and that he found no evidence that Ms. L. had been abused at Sunland. (R 115) Peacock testified that he concluded from his investigation that the sexual activity in which D. L. had been involved was more likely by mutual consent. (R 115) Peacock testified that in formulating his opinion that neglect was "indicated," he did not consider the civil rights of disabled persons, as set forth in Chapter 393, the normalization principle, or the standard of care established by the legislature for residential developmentally disabled adults. (R 114) Peacock testified that he had no knowledge as to whether there were laws or policies which addressed sexual contact among the developmentally disabled. (R 116) Peacock testified that D. L. informed him that she had engaged in sexual activity outside of Sunland. (R 118)

Sunland staff members testified that D. L. suffered no visible mental or emotional trauma. resulting from whatever sexual activity led to hex pregnancy (R 238,

242,236,247,274,320,329,354), never indicated to them that she was in any way unhappy or troubled (R 298,300), despite the fact that she was a normally communicative and vocal individual. (R 202,231,235,349). Staff members did not observe any change in D. L.'s behavior after she became pregnant. (R 242) Sunland staff members also testified that D. L. would exhibit people aggression, fight staff, clients, and whoever else got in her way. (R 232) She would destroy clothing, bed things, furniture, anything she could get her hands on, yell and scream. (R 232) Staff described her as very strong, and in one instance capable of taking a door off its hinges. (R 232) D. L. could tell the staff if someone moved her belongings, if something of hers was missing or if someone hit her. (R 237) She was prompt in reporting bad things that happened to her. (R 237) Staff could hear D. L. screaming when she would get upset. (R 237) D. L. would defend herself. (R 237) The staff tried to control Daisy Lee's weight by keeping her on a diet. (R 235) The staff had always kidded her about having a fat tummy. (R 242)

Sunland staff member Rebecca Anderson testified that Sunland needed to provide the least restrictive environment possible, that Ms. Lee was not a prisoner locked in 24 hours a day, that there were efforts to treat her like a normal human being. (R 254). Anderson stated that D. L. was not permitted to go to a dance or the gym unescorted. (R 254) There were people around D. L. all the time. (R 255)

Sunland staff member Merlin Roulhac testified that she accompanied D. L. to dances at the institution. (R 317) Roulhac stated that it was not appropriate to stand by D. L. or to hold her hand at such activities because D. L. was a grown woman with a functioning capacity to take care of herself. (R 318)

CERTIFIED QUESTION

This court has jurisdiction pursuant to Rule 9.030(a)(2)(v), Florida Rules of Appellate Procedure, and Art. V, Sec. 3(b)(4), Florida Constitution. The district court certified the following question as one of great public importance:

> WHERE A SEVERLY RETARDED RESIDENT OF AN HRS FACILITY BECOMES PREGNANT WHILE IN HRS' CARE, BUT NEITHER THE SPECIFIC CIRCUMSTANCES OF HER IMPREGNATION NOR ANY SPECIFIC ACT OF HRS' NEGLIGENCE IS ALLEGED OR ESTABLISHED AT TRIAL, CAN HRS BE HELD LIABLE IN TORT FOR ALLEGED NEGLIGENT SUPERVISION OF THE RESIDENT, GIVEN THE "NORMALIZATION PRINCIPLE," SECTION[S] 393.13-.14, FLORIDA STATUTES ("THE BILL OF RIGHTS OF PERSONS WHO ARE DEVELOPMENTALLY DISABLED")?

SUMMARY OF ARGUMENT

I

Petitioner failed to allege or prove the occurrence of a sexual assault or battery upon D. L., any breach of DHRS' common-law duty to protect D. L. from physical harm, any breach of DHRS' rules or regulations pertaining to supervision and staffing, or a causal link between the asserted negligent supervision and oversight and the sexual activity and resulting pregnancy of D. L. Petitioner failed to produce any evidence that the asserted sexual assault of D. L. was reasonably foreseeable. Petitioner's theory that D. L.'s pregnancy itself was evidence of sexual assault and negligent supervision imposed strict liability upon DHRS in contravention of the applicable common-law duty of reasonable care and legislative intent expressed in §393.13(4), Florida Statutes, read in pari materia with 768.28(9)(a), Florida Statutes, to make DHRS liable only for acts of negligence.

Petitioner failed to establish that D. L. did not or could not consent to the sexual activity which resulted in her pregnancy. Petitioner's requested jury instruction on consent relied solely upon D. L.'s mental age and intellectual functioning as a basis for determination of D. L.'s capacity to consent to sexual activity. Amicus Advocacy Center correctly argues that consent to voluntary sexual activity among the developmentally disabled involves a complex, multifaceted inquiry which properly encompasses far more than mental age or intellectual ability. Section 393.13(4), as well as corollary

federal statutes, afford all mentally disabled adults a right to engage in voluntary sexual activity. Therefore, leve of mental functioning cannot be the determinative measure of consent to such conduct. Regardless of her mental age and level of functioning, D. L. was an adult who was entitled to **all** the rights and privileges set forth in §393.13(3), Florida Statutes, and 42 U.S.C §9501. Under these provisions, voluntary sexual activity is **not and** cannot be an objective harm against which **DHRS** had a duty to protect D. L.

II

DHRS' duty of reasonable care to protect its residential developmentally disabled adult clients from physical harm must be balanced against the competing, equally compelling duty to provide the least restrictive environment possible **and** to afford and maximize all of the rights and privileges secured by §393.13(3), Florida Statutes, and 42 U.S.C. §9501. For this reason, DHRS' duties of oversight and supervision in **the** context of residential mentally disabled adults are significantly distinguishable from the duties owed by prison or school officials toward those within their custody, or DHRS' duties toward dependent or delinquent children.

III

In the absence of allegations or proof of operational-level negligence in the supervision and oversight of D. L., Petitioner's claim amounted to a challenge to DHRS' policies as to level of supervision and staffing at Sunland which precludes application of **the** Evangelical United Brethren discretionary-

operations' analysis. DHRS' conduct of supervising its residential adult developmentally disabled clients is a Category IV function under Trianon Park Condominium Assoc. v. City of Hialeah. Where no act of aperational-level negligence is alleged or proved, however, DHRS' policies must be regarded as discretionary, planning-level acts which are immune from tort liability. DHRS requests this court *to* answer the certified question in the negative, and to approve the decision of the district court.

ARGUMENT

ISSUE I

THE DISTRICT COURT CORRECTLY CONCLUDED THAT PETITIONER FAILED TO MAKE OUT A PRIMA FACIE CASE OF NEGLIGENCE AGAINST DHRS.

Petitioner argues that she presented a prima facie case of negligent oversight and supervision of D. L. The district court held that the absence of specific allegations or proof of negligence indicated that Petitioner actually was challenging DHRS' policies regarding supervision rather than any specific operational-level act of negligence. The district court was correct.

In order to prove negligence, a plaintiff must show that the defendant owed a duty of care, there was a breach of that duty, damage occurred, and the damage was caused by the breach of the duty of care. Cato v. West Florida Hospital Inc., 471 So.2d 598 (Fla. 1st DCA 1985). Absent any one of the elements, the *cause* of action must fail. Id. In this case, Petitioner failed to establish any negligent act, omission, event or occurrence which resulted in D. L. engaging in non-consensual sexual activity with or without DHRS knowledge or supervision. Petitioner failed to present any evidence of a breach of the common-law or statutory duty of care to protect D. L. from physical harm, that physical harm occurred, or that the alleged harm was caused by a breach of duty.

Petitioner alleged in Count I of the Complaint that DHRS had knowledge that Sunland clients engaged in sexual intercourse while on the premises,, that the practice was condoned by DHRS,

that DHRS failed to take reasonable steps to prohibit such conduct, that D. L. was no more capable than any other three-year-old child of giving informed consent to voluntary intercourse or of protecting herself from sexual abuse, that DHRS was negligent in the oversight and supervision of D. L., and that as a result of such negligence, D.L. was subjected to sexual abuse on one or more occasions.

DHRS agrees that it owed D. L., as a residential developmentally disabled adult client of Sunland-Marianna, a common-law duty of reasonable care to protect her from physical harm. **Department of Health and Rehabilitative Services v. Whaley,** 574 So.2d 100 (Fla. 1991). That duty of care includes the duty to use reasonable care to protect D. L. from foreseeable intentional harm by third persons. Restatement (Second) of Torts §320 (1965 ed.).

PETITIONER'S CASE AGAINST DHRS

Petitioner relied upon the following evidence to demonstrate negligence by DHRS: (1) D. L. was estimated to have become pregnant within four days of March 21, 1987; (2) on March 18, 1987 Sunland patients attended a dance from 6:30 P.M. until 8:45 P.M.; (3) a Sunland employee observed a client "fingering" D. Lee on some date before the March 18, 1987 dance, but no report was made about the fingering incident; (4) D. L. told a DHRS investigator that a client had "played nasty" with her, and that two clients had "played nasty" with her at the March 18, 1987 dance; (5) the DHRS investigator concluded that neglect was "indicated' in that Sunland had failed to adequately supervise

D. L. at the dance, that the sexual activity in which D. L. had participated was more likely by mutual consent, but that D. L. could not consent due to her intellectual limitations; (6) Petitioner's expert concluded that D. L. was forced to have sex against her will on at least two occasions; (7) the expert concluded that D. L. suffered from symptoms of Post Traumatic Stress Disorder; (8) D. L.'s family testified that her behavior had changed during a July, 1987 home visit, and that D. . had nightmares; (9) DHRS did not have knowledge that D. L. had engaged in sexual activity or was pregnant until she was several months pregnant; (10) there were multiple opportunities for D. L. to have engaged in sexual activity without the knowledge of DHRS; (11) Sunland knew that some of its clients were sexually active.

DHRS objected at trial to the admission of the DHRS abuse report and the investigator's testimony regarding his conclusions of inadequate supervision, and challenged the trial court's ruling of admissibility on direct appeal. The investigator's conclusion that D. was inadequately supervised was not based upon any facts uncovered during the course of the investigation. The investigator testified that he was unable to determine the circumstances of the sexual activity which resulted in D. Lee's pregnancy. Moreover, the investigator testified that he did not consider the normalization principle or the client's Bill of Rights contained in 393.13, Florida Statutes, in forming his conclusion of inadequate supervision of D. L. and her unidentified sexual partner at the March 18, 1987 dance.

Investigator Peacock was not even familiar with these statutory provisisions. (R 113-114) More importantly, Peacock s conclusion that neglect was "indicated" improperly told the jury how to decide the issue of negligence.[1] See Town of Palm Beach v. Palm Beach County, 460 So.2d 879 (Fla. 1984)(error to permit expert to testify that county services did not provide a "real and substantial" benefit to residents); 3-M Corp. McGhan Medical Reports Division v. Brown, 475 So.2d 994,996 (Fla. 1st DCA 1985)(error to permit expert to testify that product was defective in product liability case). See also Ehrhardt, Florida Evidence §703.1 (1993 ed.). The trial court's error in admitting the investigator's conclusory testimony that negligence was "indicated" was compounded by the misleading nature of the term. Under §415.102(11), Florida Statutes, a classification of "indicated" constitutes no more than a determination that "some indication of abuse, neglect or exploitation exists." By la , a classification of "indicated,"does not constitute a determination that abuse, neglect or exploitation has occurred. DHRS directs this court to the arguments presented in its Initial and Reply briefs in the district court as to the inadmissibility of the investigator'sconclusions and his report.

DHRS also objected at trial to the admission of the expert's testimony, arguing on direct appeal that the expert was unqualified to render an opinion regarding D. Lee's mental state, and that the expert's opinion based upon D. T~*.*'S

I ~ h einvestigator's conclusion that Daisy Lee was unable to consent to voluntary sexual activity similarly constitued inadmissib1e opinion testimony.

hearsay statements was inadmissible. Plaintiff's expert was unqualified to render an opinion a5 to D. L.'s mental state because the expert had no training or experience in evaluating developmentally disabled adults, including with respect to ascertaining symptoms of Post-Traumatic Stress Disorder in such individuals. (R 194-195) In addition, the expert's first contact with D. L. occurred two to three weeks prior to trial, six years after the presumed sexual activity which led to D. pregnancy. (R 196) That contact consisted of two visits totalling three hours. (R 206-207) As to the expert's conclusion that sexual abuse of D. L. had occurred, the conclusion was based solely upon hearsay statements of D. L. made to tha expert years after the alleged events. DHRS directs this court to the arguments presented to the district court in its Initial and Reply briefs as to the inadmissibility of the expert's opinion testimony.

Petitioner's evidence failed to establish when, where, under what circumstances, or with whom D. L. engaged in the sexual conduct which resulted in her pregnancy, The evidence failed to establish any specific act of negligence by DHRS which was causally linked to the unidentified sexual activity which resulted in the pregnancy. No competent evidence was introduced to indicate that a sexual assault ever occurred. Insufficient evidence was introduced to establish that D. L. could not consent to voluntary sexual activity

Petitioner did not introduce evidence of logs or records to show that DHRS staff were not in attendance or were not properly

performing their job duties at the March 18, 1987 dance or at any other time. Petitioner did not introduce any evidence that the staff to client ratio was not met at the March 18, 1987 dance, or at any other time. Petitioner did not introduce any evidence of any specific event or occurrence at which D. L. was not properly supervised and was subjected to sexual assault. Other than the inadmissible conclusory opinion of the DHRS abuse investigator that D. L. was inadequately supervised at the March 18, 1987 dance, which itself was based only upon the medical opinion that D. L. became pregnant within four days of March 21, 1987, Petitioner did not introduce any evidence pertaining to the dance or the Sunland staff's supervision of clients at the dance. Petitioner did not introduce any evidence as to who was at the dance, how many clients or staff attended, what the clients or staff were doing, or any particular time or place at which D. L. and any another client were not supervised at the dance. Petitioner did not introduce such facts pertaining to any other specific event or occurrence involving D. L..

Petitioner did not introduce any evidence to demonstrate that D. was observed to have injuries consistent with a sexual assault after the March 18, 1987 dance, or at any other time, or testimony of the DHRS staff with whom she resided on a daily basis that her behavior or demeanor changed after March 18, 1987. To the contrary, DHRS officials testified that there was no sign of forced or consensual sexual activity, they did not observe any change in D. L.'s behavior after the time of the

presumed sexual activity, and that D. L. showed no distress when questioned about her sexual activities.

Petitioner, in addition, did not introduce evidence to show that Daisy Lee intermingled, unsupervised, at any particular time with particular clients who were known by DHRS to be sexually aggressive toward D. L. or any other client. Petitioner did not introduce evidence to show prior instances of sexual or physical abuse or improper supervision of D. L. at any time during her 25-year stay at Sunland. Petitioner did not introduce any evidence to show that any other patient had suffered sexual or physical. abuse or had been improperly supervised at Sunland. Petitioner did not introduce any evidence to show that any other Sunland client had ever become pregnant while at the institution. The evidentiary deficiencies of this case exist in stark contrast to the quality and quantity of evidence presented in cases referenced by Petitioner and Amici Curiae. See Shaw v. Strackhouse, 902 F.2d 1135 (3d DCA 1990)(evidence of prior incidents of sexual abuse of other clients introduced, in addition to three incidents of abuse of the plaintiff); Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed. 2d 28 (1982)(evidence of sixty to seventy incidents of prior abuse presented); Astorino v. Lensink, U.S. Dist. 1993 (1993 WL 366513) (D.Conn. 1993)(plaintiff alleged and submitted evidence that she was abused on several specified occasions by an assailant who had a known history of acting out sexually, and who was on one-on-one supervision to protect other residents, and that the defendants' failure to investigate one of the assaults was a contributing factor in the subsequent assaults),

Regarding the DHRS rules and regulations pertaining to 24-hour continuous supervision and the 1:2 staff-to-client ratio, Petitioner's case consisted of no more than her counsel's unsupportable disagreement with the agency's interpretation as to how the rule requirements were to be met. Petitioner introduced no evidence to demonstrate that DHRS' interpretation of its rules was incorrect. Petitioner introduced no evidence of a standard of care which DHRS failed to meet in implementation of its rules. Finally, Petitioner failed to show that claimed sexual assault of Daisy Lee was causally related to a violation of the continuous supervision or staff-to-client rules.

The Complaint did not allege violation of any statutory or rule provision. If Petitioner bid intend to sue DHRS for violation of its rules and regulations, the claim was barred because neither Chapter 393 nor any provision of Chapter 10D-38 contains an expression of legislative intent to permit a private cause of action based upon violation of the rules pertaining to supervision or staffing. See **Murthy v. N. Sinha Corp., 664** So.2d 983 (Fla. 1994). **Compare Department of Health and Rehabilitative Services v. Yamuni**, 529 So.2d 258 (Fla. 1988). In addition, Petitioner did not request, and the court did not provide a special instruction directing the jury to predicate a finding of negligence upon violation of the supervision or staffing rules. ***See*** **Florida** Standard Jury Instruction 4.9 Thus, there was no finding by the jury that DHRS violated its supervision and staffing rules.

AS to the 24-hour continuous supervision rule, DHRS representatives repeatedly testified that the rule does not and cannot mean that DHRS staff are to provide constant, one-on-one supervisior of clients. Parramore testified that Sunland did not have the ability to provide one-on-one oversight for its residents, and that such supervision was never a stated goal of federal or state staffing regulations. (R 343) Parramore testified that the statutory normalization principle and the Bill of Rights of Developmentally Disabled Persons require that Sunland residents have as much freedom as possible. (R 344) Parramore testified that there are no rules or regulations forbidding sexual contact for Sunland residents. (R 356)

Russell Register, D. L.'s social worker at Sunland, testified that the need for one-on-one supervision of residents was discussed during habilitation meetings or a quarterly active treatment meeting. (R 308) Such supervision was required for "someone who s extremely self-abusive or possible would even slope, run from the center." (R 308) Register testified that D. L. did not require one-on-one supervision. (R 308)

Tracy Clemmons, Superintendent of Sunland-Marianna, testified as follows as to how the institution supervised its clients in accordance with the requirements of the normalization principle and the disabled persons' bill of right:

> When an individual comes in to Sunland, of course there is a hab[ilitation] team that is developed for that individual. Then the records will come with them from somewhere, wherever they come from, whether it's the community of whether it's another facility...,

This person is looked at in many different aspects, and the degree of trust, freedom of movement is decided at that time. Now, there is an element of risk and this element of risk has been developed, you know, since '75 when the normalization principles and the bill of rights came out. Before '75, the word "institution" was truly a touch word because you had folks who stood around walls in underwear all day and had their meals and had a place to sleep and that was it. That was truly the meaning of an institution.

Sunland is a training facility. Our folks that live at Sunland are busy from 9:00 o'clock in the morning until 9:00 o'clock at night with activities and programs that will try to make them a productive member of society in whatever degree or level that they possibly can. Some of them have jobs in the community. Some work at Sunland, very low functioning individuals work at Sunland...,

***

Q. In this context, the context that you have people with different levels of functions and different ranges and abilities, how do you judge the level of supervision, and how do you place that into effect?

A. Everyone working at Sunland knows to watch out for clients. It doesn't make a difference if you are driving a car or you're working in a different location or whatever it may be. When an individual leaves a home or leaves a work site, wherever it may be, they either go at it in two or three different ways. Either transportation is going to pick them up, if they either work too far from where they live, or do not have the ability to walk there, then a bus will carry them. If they have the ability to walk to the store or walk to mini-market or the mall or the beauty salon or barber shop or wherever they may be going, if they have the ability to walk, then that freedom of movement is given to them. Staff are on the lookout for individuals that may get in trouble. Now , you can't be all places at all times, but that element of risk, we have to take.

(R 373-375)

As to the 1:2 staffing rule, trial testimony established that Piece Cottage, at which D. L. resided, housed up to 23 clients. (R 229) DHRS officials testified that the 1:2 overall staff requirements was met by providing ratios of 1:8 for the first shift, 1:8 for the second shift and 1:16 for the third shift.[2] Petitioner presented no evidence to demonstrate that this overall ratio was not in compliance with the rule requirements. Rather, Petitioner's counsel merely argued that the agency engaged in "fancy math" to meet the rule requirements. The Sunland director testified as follows regarding the staffing requirements:

> 1 to 2 staffing ratio depends on the level of services you are providing. There are several different standard ratios. 1 to 2 staf fing ratio means overall staff assigned to a cottage for a 24 hour period. It does not mean that we have to have one staff on duty for every two clients living in that unit at all times.
>
> ***
>
> The 1 to 2 staffing ratio rates down to a formula used by the federal surveyors, states that we have to have one staff member on duty for every eight individuals living within a cottage, ***or*** living unit.

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[2] Sunland cottages are staffed 24 hours per week, 7 days per week. Full-time cottage staff work 40 hours per week. During a 24-hour period, two daytime shifts are staffed at a 1:8 staff to client ratio, and a single nighttime shift is staffed at a 1:16 staff to client ratio. During a weeklong period, 14 daytime shifts multiplied by 8 hours per shift and 2 staff members equals 224 work hours, and 7 nighttime shifts multiplied by 8 hours per shift and 1 staff member equals 56 work hours. The total staff work hours per week therefore are 280 hours. The total staff work hours divided by 40 hours per week for each staff member provides 7 staff members for 16 clients. The overall staff to client ratio for a one-week period therefore is 7:16, or approximate;y 1:2. The staff to client ratio addresses the total staff assigned to the cottage, not the number of staff on duty at a particular time.

> Q. This, again, deals with total staff ratio, not necessarily on duty. It doesn't say anything here about on duty; is that your statement?
>
> A. No, it does not, 24 hour staffing.
>
> Q. What would . . . the staff ratio in the cottage where D. resided have been?
>
> A. We met a 1 to 2 staffing ratio, but again, every time the survey team, the federal state survey team came to survey our facility, they had a form that they filled out to check our staffing ratio where we had to have a minimum of three staff on duty for the first shift, minimum of three staff on duty for the second shift, and a minimum of two staff on duty for the third shift. Again, that was 1 to 8. We had 23 individuals living in one unit. 1 to 8 for the first shift, 1 to 8 for the second shift, and 1 to 16 while the individuals were sleeping.

(R 342).

Lee presented no evidence to controvert DHRS' officials testimony that they had never been found to be in violation of state or federal staffing requirements. The fact that the federal requirements which Sunland officials followed became effective after 1987 does not demonstrate negligence. An agency's interpretation of its rules and the statutes which it is charged to administer is to be given great deference unless clearly erroneous. **Pershing Indus. v. Department of Banking**, 591 So.2d 991 (Fla. 1st DCA 5.991). Petitioner presented no evidence to demonstrate that Sunland officials' interpretations as to how the staffing and supervision rules were to be interpreted was **clearly** erroneous. Petitioner presented no evidence of an applicable standard of care pertaining to the supervision of

D[illegible] or the staffing of the Sunland facility which DHRS failed to meet through its interpretation of its rules. In the absence of such evidence, the jury was without any valid means to determine whether there had been a violation of DHRS' rules. See Roberts v. James, 447 So.2d 947,949 (Fla. 2d DCA 1984).

Petitioner did not establish any of the following: (1) that DHRS watched D. L. engage in sexual activity, either consensual or otherwise, and did nothing to stop it; (2) that DHRS did not properly watch over D. L. and improperly permitted her and some other individual to engage in nonconsensual sexual activity; or (3) that DHRS did not comply with its rules and regulations regarding supervision of D. L. or that the alleged sexual assault 'was a result of any failrue to comply.

The district court concluded that Petitioner presented no proof at trial of a specific act of negligence. Inherent in the court's conclusion is its rejection of evidence submitted by Petitioner: including the investigator's and the expert's testimony, as competent proof cf negligence.

Petitioner, citing Rupp v. Bryant, 417 So.2d 658 (Fla. 1982) and Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987), argues that she was unable to make out a prima facie case of negligence against DHRS because of DHRS' negligent supervision of D. including the failure to prepare a report pertaining to the incident in which Sunland employee Mary Smith, at some unidentified time before the March 18, 1987 dance, observed a client "fingering" D. L..

With respect to the asserted failure to prepare the report, Petitioner did not introduce any evidence regarding what Smith meant when she described another client "fingering" D. L., or whether Smith violated any rule in failing to document that incident by a report. Petitioner did not present any evidence which connected the "fingering" incident with the dance, any sexual activity which led to D. L.'s pregnancy, or any negligence by DHRS. More importantly, Petitioner does not explain how DHRS' asserted failure to prepare that report hampered her in her efforts to prove that DHRS negligently supervised D. L.. Petitioner had full access to the abuse report prepared by investigator Peacock. The report contains Mary Smith's statements regarding the "fingering" incident.

In Valcin, the court found that the defendant's failure to comply wit?? a statutory duty to maintain an operative report shifted the burden to the defendant to prove that the surgical procedure was not negligently performed.

Petitioner does not point to any specific act which DHRS failed to perform. There is no evidence or assertion by Petitioner that DHRS did not fully investigate to determine the circumstances of the sexual activity which resulted in D. L.'s pregnancy. There is no evidence that DHRS uncovered facts pertaining to D. L.'s sexual activity or her pregnancy which it did not provide to Petitioner. To the contrary, the evidence at trial established that DHRS fully complied with its duty to investigate this incident and that Petitioner had complete access to all information gathered by DHRS, including the report of the

independent investigator, While Petitioner argues that DHRS failed to conduct blood tests to determine the identity of the father of D L's child, uncontroverted testimony established that DHRS did not have custody of the child after her birth, and therefore could not obtain a blood sample to use to locate a blood type match among Sunland clients or staff. Petitioner presents no evidence or authority for her assertion that DHRS was somehow negligent, under these circumstances, in failing to conduct blood testing to identify the child's father.

Petitioner did not argue to the trial court that because DHRS allegedly negligently supervised D. L. the burden should shift to DHRS to provide that it was not negligent. Petitioner did not assert either to the trial court OK the district court that DHRS' negligence prevented her from making out a prima facie case of negligence. Had Petitioner made such an argument in the trial court. DHRS would have come forward with evidence to show that it did not obstruct Petitioner's 'efforts to establish negligence. The trial court was the proper place to make the argument which Petitioner makes now, for the first time, in this court. DHRS should not be placed in the position of attempting to demonstrate on the record before this court that it did not prevent Petitioner from making out her case. Petitioner waived this argument.

Unlike the plaintiff in **Valcin,** Petitioner utterly fails to identify any act required of DHRS which was not performed and which prevented Petitioner from making out a prima facie case of negligence>

In Rupp v. Bryan-b, plaintiffs sued school officials for failure to supervise students at an extracurricular event. School officials asserted that because they did not attend a club meeting at which students planned a hazing ritual, the school could not have known about the event. The court, noting that school officials had a du-ty to attend club meetings, found that the school's self-induced ignorance could not support a lack of proximate cause.

As argued above, Petitioner in this case identifies no specific time or place at which DHRS failed to supervise D. L., or failed to comply with any other specific duty, to the detriment of Petitioner to obtain evidence of negligence. In addition, while the court in Rupp v. Bryant applied a presumption of lack of proper behavior among unsupervised students so as to relieve the plaintiffs of their burden to establish proximate cause, no equivalent presumption would have been proper in this case, and none was requested by Petitioner or granted by the trial court.

CONSENT

Since Petitioner failed to present a prima facie case of negligence, the question of D. L.'s capacity to consent to voluntary sexual conduct is irrelevant, Therefore, this court need not address the issue of consent. Even so, sexual activity cannot be presumed to be nonconsensual.

Because Petitioner failed to introduce any evidence to show that D. L. was sexually assaulted, she was left with a case premised solely on the jury's acceptance of inference stacked

upon inference. Petitioner's case consisted of a theory that because D. L. was pregnant,. she necessarily **was** the victim of a sexual act to which she was unable to knowingly, intelligently and voluntarily consent, which occurred as a result of DHRS' alleged negligent supervision. This theory amounted to imposition of strict liability upon DHRS, in contravention of the applicable common-law duty of reasonable care and legislative intent expressed in §393.13(4), Florida Statutes, read **in pari materia** with 5768.28, Florida Statutes, to make DHRS liable only for acts of negligence in the supervision of those individuals within its care and custody.

DHRS at trial moved for directed verdict on grounds of the impermissible stacking of inferences, and challenged the trial court's order denying the motion on direct appeal. Similarly, DRRS objected at trial to Petitioner's requested jury instruction on consent and challenged the trial court's grant of that request on direct appeal, DHRS directs this court to DHRS' arguments presented in its Initial and Reply briefs in the district court as to these issues.

Amicus Advocacy Center echoes DHRS' trial and district court arguments in its assertion that the use of mental age equivalents is "noxious, inappropriate and misleading" in cases involving the sexuality of people with mental retardation, that "individuals with developmental disabilities generally possess the physical and sexual maturity of their same **age** peers," that these individuals "are not children and should not be considered children," that individuals with mental retardation can and

should enjoy intimate sexual relationships, that the right of mentally retarded individuals to have consensual sexual activity has been recognized by Florida law in Section 393.13(3), Florida Statutes, and that "voluntary sexual activity" is not actionable. Amicus Brief at 11, 12-14,20. DHRS previously has argued each of these contentions,

The consent jury instruction given by the trial court ignored and excluded capacities of D. L., other than intellectual, for determining her capacity to consent to voluntary sexual conduct. While no Florida cases have yet addressed this issue, it is clear that if §393.13(3) affords the mentally disabled the right to enjoy sexual relations, a determination of lack of consent cannot be based upon mental disability alone. Yet, mental, as well as alleged physical, disability was the only evidence Fetitioner introduced on the issue of consent.

It must be noted that Petitioner's repeated assertions that D. L. was completely helpless in the face of an aggressive sexual act are not supported by the record. D. L.'s caretakers testified that she was physically strong, extremely vocal and physically destructive whenever any individual opposed her desires. (R 232) Ms. L. was capable of reporting bad things that happened to her. (R 237) It was undisputed that D. L. never gave any indication to the staff that she had suffered any trauma as a result of sexual activity. (R 43,320).

Petitioner also argues that Sunland staff disapproved of consensual sexual activity and tried to stop it when they

encountered it. Testimony established, more accurately, that Sunland staff recognized that they did not have the authority to deny clients sexual activity, and that when they realized a client was sexually active, they provided the client with birth control measures. (R 150,169,174,241,253,268,319,326-327,376)

In conclusion, Petitioner failed to introduce any evidence of any specific event, act or occurrence of D. L. engaging in either consensual or nonconsensual sex resulting in her pregnancy, Petitioner failed to introduce any evidence of any specific act of negligence by DHRS which proximately caused a sexual assault of D. L.. Petitioner's reliance upon a theory that D. L.'s pregnancy itself was evidence of both sexual abuse and negligent supervision was impermissible as a matter of law, and Petitioner's reliance upon D. L.'s intellectual functioning in determining her capacity to consent was improper. Under these circumstances, the district court correctly concluded that Petitioner failed to make out a prima facie case of negligence against DHRS.

ISSUE II

DHRS' DUTY TO PROTECT ITS RESIDENTIAL DEVELOPMENTALLY DISABLED ADULT CLIENTS FROM PHYSICAL HARM MUST BE EALANCED AGAINST A COMPETING DUTY TO RECOGNIZE AND MAXIMIZE THE RIGHTS AND PRIVILEGES SECURED BY SECTION 393.13(3), FLORIDA STATUTES (1987).

Petitioner argues that DHRS' duty to continuously supervise its residential clients is not obviated by the normalization principle set forth in §393.13, Florida Statutes. DHRS **agrees** with Petitioner's assertion. In this case, however, Petitioner failed to allege or prove any specific act of negligence by DHRS in its supervision and oversight of D. L..

In analyzing the requirements of 8393.13, and §393.063, Florida Statutes, in the context of DHRS' duty to supervise its adult residential clients, the district court concluded as follows:

> HRS' supervision policies being challenged here are dictated by the Florida Legislature's enactment of the Bill of Rights of Persons Who are Developmentally Disabled, sections 393.13-.14, Florida Statutes. These statutes mandate that care in a residential facility such as Sunland-Marianna shall be in the least restrictive setting, and require adherence to the "normalization principle," which is defined in section 393.063, Florida Statutes . . . .
>
> The Bill of Rights of Persons who are Developmentally Disabled also generally provides that persons with developmental disabilities shall have all the rights enjoyed by citizens of the State of Florida and the United States, and specifically identifies rights to, **inter alia**, dignity, privacy, social interaction, and participation in community activities, as well as the right to be free from isolation or unreasonable restraint. §§393.13, Fla. Stat.

> In sum, the legislature has mandated that HRS provide "normal" living conditions, to the extent possible, to persons with developmental disabilities within its care. Under this directive, HRS' policy is that residents have social functions on the premises and have contact with friends and visitors. Residents are not confined to the institution at all times. Secure, restrictive, and constant supervision is inconsistent with the normalization policy, and one-on-one supervision of residents at all places and at all times is, practically speaking, unrealistic, if not all but impossible.

Id., 665 So.2d at 306.

DHRS has never argued that its duty of reasonable care to protect its residential clients from physical harm is obviated by the normalization principle and the clients' Bill of Rights. DHRS has asserted that its duty to protect must coexist with its duty to afford and maximize the rights and privileges set forth in §393.13 and 8393.063. Contrary to petitioner's argument, DHRS has never asserted that "continuous" supervision is not required as to its residential clients. Rather, DHRS officials testified that Sunland clients, including D. L., were continuously supervised within the meaning of that phrase as circumscribed by -the 8393.13 requirements.

The stated purpose of the regulations as set forth in Rule 10D-38.001, Florida Administrative Code (1986) is:

> to insure that habilitative services designed to meet the specific needs of individual clients are provided. Additionally, in consonance with the philosophy that service be rendered in the least restricted environment, this rule defines and limits the size and design characteristics of ICF/MR to produce less restrictive environments in which service delivery occurs. This rule reflects the ability of the State of Florida

to practically specify program requirements and residential requirements including facility and living unit sizes.

The clear purpose of the Chapter 10D-38 rules is to provide care in the least restrictive environment possible. This purpose is consistent with the stated objectives of the normalization principle and the civil liberties embraced by Chapter 393, Florida Statutes (1987).

Chapter 393, Florida Statutes (1987), sets forth DHRS's statutory duties and obligations -with respect to developmentally disabled persons. Section 393.13, "The Bill of Rights of Retarded Persons,'" provides in pertinent part:

> (2) LEGISLATIVE INTENT
>
> (a) The Legislature finds and declares that the system of care which the state provides to mentally retarded individuals must be designed to meet the needs of the client as well as protect the integrity of their legal and human rights....
>
> (b) The Legislature further finds and declares that the design and delivery of treatment and services to the mentally retarded should be directed by the principles of normalization and therefore should:
>
> ***
>
> (3) Provide training and education to mentally retarded individuals which will maximize their potential to lead independent and productive lives and which will afford opportunities for outward mobility for institutions.
>
> ***
>
> (d) It is the intent of the Legislature:
>
> 1. To articulate the existing legal and human rights of the retarded so that they may be exercised and protected. The mentally retarded person shall have all the rights enjoyed by citizens of the state and the United States.

***

(3) CLIENT RIGHTS

(a) Clients shall have a right to dignity, privacy, and humane care.

***

(c) Clients shall have an unrestricted right to communication.

(3) Clients shall have an unrestricted right to visitations. However, nothing in this provision shall be construed to permit infringement upon other clients' rights to privacy.

(e) Each client shall receive education and training services regardless of chronological age, degree of retardation, or accompanying disabilities or handicaps. Clients may be provided with instruction in sex education, marriage, and family planning as prescribed in the client's individual habilitative program.

(g) Clients shall be provided with suitable opportunities for behavioral and leisure time activities which include social interaction.

Section 393.063(17), Florida Statutes (1987) defines "normalization principle" as "the principle of letting the client obtain an existence as close to the normal as possible, making available to the client patterns and conditions of everyday life which are as close as possible to the norm and patterns of the mainstream of society."

Section 393.063(14) defines "habilitation" as "the process by which a client is assisted to acquire and maintain those life skills which enable him to cope more effectively with the demands of his condition and environment and to raise the level of his physical, mental, and social efficiency. It includes, but is not

limited to, programs of formal structured education and treatment . "[3]

No provision of Chapter 393 authorizes DHRS to limit voluntary sexual activity among developmentally disabied individuals residing within DHRS custody.

In addition, under §393.13(2)(d)(1), providing that disabled persons shall "have all the rights enjoyed by citizens of the state and the United States," DHRS must recognize its residential disabled adult clients' rights to privacy under Art. I, §23, Florida Constitution, and Congressional mandates under 42 U.S.C. §9501, which require that all state mental health institutions provide treatment in the least restrictive environment possible,

In Foy v. Greenblott, 190 Cal, Rptr. 84 (1st App. Div. 1983), the California court held that the plaintiff's claim for negligent supervision against her treating and attending physicians was not actionable because tort liability was inconsistent with and detrimental to the mental health facility's duty to provide her with the least restrictive environment. Plaintiff Virgie Foy was a gravely disabled woman who resided at a state-licensed facility- She sought monetary damages for negligent supervision and failure to provide contraceptive devices, alleging that as a result of such negligence, she became pregnant, The court's discussion of the institution's obligation

[3] See also Rule 10D-38.015, Florida Administrative Code, which sets forth the goals and objectives of HXS intermediate care facility programs and services.

to protect Foy's righ-ts is instructive as to the discretionary nature of HRS's supervisory duties with respect to D. L.:

> Appellants suggest "extra supervision" of the conservatee's contacts with men as one means of insuring she does not conceive. Every institutionalized person is entitled to individuaiized treatment under the "least restrictive" conditions feasible - the institution should **minimize** interference with a patient's individual autonomy, including her personal "privacy" and "social interaction." [footnote and code reference omitted! Obviously, effective hospital policing of patients would not only deprive them of the freedom to engage in consensual sexual relations, which they would enjoy outside the institution, but would also compromise the privacy and dignity of all residents.
>
> ***
>
> By this review of the legal rights **affected** by the procedures appellants urge respondents should have followed, we do not indicate that mental health personnel can never restrict consensual sexual activities of a patient or prescribe contraceptives over a patient's objections without infringing civil rights.... Nonetheless, the statutes and case law discussed above do more than define the minimum patients' rights, which mental health professionals are obliged to respect; they also express a public policy of maximizing patients' individual autonomy, reproductive choice, and rights of informed consent. **Within the** considerable **range of discretion** left to **them, mental health professionals are expected to opt for the treatments and conditions of confinement least restrictive of patients" personal liberties. The threat of tort liability for insufficient vigilance in policing patients' sexual conduct and in second-guessing their reproductive decisions would effectively reverse these incentives** and **encourage mental hospitals ta accord** patients **only their minimum legal rights.** (e.s.)

Id., 190 Cal.Rpt. at 90-92.

The district court noted that Petitioner's claim in this case was akin to Foy's inadequate supervision claim. In this

way, Foy is an analogous case, and the distinguishing particulars of that case do not diminish the court's insightful analysis of the requirements of the normalization principle within the confines of a residential institution.

Petitioner's argument at Initial Brief, page 28, highlights her challenge to supervision policies in the absence of any proof of a specific act of negligence. Petitioner states as follows:

> Just as one would not throw a paraplegic into a pool without safety devices so that he could swim as other people do, HRS cannot be allowed through the guise of "normalization" to allow D. L. to freely intermingle with persons who HRS knew could and would harm her if she was left without proper supervision and protection. Yet, the evidence reveals that this is exactly what has occurred in this case. HRS has acknowledged that in accordance with the "normalization principle" higher functioning clients who are known to be sexually aggressive are allowed to freely associate with lower functioning clients such as D. L. HRS staff testified that the only safeguard available to D. L. and similar clients was proper supervision. (e.s.j

(R 146,169, 72,326)

Petitioner in fact presented no evidence to establish that D L was freely permitted to intermingle with '"persons who HRS know could and would harm her if she was left without proper supervision and protection," no evidence that D. L. was left without proper supervision or protection at any time, and no evidence tha-t D L suffered a sexual assault as a result of inadequate supervision. Petitioner's argument cited above asserts no more than a bare challenge to DHRS' policy of permitting D. L. to freely intermingle with sexually active higher functioning clients, a policy dictated and circumscribed

not only by the clients' Bill of Rights and the normalization principle, but also DHRS determinations, made during the course of 25 years of Sunland's residential. care of D. L., as to / L 's level of functioning and her capacity to care for herself in a social. setting, and the level of functioning of the clients with whom she was permitted to socially intermingle. Petitioner provides not even a clue to this court as to what other standard or whose higher expertise should be applied to demonstrate that these determinations were somehow deficient.

The Advocacy Center echoes Petitioner's argument by asserting that the district court's decision erroneously equates the normalization principle with lack of supervision. Amicus Brief at 16-17. This is an erroneous reading of the court's decision. The court concluded that, in the absence of proof of a specific operational-level negligent act, DHRS decisions as to the level of supervision and staffing to provide its residential developmentally disabled adult clients must be viewed as discretionary calls which cannot be second-guessed by courts through tort suits.

The coexistence of DHRS' duty to protect and its duty to give effect to the Chapter 393 rights and privileges distinguishes its staffing and supervisory decisions for its residential developmentally disabled adult clients from similar decisions made in other contexts, particularly in light of Petitioner's failure to prove a. specific act of operational-level negligence. This case is distinguishable from other supervision cases such as Department of Health and Rehabilitative Services v.

Whaley, 574 So.2d 100 (Fla. 1991), **Comuntzis v. Pinellas County School Board, 5078** So.2d **750** (Fla. 2d DCA 1987); **Doe v. Escambia County School Board, 599** So.2d 226 (Fla. 1st DCA 1992); **Rupp v. Bryant,** or **Department of Health and Rehabilitative Services v. Yamuni,** 529 So.2d 258 (Fla. 1988) in that the defendants in those cases ware not charged with the task of balancing competing duties to protect and to afford adult rights of freedom of movement, association and privacy, including the right to engage in sexual relations.

ISSUE III

DHRS IS IMMUNE FROM TORT LIABILITY UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY FOR PETITIONER' CLAIM OF NEGLIGENT SUPERVISION AND OVERSIGHT. (Restated)

The district court, citing **Cutler v. City of Jacksonville Beach**, 489 So.2d I26 (Fla. 1st DCA 3.986) and **Kirkland v. Department of Health and Rehabilitative Services**, 424 So.2d 925 (Fla. 1st DCA 1983), found that Petitioner's case lacked the allegations and proof needed to apply the **Evangelical United Brethren Church v. State,** 67 Wash. 2d 246, 407 P.2d 440 (Wash. 1965) to determine whether the alleged failure of DHRS to adequately supervise D. L. constituted operational-level negligence. The court found that in the absence of any allegation or proof of a specific violation of the duty to supervise, Petitioner necessarily challenged DHRS' policies with respect to supervision and oversight of its clients.

The district court was correct. As has been previously argued, Petitioner did not present any evidence that D. L. was sexually assaulted and did not allege or prove any specific act of negligence which was shown to have proximately caused a foreseeable sexual assault. See **Cutler** (plaintiff's conclusory allegation that lifeguards failed to adequately supervise and monitor a swimming area was insufficient to identify any specific operational-level acts, and failed to establish any causal relationship); **Kirkland** (allegations of negligent supervision were insufficient). See also Banta v. Rosier, 399 So.2d 444 (Fla. 5th DCA 1981)(complaint which alleged breach of operational-level duties in conclusory terms was deficient). The

allegations of the complaint and the proof submitted at trial failed to establish who D. L. engaged in **sexual** relations with, when the incident occurred, where the incident occurred, what specific standard of care was breached by DHRS, **and** how DHRS either inadequately supervised D. L. or **how** DHRS could have prevented the incident.

In the absence of such proof, Petitioner challenged only DHRS policies with respect to permitting D. L. to intermingle with other clients, the 24-hour supervision rule and the 1:2 client to staff ratio.

In finding that DHRS supervision policies are dictated by the Chapter 393 normalization principle, the district court noted that the wisdom of that principle, with "its attendant risks and benefits, is a discretionary matter involving budgetary and public policy considerations outside the realm of the courts." **Department** of **Health and Rehabilitative Services v. Lee, 665** So.2d at 307.

The court was correct in this conclusion. If the **Evangelical United Brethren Church v. State, 407** P. 2d 440 (Wash. 1965) test adopted by this court in **Commercial Carrier Corp. v. Indian River County, 371** So.2d 1010 (Fla. 1979) could be applied to this case, it is clear that DHRS' policies as to how closely and in what manner to supervise its residential clients and in what manner to staff its facilities are discretionary functions which are immune from tort liability under the doctrine of sovereign immunity. The district court relied in part upon this court's decision in Department of Health and Rehabilitative

Services v. B.J.M., **656** So.2d 906 (Fla. 1995), and the following language from that decision:

> We distinguish the HRS function at issue, the allegation of services, from the actions at issue in **Department of Health and Rehabilitative Services v. Whaley**, **574** So.2d 100 (Fla. 1991), and **Department of Health and Rehabilitative Services v. Yamuni**, **529** So.2d 258 (Fla. **1988**). Both **Whaley** and **Yamuni** involved HRS caseworker level decisions concerning the physical safety of children within the agency's protective custody which did not implicate any "discretionary planning or judgment function" as contemplated by **Trianon Park Condominium Assoc. v. City of Hialeah**, 468 So.2d 912 (Fla. 1988).
>
> These operational level decisions [of **HRS** caseworkers] exposing children to specific dangers should be distinguished from the broad discretionary authority vested by the legislature in HRS to determine an appropriate course of remedial treatment for the children that come within its custody through dependency and delinquency proceedings.

Id., 665 So.2d at 307.

DHRS agrees that its acts pertaining to the supervision and staffing of its residential developmentally disabled adult clients fall into Category IV, providing professional, educational and general. services, under the court's analysis in **Trianon Bark Condominium Association v. City of Hialeah**, **468** So.2d 91.2 (Fla. 1988), and that liability can exist for the providing of such services. Whether liability does exist must be determined on a case-by-case basis. **Commercial Carrier**. Where no specific act of operational -level negligence is alleged or proven, however, the agency's policies as to how closely and in what manner to supervise its clients, and in what manner to Staff

its facility necessarily must be viewed as immune discretionary, planning-level. acts. See Trianon Park at 912 (whether there are sufficient doctors provided to state medical facility may be a discretionary judgmental. decision for which tort liability would not exist) . Had Petitioner alleged and proved a specific act of operational-level negligence in DHRS' supervision of D. L., the analysis would be far different,

Petitioner and Amici Curiae strenuously urge the applicability of this court's decisions in **Department of Health and Rehabilitative Services v. Yamuni and Department of Health and Rehabilitative Services v. Whaley** to this case. As previously argued by DHRS, those cases are not analogous in that the applicable duty of care is distinguishable, Similarly, these cases are not persuasive as to whether Petitioner's claim is barred by sovereign immunity. As this court noted in **B.J.M.**, Whaley and Yamuni involved operational caseworker-level decisions concerning the physical safety of children in DHRS custody. Petitioner in this case has neither **alleged nor** proven any operational-level **staff** decision which caused D. L. physical harm. Both Whaley and Yamuni involved children, while this case, as noted above , involves an adult with adult rights and privileges, particularly within the realm of sexual conduct. Neither **Whaley** nor Yamuni involved the balancing of the duty to use reasonable care to protect from physical harm with the duty to give effect to rights of association and privacy.

The agency's acts of staffing and supervision in this case are more like those **in Emig v. Department of Health and**

Rehabilitative Servicer; , 456 So.2d 1204 (Fla. 1st DCA 1984)(security decisions at an HRS facility, Reddish v. Smith, 468 So.2d 929 (Fla. 1985)(security classification of prisoners); Davis v. Department of Corrections, 460 So.2d 542 (Fla. 1st DCA 1984)(classification and placement of inmates), and Dunagan v. Seely, 533 So.2d 867 (Fla. 1st DCA 1988)(the creating of prison policies for supervising, classifying and maintaining inmates is an immune discretionary, planning-level function).

Amicus Advocacy Center argues that DHRS should not be permitted to enjoy immunity from tort liability in this case because a private facility providing treatment to patients similar to D. wouid be held liable. A private facility could not have been held liable in this case because Petitioner failed to prove negligence. DHRS does not argue that it could never be held liable for an operational-level breach of its duty to protect its residential developmentally disabled adult clients from physical harm. It has argued, and the district court concluded, that where a claim of inadequate supervision constitutes a challenge only to supervision and staffing policies, that claim necessarily is barred by sovereign immunity.

For the above reasons, this court should answer the certified question in the negative, and approve the decision of the district court.

CONCLUSION

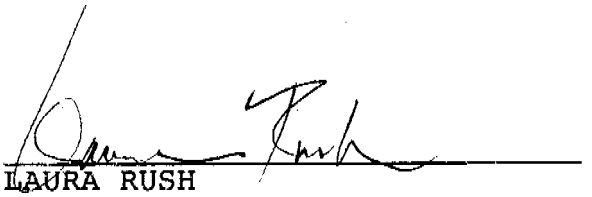
Based upon the foregoing argument and citations of authority, DHRS requests this court to answer the certified question in the negagive, and to approve the decision of the district court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Dean R. LeBoeuf, Esquire, Ronald W. Brooks, Esquire, and Rhonda S. Bennett, Esquire, Brooks, LeBoeuf and Bennett, P.A., 863 East Park Avenue, Tallahassee, FL, Ellen M. Saideman, Esquire, Advocacy Center for Persons with Disabilities, Inc., 2901 Stirling Road, Fort Lauderdale, FL 33312, and Loren E. Levy, The Levy Law Firm, P.O. Box 10583, Tallahassee, FL 32302 this 17th day of April, 1996.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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IN THE SUPREME COURT OF FLORIDA

LEVADA LEE, etc.

Petitioner,

v. Case No. 87,071

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.

_____/

APPENDIX

A. Department of Health and Rehabilitative Services v. Lee, 665 So.2d 304 (Fla. 1st DCA 1995)

ase is reversible fundamental error that need not have been preserved for appeal.

[2] Since the nolo plea was entered on a material mistake of law, it was invalid, and no legal sentence could be imposed. *Jolly v. State*, 392 So.2d 54 (Fla. 5th DCA 1981). Accordingly, we set aside the plea, judgment and sentence on the two counts of attempted first degree felony murder. On remand, the state may file an amended information as to those two counts in order to charge a valid offense. The robbery with a firearm conviction is remanded for resentencing inasmuch as the sentence imposed was part of the plea agreement along with the two invalid charges.

As to the second issue, we agree with the state that the court did not err in assessing the $800 attorney fee because the state has not sought enforcement of the fee. See *Valdez v.* State, 632 So.2d 654 (Fla. 4th DCA 1994).

Accordingly, we reverse the attempted first degree felony murder convictions, set aside the plea and remand the robbery with a rearm conviction for resentencing.

BLUE and WHATLEY, JJ., concur.

STATE of Florida, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, Appellant/Cross-Appellee.

v.

Levada LEE, Individually and as Mother and Legal Guardian of D.L., Incompetent, Appellee/Cross-Appellant.

Nos. 93-1350, 93-1411.

District Court of Appeal of Florida, First District.

Dec. 13, 1995.

Mother of severely retarded woman sued Department of Health and Rehabilitative Services for negligent supervision after woman became pregnant and gave birth. The Circuit Court, Leon County, Terry P. Lewis, J., entered judgment on jury verdict in favor of mother, and Department appealed. The District Court of Appeal, Booth, J., held that. Department was not liable for woman's pregnancy.

Reversed; question certified.

Mental Health ⇨52.1

Department of Health and Rehabilitative Services was not liable under theory of negligent supervision for pregnancy of severely retarded woman who was in Department's care at time of conception; plaintiff, who was woman's mother, was unable to allege specific circumstances leading to impregnation or any specific acts of Department's negligence relating thereto, and instead only contended that Department should have more strictly supervised woman, but secure, restrictive, and constant supervision would have been inconsistent with Department's legislatively mandated "normalization" policy. West's F.S.A. §§ 393.063, 393.13-393.14.

Laura Rush, Assistant Attorney General, Office of the Attorney General, Tallahassee; Kimberly J. Tucker, General Counsel, Department of Health and Rehabilitative Services, Tallahassee; and Edwin R. Hudson of Henry, Buchanan, Mick, Hudson & Suber, P.A., Tallahassee, for Appellant/Cross-Appellee.

Dean R. LeBoeuf and Rhonda S. Bennett of Brooks & LeBoeuf, P.A., Tallahassee, for Appellee Cross-Appellant.

BOOTH, Judge.

This cause is before us on appeal from a final judgment entered on a jury verdict against the Department of Health and Rehabilitative Services (hereinafter "HRS") for damages arising from its alleged negligent supervision of D.L., a resident of Sunland-Marianna who became pregnant while in HRS' care.

The facts are essentially un D.L., a 40-year-old severely retard an, gave birth to a normal child in 19 father and the circumstances of th conception are not known. Based o cal approximation of D.L.'s date o tion and its own records, HRS ackn that D.L. must have been in its ca she conceived.

D.L.'s mother and legal guardian Lee (hereinafter "Lee"), sued HRS, ly asserting in her complaint that H have at some point negligently su D.L. in order for her to have beco nant.[1] Lee was unable to allege in plaint, or establish at trial, the spe cumstances leading to D.L.'s impreg any specific acts of HRS' negligence thereto, but essentially contended t should have more strictly supervis

The trial resulted in a verdict a ment for Lee, followed by HRS'

1. Lee asserted several other counts in plaint against HRS, but the trial court disposed of these counts through summ ment, holding, *inter alia*, that "[t]he HRS which are used to determine the ateness for the provision of birth con clients is a discretionary function whi tected by sovereign immunity and w not expose the agency to tort liabil affirm without discussion Lee's cross the summary judgment order.

2. Lee also asserted that D.L. must sexually abused because of her allege to consent to sexual intercourse. The instructed the jury that "[t]he parti action have agreed that D.L. suffers f profound mental retardation. You this in mind when you consider wh could intelligently, knowingly, and consent to sexual intercourse." HRS that this instruction was erroneous, b not address this issue due to our re this case on other grounds. *See ge* chael L. Perlin, *Hospitalized Patient Right to Sexual Interaction: Beyond Frontier?*, 20 N.Y.U. Rev. L. & Soc. C 531-34 & 540-45 (1993-94) (discussi pacity of institutionalized persons to sexual intercourse).

3. Although not initially raised by the an issue on appeal, sovereign immun issue below and is properly considered *Trushin v. State*, 425 So.2d 1126, 1129 (once appellate court has jurisdiction finds necessary to do so, consider any may affect the case); *Department o Safety & Motor Vehicles v. Kropff*,

The facts are essentially undisputed. D.L., a 40-year-old severely retarded woman, gave birth to a normal child in 1988. The father and the circumstances of the child's conception are not known. Based on a medical approximation of D.L.'s date of conception and its own records, HRS acknowledges that D.L. must have been in its care when she conceived.

D.L.'s mother and legal guardian, Levada Lee (hereinafter "Lee"), sued HRS, generally asserting in her complaint that HRS must have at some point negligently supervised D.L. in order for her to have become pregnant.[1] Lee was unable to allege in her complaint, or establish at trial, the specific circumstances leading to D.L.'s impregnation or any specific acts of I IRS' negligence relating thereto, but essentially contended that HRS should have more strictly supervised D.L.[2]

The trial resulted in a verdict and judgment for Lee, followed by HRS' appeal. This court ordered additional briefing on the issue of sovereign immunity,[3] with particular reference to the recent Florida Supreme Court decision in *Department of Health and Rehabilitative Services v. B.J.M.*, 656 So.2d 906 (Fla.1995).

In *B.J.M., supra*, the Florida Supreme Court reaffirmed its commitment to the "*Evangelical Brethren* test" as a basis for determining whether activity is "discretionary" or "operational." The test requires that the court resolve four preliminary questions related to the activity alleged to have caused the harm.[4] However, the instant case lacks the allegations and proof needed to apply this test.[5]

Further, the general nature of the allegations made and the absence of specific allegations or proof leads us to conclude that Lee is actually challenging HRS' policies regarding supervision, rather than any specific op-

1. Lee asserted several other counts in her complaint against HRS, but the trial court eventually disposed of these counts through summary judgment, holding, *inter alia*, that "[t]he policies of HRS which are used to determine the appropriatcness for the provision of birth control to its clients is a discretionary function which is protected by sovereign immunity and which does not expose the agency to tort liability." WC affirm without discussion Lee's cross-appeal of the summary judgment order.

2. Lee also asserted that D.L. must have been sexually abused because of her alleged inability to consent to sexual intercourse. The trial court instructed the jury that "[t]he parties to this action have agreed that D.L. suffers from severe profound mental retardation. You must keep this in mind when you consider whether D.L. could intelligently, knowingly, and voluntarily consent to sexual intercourse." HRS contends that this instruction was erroneous, but we need not address this issue due to our resolution of this case on other grounds. See *generally* Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. Rev. L. & Soc. Change 517, 531-34 & 540-45 (1993-94) (discussing the capacity of institutionalized persons to consent to sexual intercourse).

3. Although not initially raised by the parties as an issue on appeal, sovereign immunity was an issue below and is properly considered here. See *Trushin v. Stare*, 42.5 So.2d 1126. 1129 (Fla.1982) (once appellate court has jurisdiction it may, if it finds necessary to do so, consider any item that may affect the case); *Department of Highway Safety & Motor Vehicles v. Kropff*, 491 So.2d 1252. 1254 n. I (Fla. 3d DCA 1986) (sovereign immunity relates to subject matter jurisdiction and may be raised at any time).

4. *Evangelical United Brethren Church v. State*, 67 Wash.2d 246, 407 P.2d 440 (Wash.1965). The *Evangelical Brethren* test, as adopted by the Florida Supreme Court in *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979). poses four questions: (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 tho 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?

5. *See Cutler v. City of Jacksonville Beach*, 489 So.2d 126, 128 (Fla. 1st DCA 1986) (allegation that on-duty lifeguards failed to adequately supervise and monitor area in which decedent drowned were not sufficient, in absence of other allegations of specific fact, to state a cause of action against the city); *Kirkland v. Department of Health & Rehab. Servs.*, 424 So.2d 925, 927 (Fla. 1st DCA 1983) (allegation that hospital negligently supervised mental patient not sufficiently detailed to apply *Evangelical Brethren* test).

erational negligence. The Florida Supreme Court held in *B.J.M., supra* at 913:

> [W]e distinguish the HRS function at issue, the allocation of services, from the actions at issue in *Department of Health & Rehabilitative Services v. Whaley*, 574 So.2d 100 (Fla.1991), and *Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258 (Fla.1988). Both *Whaley* and *Yamuni* involved *HRS caseworker-level decisions* concerning the physical safety of children within the agency's protective custody which did not implicate any "discretionary planning or judgment function" as contemplated by *Trianon [Park Condominium Ass'n, Inc. v.* City of *Hialeah*, 468 So.2d 912 (Fla. 1988)]. [(Emphasis added).]

Since no specific operational function is involved here, such as, for example, an "HRS caseworker-level decision," the *Whaley* and *Yamuni* cases are distinguishable from the present case just as they were distinguishable from *B.J.M.*[6]

The Florida Supreme Court further held in *B.J.M., supra* at 913:

> These operational level decisions [of HRS caseworkers] exposing children to specific dangers should be distinguished from the broad discretionary authority vested by the legislature in HRS to determine an appropriate course of remedial treatment for the children that come within its custody through dependency and delinquency proceedings.

To like effect are the decisions in *Dunagan v. Seely*, 533 So.2d 867, 869 (Fla. 1st DCA 1988), holding prison employees' failure to follow prison policies for supervising, classifying and maintaining inmates to be operational, but the prison's making of such policies to be discretionary; and *Davis v. Department of Corrections*, 460 So.2d 452, 453 (Fla. 1st DCA 1984), holding that decisions regarding the number and placement of supervisory personnel in prison system is discretionary, *rev. dismissed*, 472 So.2d 1180 (Fla.1986).

HRS' supervision policies being challenged here are dictated by the Florida Legislature's enactment of the Bill of Rights of Persons Who are Developmentally Disabled, sections 393.13-.14, Florida Statutes. These statutes mandate that care in a residential facility such as Sunland-Marianna shall be in the least restrictive setting, and require adherence to the "normalization principle," which is defined in section 393.063, Florida Statutes:

> "Normalization principle" means the principle of letting the client obtain an existence as close to the normal as possible, making available to the client patterns and conditions of everyday life which are as close as possible to the norm and patterns of the mainstream of society.

The Bill of Rights of Persons Who are Developmentally Disabled also generally provides that persons with developmental disabilities shall have all the rights enjoyed by citizens of the State of Florida and the United States, and specifically identifies rights to, *inter alia*, dignity, privacy, social interaction, and participation in community activities, as well as the right to be free from isolation or unreasonable restraint. § 393.13, Fla.Stat.

In sum, the legislature has mandated that HRS provide "normal" living conditions, to the extent possible, to persons with developmental disabilities within its care. Under this directive, HRS' policy is that residents have social functions on the premises and have contact with friends and visitors. Residents are not confined to the institution at all times. Secure, restrictive, and constant supervision is inconsistent with the normalization policy, and one-on-one supervision of residents at all places and at all times is, practically speaking, unrealistic, if not all but impossible. Yet this is what Lee urges in the present appeal.[7]

The Florida Supreme Court's ho
B.J.M., supra at 914, is particularly
sive in this context:

> Indeed, HRS is one of the prima
> by which adult society carries ou
> plicit obligation to care for those
> reason of age and unfortunate
> stances, cannot care for themsel
> have no one else to care for them
> also apparent, in our view, that
> HRS liable for tort damages for
> takes in judgment in carrying out,
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> that function. Parents, for insta
> granted almost unlimited discretio
> rying out similar responsibilities.
> rare case where the State will in
> and the rarer case still that the S
> impose tort liability for parental
> *Similarly, the courts, through tort*
> *are ill-suited to second-guess HR*
> *sions* as *to the* provision, *and c*
> *services each time there is* an, *un*
> *tory outcome*. [(Emphasis added)

The wisdom of the normalizatio
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discretionary matter involving budg
public policy considerations outside
of the courts. The Florida Supreme
City of Pinellas Park v. Brown, (
1222, 1226 (Fla.1992), held that gov
acts are discretionary and sovere
mune if they involve an exercise of
or legislative powers such that, fo
t o intervene by way of tort law,
inappropriat ely entangle itself in f
tal questions of' policy and planning.

We, therefore, reverse, but certif
lowing question of' great public imp
the Florida Supreme Court:

> WHERE A SEVERELY RE
> RESIDENT O F AN HRS F
> BECOMES PREGNANT WH
> HRS' CARE, BUT NEITHER T
> CIFIC CIRCUMSTANCES OF
> PREGNATION N O R ANY S
> ACT O F HRS' NEGLIGENCE

6. Also distinguishable is *Doe v. Escambia County School Board*, 599 So.2d 226, 227 (Fla. 1st DCA 1992), since it involved specific allegations and proof that certain teachers negligently breached their duty to supervise students.

7. A similar contention was urged and rejected in *Foy v. Greenblott*, 141 Cal.App.3d 1, 190 Cal. Rptr. 84, 90-91 (1st App.Div.1983), which holds:

> Appellants suggest "extra supervision" of the conservatee's contacts with men as one means of insuring she does not conceive. Every institutionalized person is entitled to individualized treatment under the "least restrictions feasible—the institution should *interference with a patient's individ* my, including her personal "privacy cial interaction." Obviously, *effec policing of patients would not only a*

The Florida Supreme Court's holding in *B.J.M., supra* at 914, is particularly persuasive in this context:

> Indeed, HRS is one of the primary means by which adult society carries out its implicit, obligation to care for those who, by reason of aged and unfortunate circumstances, cannot care for themselves and have no one else to care for them. IC is also apparent, in our view, that making HRS liable for tort damages for its mistakes in judgment in carrying out this task would considerably impair the exercise of that function. Parents, for instance, are granted almost unlimited discretion in carrying out similar responsibilities. It is the rare case where the State will intervene, and the rarer case still that the State will impose tort liability for parental actions. *Similarly, the courts, through tort actions, are ill-suited to second-guess HRS's decisions as to the provision and choice of services each time there is an unsatisfactory* outcome. [(Emphasis added).]

The wisdom of the normalization policy, with its attendant benefits and risks, is a discretionary matter involving budgetary and public policy considerations outside the realm of the courts. The Florida Supreme Court in *City of* Pinellas *Park v. Brown*, 604 So.2d 1222, 1226 (Fla.1992), held that governmental acts are discretionary and sovereignly immune if they involve an exercise of executive or legislative powers such that, for the court to intervene by way of tort law, it would inappropriately entangle itself in fundamental questions of policy and planning.

We, therefore, reverse, but certify the following question of great public importance to the Florida Supreme Court:

> WHERE A SEVERELY RETARDED RESIDENT OF AN HRS FACILITY BECOMES PREGNANT WHILE IN HRS' CARE, BUT NEITHER THE SPECIFIC CIRCUMSTANCES OF HER IMPREGNATION NOR ANY SPECIFIC ACT OF HRS' NEGLIGENCE IS ALLEGED OR ESTABLISHED AT TRIAL, CAN HRS BE HELD LIABLE IN TORT FOR ALLEGED NEGLIGENT SUPERVISION OF THE RESIDENT, GIVEN THE "NORMALIZATION PRINCIPLE," SECTION[S] 393.13–.14, FLORIDA STATUTES ("THE BILL OF RIGHTS OF PERSONS WHO ARE DEVELOPMENTALLY DISABLED")?

ALLEN and BENTON, JJ., concur.

John E. MARSHALL, a/k/a John Edward Gavin, a/k/a Christopher Williams, Appellant,

v.

STATE of Florida, Appellee.

No. **92–04706.**

District Court of Appeal of Florida, Second District.

Dec. 13, 1995.

Defendant was convicted in the Circuit Court for Hillsborough County, Donald C. Evans, J., of grand theft motor vehicle and two misdemeanors and of violating probation imposed for other crimes, and he appealed. The District Court of Appeal, Campbell, Acting C.J., held that *Nelson* inquiry was insufficient to establish voluntariness of defendant's waiver of counsel.

Reversed and remanded with directions.

of the freedom to engage in consensual sexual relations, which they would enjoy outside the institution, but would also compromise the privacy and dignity of all residents. [(Citations and footnote omitted).]