IN THE SUPREME COURT OF FLORIDA

LEVADA LEE, ETC.,

Petitioner,

v.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.

CASE NO. 87,071

DISTRICT COURT OF APPEAL,
1ST DISTRICT NO. 93-1350
93-1411

INITIAL BRIEF OF PETITIONER

DEAN R LeBOEUF, ESQ.
Florida Bar No. 0328715
RONALD W. BROOKS, ESQ.
Florida Bar No. 0122541
RHONDA S. BENNETT, ESQ.
Florida Bar No. 0854360
BROOKS, LeBOEUF and BENNETT, P.A.
863 East Park Avenue
Tallahassee, Florida 32301
(904) 222-2000

Attorneys for Petitioner

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PRELIMINARY STATEMENT

Petitioner will be referred to herein **as** Petitioner or Plaintiff. Respondent will be referred to herein as Respondent, HRS, or Defendant.

Citations to the original record will be made by the letter "R" and the **appropriate page** number.

STATEMENT OF THE CASE AND FACTS

Petitioner, Levada Lee, is the natural mother and duly appointed guardian of the person of D , an incompetent (R 617). D. L. suffers from severe profound mental retardation (R 46, 47) and was a resident of Sunland in Marianna, Florida from the age of twelve until her discharge in September 1987 at the age of 37 (R 47). Sunland-Marianna provides residential care and services to persons suffering from serious mental retardation (R 46). Between March 17 and March 25, 1987, while in the exclusive care, custody and control and under the direct supervision of HRS, D. L. was sexually assaulted on one or more occasions and impregnated. HRS employees claim that they were unaware of this sexual assault until at least July 27, 1987 when D. L. was examined by a physician for possible pregnancy. That doctor determined that D. L. was pregnant and that she was approximately 18 and a half weeks in gestation (R 47).

Plaintiff filed a three count negligence complaint against Defendant, State of Florida Department of Health and Rehabilitative Services (R 617-620). Following Summary Judgment in favor of the Defendant as to Counts II and III, the parties proceeded to trial on the allegations contained in Count I of the Complaint which stated that the Defendant had negligently supervised D. L. and that as a proximate result of that negligence, D. L. had been sexually assaulted and impregnated (R-617).

At trial, a stipulation was read to the jury that at the time of her impregnation D. L. was in the care and custody of HRS. (R 47). The undisputed evidence revealed that D. L.'s overall level of mental retardation was rated as severe minus four (R-165); her mental age was three years, eleven months; and, she had an IQ of 21 (R 147; R 165). Due

to severe ambulatory problems, D. was kept in knee pads so that she would not hurt her knees when she fell (R **147).** It was further undisputed that D. L. had no comprehension of the relationship between sexual intercourse and pregnancy, and that she was unable to protect herself or her own interests (R ***90;*** R **134;** R 150).

HRS admitted that although D. L. had never shown any interest in ***sex,*** there were clients at Sunland who were **known** to be sexually aggressive and who might grab other clients against their will (R 148, R **169-170;** R **174;** R **253;** R **326). HRS** acknowledged that it had **a** duty to provide care and supervision of D. L. and that this duty included protecting her **from** other patients as well as staff (R **145-146).** It was further acknowledged that higher functioning clients were allowed to intermingle with severely disabled clients like D. L., and that supervision by Sunland staff was the **only** means available to protect D. L. from foreseeable sexual **abuse** by clients **known** to be sexually aggressive **(R 146;** R **171-172;** R **361).**

The record reveals that pursuant to the mandates of Section **393.067,** Fla. Stat., HRS adopted minimum standards for Intermediate Care Facilities for the Mentally Retarded (ICF/MR) which are set forth in Fla. **Admin.** Code Chapter 10D-38 (R **134-135).** HRS admitted that these rules specifically apply to Marianna-Sunland in this case (R 135). Fla. **Admin.** Code R. 10D-38.002(26), defines an ICF/MR in relevant part as a facility providing room and **board** and continuous **24** hour-a-day supervision (R **136).** Fla. Admin. Code R. 10D-38.024(5)(a), provided that the **minimum** staff to client ratio was to be one staff member for every two clients in living units licensed as developmental residential (R **138-139).** Chapter ***393,*** Fla. Stat., mandated that HRS evaluate its clients, including D. L.,

to determine the required level of supervision and care. HRS evaluated D. L. and prepared an individual habilitation plan for her (R 139-140). D. L.'s habilitation plan indicated that her level of care was a code **7,** which required a minimum level of supervision of **one** staff member for every two clients (R 140). It **was** acknowledged by **HRS** staff that D. L. should have been supervised at all times (R 144; R **173).**

Notwithstanding the above referenced stipulations, statutes, rules and testimony, Bill Parramore, the Director of Sunland-Marianna, testified that Sunland-Marianna staff **supervise** many more than two patients (R-257). He acknowledged that Sunland-Marianna provided **only** one staff member for every eight patients on the first and second shifts and one staff member for every sixteen patients at night (R **136-139).** Mr. Parramore asserted that this ratio was based upon Federal regulations, however **it** was proven that the Federal regulations he used for justification were not adopted until the year after D. L 's impregnation (R **368).** HRS was unable to provide any documentation that their ratio of 1:8 or 1:16 was in compliance with the prevailing state rules and regulations which required a minimum level of supervision of one staff member for every two clients who were as severely disabled as D. L.

Despite the Defendant's acknowledgment that Sunland-Marianna was required to provide D. L. with continuous 24 hour-a-day supervision (R 144), Mr. Parramore testified that his own internal investigation into the facts surrounding D. L.'s pregnancy revealed that D. L. had sufficient freedom, and opportunity on the Sunland Center to have intercourse (or be sexually assaulted), in many different areas, both during the day and the evening (R 150). Mr. Parramore's investigation also revealed that D.

L. did not understand the relationship between pregnancy and intercourse (R 150).

Mr. Parramore's testimony was confirmed by Gene Peacock, an HRS investigator for the HRS Department of Aging and Adult Services. Mr. Peacock had a statutory duty to investigate reports of possible abuse or neglect and conducted an investigation of Sunland's supervision of D. L. including the facts leading up to her sexual assault (R 86-88). Mr. Peacock testified that he reviewed all of the logs and charts that were available on D. L., and that he conducted interviews with D. L., several staff members, and clients (R 111-112). In his interview D. L. told Mr. Peacock about several instances where a client had "played nasty" with her, and she stated that two clients had "played nasty" with her at a dance (R 94; R *96).* He further testified that D. L. had a difficult time comprehending sex and issues related to *sex* (R 129).

During D. L.'s pregnancy, a sonogram was performed which indicated that she was impregnated within four days of March 21, 1987 (R 97). Mr. Peacock's investigation and testimony revealed that on March 18, 1987, a date within the critical time frame for impregnation, patients were left at a dance conducted in the gym from 6:30 p.m. to 8:45 p.m. without proper supervision (R 97-98). During an interview with Mary Smith, D. L.'s supervisor, Mr. Peacock was advised by Ms. Smith that she had observed a client "fingering" D. L. (R 94-95). This observation, however, was not noted in any of the records produced for his review (R *95).* Mr. Parramore testified that if someone was observed trying to have *sex* with a severely retarded patient like D. L., an unusual report should be completed in accordance with Fla. Admin. Code R. 10D-38.023(1)(d),

however no such report was ever completed with regard to D. L. (R 143-144; R 146-147).

Based upon the facts adduced during his investigation, Mr. Peacock testified that there could have been multiple opportunities for someone to impregnate D. L., but that the most likely time of conception was when D. was left improperly **supervised** at the *gym* on March 18, 1987 (R 130). Following his investigation, Mr. Peacock concluded that neglect was "indicated", as that term is defined in Chapter 415, Fla. Stat., and that D. L.'s caretakers failed to adequately supervise her and the person who impregnated her (R 99; R 112).

HRS claims that because it must operate in accordance with the normalization principle set forth in section ***393.063,*** Fla. Stat., which mandates that HRS provide "normal" living conditions, to the extent possible, to persons with developmental disabilities within its care, it was not responsible for supervising D. L. more closely and is immune from liability. However, the Director of Sunland and HRS staff acknowledged that nothing in Chapter 393 provides that clients should not be supervised while exercising their rights to live as normally as possible. (R 144; R 171; R 255-256). Further, although HRS' policy is that residents have social interaction, testimony of HRS employees revealed that sexual relations were neither condoned nor allowed on the Marianna-Sunland Campus (R 173-174; R 327). If clients were observed engaging in sexual relations they were physically separated (R 173-174). HRS employees were unable to offer any explanation as to how D. L. could have had sex at Sunland without their knowledge had she been properly supervised (R 326).

In support of her contention that D. L. was impregnated as the result of sexual abuse, the Plaintiff presented the testimony of D. L.'s mother and sister who testified that during a home visit in July of 1987, prior to their knowledge that D. L. was pregnant, D. L.'s behavior had changed from happy and talkative to sad and withdrawn (R 53; R 181). They testified that D. L. had nightmares and would wake up screaming, "Turn me loose...you're hurting me, I'm going to tell my cottage parents." (R 59; R 182-183).

The Plaintiff also presented the testimony of Jeannie Becker-Powell, an imminently qualified expert in the areas of victimology and Post Traumatic Stress Disorder (PTSD). Ms. Becker-Powell testified that based upon her review of HRS records and her interviews with D. L. and D.'s mother and sister, it was her expert opinion that D. L. had been forced to have sex against her will on at least two occasions (R 199). She further testified that prior to leaving Sunland D. L. was displaying symptoms and continues to display symptoms consistent with Post Traumatic Stress Disorder (R 198). The Defendant presented no conflicting expert testimony.

Upon deliberation, the jury returned a verdict for the Plaintiff in the amount of $1,000,000.00 (R 847-849). The trial court denied the Defendant's Renewed Motion for Directed Verdict, or in the Alternative, Motion for Judgment Not of Verdict, or in the Alternative, Amended Motion for New Trial or Remittitur (R *903-906).* HRS appealed (First District Court of Appeal Case No. 93-1411) alleging that the trial court committed reversible error in failing to instruct the jury properly as to the correct standard to apply in determining D. L.'s capacity to consent; in failing to grant Defendant's Motion for

Directed Verdict as there was no showing of sexual abuse; in failing to grant Defendant's Motion for Directed Verdict as there was no evidence of negligent supervision; and, in failing to grant Defendant's Motion for Directed Verdict as the submission of the case to the jury allowed an impermissible stacking of inferences (Amended Initial Brief of Appellant).

Following oral arguments on July 21, 1994, the First District Court of Appeal ordered the parties to submit supplemental briefs on the sole issue of whether HRS is immune from liability in the present case under the doctrine of sovereign immunity. A second order directed the parties to include in their supplemental briefs discussion of the case of Department of Health and Rehabilitative Services v. B.J.M. 656 So.2d 906 (Fla. 1995) (Appendix 1).

Following submission of the supplemental briefs, the First District Court of Appeal reversed the Final Judgment for Plaintiff holding that HRS was immune from liability in this case under the doctrine of sovereign immunity (Opinion, Appendix 2). The court stated that the absence of specific allegations or proof regarding the specific circumstances leading to D.L.'s impregnation or any specific acts of HRS' negligence relating thereto leads to the conclusion that Plaintiff is actually challenging HRS' policies regarding supervision, rather than any specific operational negligence. The court further noted that the HRS' supervision policies being challenged by the Plaintiff are dictated by the Florida Legislature's enactment of the Bill of Rights of Persons who are Developmentally Disabled, sections 393.13-.14, Fla. Stat., which mandates that HRS provide "normal" living conditions, to the extent possible, to persons with developmental disabilities within its care.

The court held that "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." However, the First District Court of Appeal **also** certified the following question **as** being of great public importance:

> 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 **393.13-393.14,** FLORIDA STATUTES ("THE BILL OF RIGHTS OF **PERSONS** WHO ARE DEVELOPMENTALLY DISABLED")?

Petitioner now **seeks** to invoke the jurisdiction of the Supreme **Court** to review the decision of the First District **Court** of Appeal.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal erred in holding that the Plaintiff's cause of action against HRS for negligent supervision is barred by the doctrine of sovereign immunity. As in Department of Health & Rehabilitative Services v. Whaley, 574 So.2d 100 (Fla. 1991) and Department of Health & Rehabilitative Services v. Yamuni, 529 So.2d 258 (Fla. 1988), the instant case involves employee level decisions concerning the physical safety of D. L., a severely retarded person within HRS' exclusive care, custody and control, which does not implicate any discretionary planning or judgment function.

The Complaint filed by the Plaintiff alleged that HRS had negligently supervised D. L. and that as a proximate result of that negligence, D. L. had been sexually assaulted and impregnated. At trial, HRS stipulated that at the time of her impregnation D. L. was in the exclusive care and custody of HRS. This Court has consistently recognized that a person taken into custody is owed a common law duty of care and that this duty is an operational level function.

HRS has acknowledged that it had a duty to provide care and supervision of D. L., a profoundly retarded woman who was unable to protect herself or her own interests, and that this duty included protecting her from known sexually aggressive clients. In fact, HRS staff acknowledged that supervision was the only means available to protect D. L. from foreseeable sexual abuse.

In addition to its common law duty of care to protect D. L. from foreseeable sexual abuse, the Plaintiff presented uncontradicted testimony that HRS had a duty to provide D. L. with continuous 24-hour-a-day supervision in accordance with Chapter

393, Fla. Stat., Fla. Admin. Code Chapter 10D-38, and D. L.'s own individual habilitation plan. Conflicting evidence was presented at trial regarding **HRS'** negligent breach of both its common law and statutory duty of care. Thus, the evidence presented at trial that HRS negligently breached its acknowledged duty of care to supervise and protect D. L. from foreseeable harm, resulting in injury to D. L., was properly submitted to the **jury.**

The Appellate Court reversed the jury verdict in this case holding that constant supervision of severely profoundly retarded clients like D. L. would be inconsistent with the "normalization policy" set forth in Section *393.063,* Fla. Stat. The practical effect of this ruling is to eliminate **HRS'** accountability for its negligent failure to protect mentally disabled individuals who cannot protect themselves or their own interests. The normalization principle necessarily presupposes that mentally disabled persons will be allowed to do things they want to do and that they are capable of doing without unreasonable restrictions. However, in adopting section *393.063,* Fla. Stat., which mandates that **HRS** provide "normal" living conditions, to the extent possible, to persons with developmental disabilities within its care, the Florida legislature implicitly assumed the need for at least some restrictions that would not be imposed on others.

HRS staff conceded at trial that nothing in Chapter **393,** Fla. Stat., provides that profoundly retarded clients like D. L. should not be supervised while exercising their rights to live as normally as possible. Clearly, the "normalization" principle does not equate to allowing every severely retarded client, regardless of their level of comprehension as to sex and its potential consequences, to have the unfettered right to engage in sexual

relations without the knowledge of HRS staff who have an acknowledged duty to protect clients who cannot protect themselves. The HRS rules and regulations set forth in Fla. Admin. Code Chapter 10D-38, requiring continuous 24 hour-a-day supervision were promulgated in accordance with Chapter *393,* Fla. Stat., and therefore it cannot be said that such supervision would frustrate a client's rights under this same regulatory chapter.

The First District Court of Appeal's conclusion that because of "the general nature of the allegations made and the absence of specific allegations of proof' the Plaintiff was "actually challenging HRS' policies regarding supervision" is also erroneous. Plaintiff's inability to plead the facts relating to D. L.'s sexual assault with more particularity was directly attributable to the Defendant's failure to properly supervise and its failure to prepare an "unusual incident report" required by its own rules. As this Court recognized in Rupp v. Bryant, 417 So.2d 658 (Fla. 1982), a defendant's self-induced ignorance can hardly support the lack of proximate cause between the defendant's failure to supervise in accordance with its own regulations, and the plaintiffs consequent injuries. Under the principles established by this Court in Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987), the Defendant should not be allowed to profit from the Plaintiffs inability to plead certain specifics regarding D. L.'s assault, where such inability is directly attributable to HRS' failure to perform its duties under the law.

The First District Court of Appeal's ruling that the Plaintiffs cause of action for negligent supervision is barred by the doctrine of sovereign immunity because it challenges a discretionary governmental function, leaves mentally disabled adults with no remedy in the event employee-level decisions result in a breach of HRS' common law and statutory

duty to protect those clients within its exclusive care, custody, and control from foreseeable harm. In order to insure the physical protection of developmentally disabled adults, like D. L., who are unable to protect themselves, this case should be governed by this Court's holdings in Whalev and Yamuni. The duty of supervision has consistently been held to constitute an operational level function. When HRS employees are negligent in conducting this operational level function and they expose clients to physical injuries, HRS should be subjected to tort liability.

ARGUMENT

I.

THE PLAINTIFF PRESENTED PRIMA FACIE EVIDENCE OF HRS' NEGLIGENCE AND THUS THE FIRST DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE PLAINTIFF FAILED TO ESTABLISH SPECIFIC ACTS OF HRS' NEGLIGENCE WHICH WOULD PROPERLY SUBJECT HRS TO TORT LIABILITY FOR THE SEXUAL ASSAULT OF D. L.

At the time of the events complained of D. L. was thirty-seven years old; however, she functioned at the level of a three year old child. She was incapable of caring for herself. She had no understanding of sex or its consequences, and during the twenty-five years she had resided at Sunland-Marianna she had never demonstrated any interest in the subject. There were other clients at Sunland, however, who were known to be sexually aggressive and the only protection D. L. had against such clients was the supervision provided by the Sunland-Marianna staff.

Sunland-Marianna is an Intermediate Care Facility for the Mentally Retarded (ICF/MR). In the exercise of discretionary policy-making, HRS adopted administrative rules relating to the level of supervision required at such facilities. Fla. Admin. Code R. 10D-38.024(5)(a), provides that the minimum staff to client ratio was one staff member for every two clients in living units (such as D. L.'s) licensed as developmental residential. Fla. Admin. Code R. 10D-38.002(26), provides that the level of supervision required at such facilities is continuous 24 hour-a-day supervision (R 136). Petitioner does not challenge this exercise of policy-making by Respondent. Neither does she challenge the habilitation plan established by HRS which likewise required a minimum of at least one

staff member for every two clients with D.'s level of functioning. What Petitioner does challenge is the negligent implementation by Respondent of these policy level decisions.

Petitioner respectfully suggests that the certified question as worded by the First District Court of Appeal reflects a misperception of the issues presented by this case. The certified question implies that HRS was being sued by the Plaintiff simply because D. L. became pregnant while in HRS' care. This implication is inaccurate. Rather, Plaintiff alleged in her Complaint and presented evidence at trial that HRS had negligently supervised D. L. while she was in HRS' exclusive care and custody, and that as a proximate result of that negligence, D. L. was sexually assaulted and impregnated (R 617). Evidence of D. L.'s traumatic pregnancy was introduced as an element of damages resulting from the sexual assault. Thus, this case was properly submitted to the jury.

Florida law is well established that in order to maintain a cause of action sounding in negligence, the Plaintiff must show:

> (1) The existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others including the plaintiff.
>
> (2) A failure on the part of the defendant to perform that duty; and
>
> (3) An injury or damage to the plaintiff proximately caused by such failure.

Stahl v. Metropolitan Dade County, 438 So.2d 14, 17 (Fla. 3d DCA 1988).

Duty

HRS stipulated that at the time of her impregnation D. L. was in its exclusive care and custody (R 47). This Court has consistently recognized that a person taken into custody is owed a common law duty of care and that this duty is an operational level function. Department of Health & Rehabilitative Services v. Whaley, 574 So.2d 100, 104 (Fla. 1991). In Whaley, this Court noted that its articulation of the common law duty of care was consistent with the Restatement (Second) of Torts § 320 (1965).[1] The scope of the duty HRS owed to D. L. in this case is to be determined from the circumstances involved, the applicable statutes, and the rules and regulations adopted by HRS to implement those statutory provisions. See Doe v. Escambia County School Board, 599 So.2d 226, 227 (Fla. 1st DCA 1992).

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[1] This section of the Restatement (Second) of Torts reads as follows:

> § 320. Duty of Person Having Custody of Another to Control Conduct of Third Persons
>
> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor
>
> (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.

The Comments to § 320 provide in pertinent part that the rule stated in this section is applicable to asylums, hospitals, schools, and similar institutions.

In Foy v. Greenblott, 190 Cal. Rptr. 84 (1st App. Div. 1983) [erroneously relied upon by the First District Court of Appeal for its conclusion that the instant case was barred by the doctrine of sovereign immunity] the court observed: "[t]he degree of the hospital's duty of care is measured by the ability of the patient to care for herself. Id. at 92. It is undisputed that D. L., who functions at the level of a three year old child (R 147; R 165) was completely lacking in ability to care for herself. HRS acknowledges that it had a duty to provide care and supervision of D. L., and that this duty included protecting her from other patients (R 145-146). In fact, Sunland employees, including Bill Parramore, the Director of Sunland-Marianna, acknowledged that supervision by Sunland staff was the only means available to protect D. L. from foreseeable sexual abuse by Sunland clients known to be sexually aggressive (R 146, R 172).

Breach of a Recognized Duty

HRS has argued on appeal, and the First District Court agreed, that the final judgment entered in favor of the Plaintiff must be reversed because she was unable to plead or prove the specific circumstances leading to D. L.'s alleged assault. In its opinion, the First District Court of Appeal stated that "the general nature of the allegations made and the absence of specific proof leads us to conclude that Lee is actually challenging HRS' policies regarding supervision, rather than any specific operational negligence." (Opinion, page 4)

Although Plaintiff concedes her inability to identify with specificity the facts surrounding the sexual assault which led to D. L.'s impregnation, such a lack of specific proof should not be fatal to her cause of action. In this particular case, the means

for determining who assaulted D. L., where, why, and how was within the exclusive province of HRS. Plaintiffs inability to plead the facts relating to D. L.'s sexual assault with more particularity was directly attributable to the Defendant's failure to supervise and the failure to prepare an "unusual incident" report required by its own rules. Under the principles established by this Court in Valcin. supra, HRS should not be allowed to profit from the Plaintiffs inability to plead certain specifics regarding her assault, where such inability is directly attributable to the Defendant's failure to prepare required reports.

This Court recognized in Rupp v. Bryant, supra, that the defendant's self-induced ignorance could hardly support the lack of proximate cause between the defendant's failure to supervise in accordance with its own regulations, and the plaintiffs consequent injuries. Id, 417 So.2d at 669. In the instant case, Plaintiff has been unable to be more precise in her allegations and proof because HRS failed to properly supervise D. L. in accordance with both its common law and statutory duty, and failed to prepare an unusual incident report documenting a staff member's observation of a patient engaging in sexual conduct with D. L..

HRS had an acknowledged duty to **supervise** and protect D. L. who they admit **was** unable to protect herself. However, **HRS** employees testified that they had no knowledge whatsoever that D. L. had been subjected to any sexual experience until she **was** almost five months pregnant. Subsequent investigations performed by Gene Peacock, the HRS abuse investigator, and Bill Parramore, the Director of Sunland-Marianna, revealed that there could have been multiple opportunities for an incident such as that complained of to have occurred without the knowledge of Sunland staff (R 117;

R 150). Because of D. L.'s profound level of retardation she was only able to state that certain clients "played nasty" with her at the gym.[2]

HRS seeks to avoid liability in the instant case not by demonstrating that its supervision and care were reasonable under the circumstances, but rather that its duty to provide meaningful care and supervision was obviated by the Legislative admonition in Chapter ***393,*** Fla. Stat., that HRS should provide "normal" living conditions to the extent possible. Apparently, under HRS' view, the provision of little, or even no supervision, can be excused by reference to the "normalization" principle. Such a rationalization however, ignores the rule long-established by this Court that statutes in derogation of the common law are to be strictly construed. Nell v. State, 277 So.2d 1, 4 (Fla. **1977). *As*** HRS conceded at trial, notwithstanding the requirements of Chapter **393,** Fla. Stat., that normal living conditions be established "to the extent possible," the statutes do not suggest that supervision of clients is no longer necessary. The common-law duty of "reasonable" care and supervision cannot be repealed by implication. Burklin v. Willis, 97 So.2d 129, *131* (Fla. 1st DCA 1957).

The jury was provided with proof that HRS failed in its common law duty to protect D. L. from foreseeable sexual assault while she was within HRS' exclusive care and custody. HRS staff acknowledged that D. L. had no comprehension of the relationship between sexual intercourse and pregnancy, and that she was unable to protect herself or her own interests (R 90; R 134; R 149-150). It was further admitted that although D.

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[2] Because of a speech impediment and her inability to comprehend sex and issues related to sex, **HRS** personnel were unable to determine exactly what "playing nasty" entailed (R 129).

L. had never shown any interest in sex, there were clients at Sunland who were known to be sexually aggressive and who might grab other clients against their will (R 148; R 169-170; R 174; R 253; R 326). HRS staff testified that higher functioning clients were allowed to freely intermingle with severely disabled clients like D. L., and that supervision by Sunland staff was the only means available to protect D. L. from foreseeable sexual abuse by clients known to be sexually aggressive (R 146; R 172; R 361). Russell Register, D.'s social worker, described D. as being like a three year old child who should be supervised at all times (R 169; R 174).

A sonogram performed following discovery of D.'s pregnancy indicated that D. was impregnated within four days of March 21, 1987 (R 97). Mr. Peacock's investigation and testimony revealed that on March 18, 1987, a date within the critical time frame for impregnation, patients were left at a dance conducted in the gym from 6:30 to 8:45 without proper supervision (R 97). Mr. Peacock testified that based upon his review of D.'s records and interviews with D. and Sunland staff, he determined, in accordance with Chapter 415, Fla. Stat. that neglect was indicated because Sunland staff failed to adequately supervise D. L. and the alleged perpetrator(s) of D.'s sexual abuse (R 99). Only HRS is aware of the identity of client(s) who were determined as likely to have had sex with D. L.; however, no unusual incident report reflecting this information was prepared, and HRS has refused to release the identity of the client(s) to the Plaintiff (R 112, R 153-154).

In addition to HRS' violation of its common law duty of care, the record reveals that HRS also violated its adopted minimum standards for Intermediate Care Facilities for the

Mentally Retarded (ICF/MR) which are set forth In Fla. Admin. Code Chapter 10D-38 (R 134-135). HRS admitted that these rules specifically apply to Marianna-Sunland, and more specifically to D. L., in this case (R **135).** Fla. Admin. Code R. 10D-38.002(26), defines an ICF/MR in relevant part as a facility providing room and board and continuous 24 hour-a-day supervision (R **136).** Fla. Admin. Code R. 10D-38.024(5)(a), provided that the minimum staff client ratio will be one staff member for every two clients in living units licensed as developmental residential (R **138-139).** Further, D. L. was evaluated by Sunland staff as part of an overall habilitation plan and her evaluation indicated that D. L.'s level of care was a seven (R **139).** Bill Parramore testified that level seven care required at least one staff member for every two clients (R 140). The evidence revealed, however, that the Defendants' staff supervised many more than two patients like D. L. (R 257).

Mr. Parramore testified that Marianna-Sunland only provided one staff member for every eight patients on the first and second shifts and one staff member for every sixteen patients at night (R **136-137).** Although Mr. Parramore attempted to justify this ratio based upon federal regulations, the Plaintiff presented Mr. Parramore with the regulations he was relying upon which revealed that said regulations were not enacted into law until a year after D. L.'s sexual assault (R ***368).*** Although on appeal HRS has offered numerous justifications supporting the 1:8 and 1:16 ratio testified to by Mr. Parramore, a review of the trial record, will reveal that the **jury** was provided with no evidence that **HRS** was in compliance with the controlling state rules and regulatians regarding minimum supervision of D. L. (R 1-469).

The evidence further revealed that, pursuant to Fla. Admin. Code R. 10D-38.023(1)(d), an unusual report must be completed if any client is seen engaging in sexual activity (R 143-144). During the course of Gene Peacock's abuse investigation, one staff member revealed that she had observed a client "fingering D." but no report was ever prepared regarding this incident (R 95). Although Mr. Peacock determined that there were at least two clients who may have had sex with D. L. no reports were ever prepared regarding any sexual activity involving D. (R 96; R 98). If Sunland employees had properly supervised and properly reported sexual activity involving D. L., steps could have been taken to ensure that she was properly protected from sexual abuse or HRS could have determined that D. L. was voluntarily engaging in sexual activity with an understanding of the possible consequences.

The evidence which was before the trial court, considered in a light most favorable to the Plaintiff, revealed disputed issues of material fact as to whether HRS breached its corm-non law duty of care by failing to adequately supervise D. and protect her from foreseeable harm while under HRS' exclusive care, custody and control, and thus presented questions of fact that were properly determined by the jury. Further the jury was entitled to find that had HRS staff provided the minimum level of supervision mandated by its own rules or complied with the common law standard of care and supervision, D. L. would have been protected from sexual assault.

Injury Resulting from Defendant's Breach of Duty

The final element which Plaintiff was required to prove in order to maintain her cause of action against HRS was that D. L. sustained an injury or damage proximately

caused by HRS' failure to properly supervise D. L. in accordance with its acknowledged duty to protect her from foreseeable harm. Despite the Plaintiffs inability to prove the exact circumstances surrounding D. L.'s assault and impregnation, there was sufficient evidence presented to the jury that D.'s pregnancy was the result of sexual assault, and not as HRS contends, D.'s voluntary participation in sexual intercourse. The Plaintiffs allegation that D. L. was the victim of sexual assault was supported by expert testimony that D. L. was forced to have sex against her will on at least two occasions while she was a client at Sunland. Additionally, the Plaintiff presented evidence that pursuant to existing Florida law D. L. lacked the capacity to consent to sexual intercourse, and thus, any sexual intercourse involving D. L. constituted sexual assault.

The undisputed evidence revealed that D. L. has an I.Q. of 21, and a functional level of three years, eleven months (R 165). The jury, without objection, viewed a videotape of D. L. which truly and accurately depicted both her appearance and her condition (R 65). Mr. Parramore testified that in D. L.'s individual habilitation plan she was identified as falling within code 7, which is a category assigned to a client who is fully ambulatory but not capable of following directions or taking appropriate action for self-presentation under emergency conditions and clients who are mobile with mechanical devices such as canes, walkers or wheelchairs (R 140). HRS staff, as well as Mr. Peacock, the HRS Abuse Investigator, testified without contradiction that D. L. had no comprehension of the relationship between sexual intercourse and pregnancy, and that she was unable to protect herself or her own interests (R 90; R 134; R 149-150). Following

his investigation, the HRS abuse investigator, determined that D. L. lacked the capacity for knowing consent under Chapter 415, Fla. Stat. (R 127).

HRS personnel testified that in the 25 plus years that D. L. had been a resident of Sunland, she had never exhibited any signs of sexual interest or activity (R 174; R 253; R 325-326). Russell Register, D. L.'s social worker, testified that D. acted like a three year old child, and had never expressed any curiosity about sex (R 169; R 174). As previously noted, however, the undisputed evidence did reveal that there were clients at Sunland who were known to be sexually aggressive and who might grab another client against his or her will (R 169-170). In fact, one of the clients named by D. L. as having "played nasty" with her at the dance was known to be sexually aggressive (R 174).

The Plaintiff presented the testimony of D.'s mother and sister, who both testified that D. L.'s behavior drastically changed between her home visit in December of 1986 and her home visit in July of 1987. Although D. L. was normally happy and playful, during her visit in July of 1987, she was sad and withdrawn (R 53-54; R 180-181). D.'s family members testified that although D. was normally happy to return to Sunland following home visits, she cried and did not want to return following her July visit (R 54; R 181). When D. moved back home with her mother following the discovery of her pregnancy, she had nightmares and would scream "Turn me loose...You're hurting me, I'm going to tell my cottage parents" (R 59).

The Plaintiff presented the testimony of Jeannie Becker-Powell, an expert in the field of Post Traumatic Stress Disorder, who testified that based upon her review of D.'s Sunland records, her interviews with D. L. and D.'s mother and sister, it was her

expert opinion that D. L. had been forced to have sex against her will on at least two occasions while she was a client at Sunland (R 198). Ms. Powell further testified that as a result of this sexual activity, D. L. had suffered several traumas and continues to show symptoms that are consistent with Post Traumatic Stress Disorder (R 198). HRS presented no expert opinion to refute Ms. Powell's testimony.

As the trial court correctly noted, the statutes dealing specifically with mentally retarded adults do not set forth the definition of "consent" to be applied in cases of alleged sexual abuse (R 398-399). Thus, the court instructed the jury in accordance with the definition of consent set forth in Chapter 794, Fla. Stat., which applies to all victims of sexual assault and recognizes differing levels of mental status.[3] In direct contradiction to the Defendant's contention that this definition of consent was not tailored to cases dealing with developmentally disabled persons, the statute expressly provides that "[e]vidence of the victim's mental incapacity or defect is admissible to prove that the consent was not intelligent, knowing, or voluntary. . . ." Section 794.011(6), Fla. Stat. The statute does not prohibit sexual intercourse with a person with a mental defect. It merely requires that their mental condition be considered in evaluating whether or not sexual abuse has occurred. Therefore, even assuming arguendo that D. L. was a willing participant in sexual intercourse while residing on the Sunland campus, an allegation which is vigorously

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[3] The jury instruction given in this case directed, "[t]he parties to his action have agreed that D. L. suffers from severe profound mental retardation. You must keep this in mind when you consider whether or not D. L. could intelligently, knowingly and voluntarily consent to sexual intercourse" (R 458).

denied by the Plaintiff, D. L.'s severe retardation is admissible to prove that she could not intelligently, knowingly or voluntarily engage in sexual intercourse.

Section 794.011(1)(b), Fla. Stat., defines a mentally defective person as one who "suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct." By the Defendant's own admission, D. L. met this definition. HRS staff acknowledged that, because of D. L.'s profound severe mental retardation she had a difficult time comprehending sex and issues related to sex, and that she did not understand the relationship between intercourse and pregnancy (R 129; R 150). Although HRS was entitled to submit evidence that despite D. L.'s level of retardation she had a basic understanding of sex and its consequences, and was able to make a knowing decision to voluntarily engage in sexual intercourse, the Defendant presented no such evidence.

The jury instruction given in this case allowed the jury to take into account the totality of the evidence presented at trial and to make a determination as to whether D. Lee, individually, had the capacity to engage in sexual intercourse with a basic understanding of the potential consequences of that activity.

II.

HRS HAD AN ESTABLISHED DUTY TO PROVIDE CONTINUOUS SUPERVISION FOR D. L., AND THIS DUTY IS NOT OBVIATED BY NOR INCONSISTENT WITH THE NORMALIZATION PRINCIPLE MANDATED BY THE FLORIDA LEGISLATURE

In this case, the Plaintiff is not seeking to impose any new duty upon HRS by alleging that D. L. should have been provided "extra supervision" as the Appellate Court indicated in its opinion. She seeks to have HRS held accountable only for the level

of supervision required by its own rules and by the common law standard of reasonable care under the circumstances. Section 768.28, Fla. Stat., waives governmental immunity from tort liability "under circumstances in which the state or [an] agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state." Clearly, if a private person or entity had undertaken the duty of providing D. L. with protective residential care, tort liability would exist if that duty was conducted in a negligent manner, as shown in this case.

The First District Court of Appeal has invoked sovereign immunity in this case based upon its opinion that "secure, restrictive, and constant supervision is inconsistent with the normalization policy. . ." The "normalization principle" set forth in section 393.063, Fla. Stat., mandates that HRS provide "normal" living conditions, to the extent possible, to persons with developmental disabilities within its care. The Appellate Court held that "[t]he 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 Plaintiff does not challenge the wisdom of the normalization policy, and in fact embraces the rights of retarded citizens to live as normally "as possible". However, in holding that constant supervision is inconsistent with this policy, the Appellate Court has ignored testimony adduced at trial regarding HRS' own rules which required continuous 24 hour-a-day supervision for clients like D. L. Additionally, HRS staff, including the Director of Sunland, testified that nothing in Chapter 393, Fla. Stat., provides that clients should not be supervised (R 144; R 171; R 255-256).

The practical effect of the Appellate Court's ruling that 24 hour-a-day supervision is inconsistent with the normalization principle is to eliminate HRS' accountability for its negligent failure to protect mentally disabled clients in its facilities who cannot protect themselves. The normalization principle necessarily presupposes that mentally disabled persons will be allowed to do things they want to do and that they are capable of doing without unreasonable restrictions. 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 policy" 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 (R 146; R 169; R 172; R 326).

The United States Supreme Court in City of Clebume. Texas v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) recognized that the Developmental Disabilities Assistance Act gives "the retarded the right to live only in the 'least restrictive setting' appropriate to their abilities, implicitly assuming the need for at least some restrictions that would not be imposed on others." Id. at 445. Similarly, the Florida legislature has recognized the need for at least some restrictions that would not be imposed on others when it enacted section 393.063, Fla. Stat., which defines the "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." (emphasis added). Clearly, allowing D. L., a severely retarded person who is unable to protect herself, to participate in normal activities including unsupervised interaction with higher functioning, sexually aggressive clients would and, in fact, did result in a clear violation of her right to be free from neglect and abuse. Further, the "normalization" principle does not equate to allowing every severely retarded client to have the unfettered right to engage in sexual relations without the knowledge of HRS staff who have the duty to protect clients who cannot protect themselves. This fact is supported by the testimony of HRS staff who stated that sexual relations are neither condoned nor allowed on the Sunland campus (R 327; R 356). Testimony revealed that if clients were observed engaging in sexual relations they were physically separated (R 173-174).

The HRS rules and regulations set forth in Fla. Admin. Code Chapter 10D-38 requiring continuous 24 hour-a-day supervision were promulgated in accordance with Chapter 393, and therefore it cannot be said that such supervision would frustrate a client's rights under this same regulatory chapter.

In support of its ruling that secure, restrictive, constant supervision would be inconsistent with the normalization policy, the Appellate Court cited to Foy v. Greenblott, 190 Cal. Rptr. 84 (1st App. Div. 1983). Foy does not provide support for the First District Court of Appeal's conclusion that the instant case is barred by the doctrine of sovereign immunity. The Foy court's determination that the defendant county was entitled to

sovereign immunity was based not upon the principle of normalization, but rather upon the language of the statute under review. The court expressly held: "the plaintiffs' actions are barred by section 854.8, which provides in relevant part:

> (a) Notwithstanding any other provision of this part, except as provided in this section and Sections 814, 814.2, 855, and 855.2, a public entity is not liable for:
> (1) an injury proximately caused by a patient of a mental institution.
> (2) An injury to an inpatient of a mental institution.

Id. at 88.

California's complete disavowment of any responsibility for harm caused by or to an inpatient in a mental institution is certainly not reflective of Florida's own policies and laws. See Kirkland v. State Dept. of Health & Rehabilitative Services, 424 So.2d 925 (Fla. 1st DCA 1982), and Miller v. State Dept. of Health & Rehabilitative Services, 474 So.2d 1228 (Fla. 1st DCA 1985).

Moreover, the factual situation alleged in Foy differs greatly from that presented by the instant case. The complaint in Foy alleged that the defendants were aware that the plaintiff was a disabled person with a medical history of irresponsible sexual behavior, and that as a result of defendants' failure to provide "extra" supervision she became pregnant. Id. at 87. The plaintiff in Foy did not argue that she had been sexually assaulted. Rather, the sexual acts engaged in by the plaintiff were admittedly voluntary. There was no evidence that the plaintiff in Foy did not understand the relationship between intercourse and pregnancy, however, damages were sought due to the defendants' failure to discover her pregnancy until it was too late to obtain a therapeutic abortion. According to the court, the suit was framed in the form of a medical malpractice action. Id. at 89. The

court held that effective hospital policing of patients would deprive them of the freedom to engage in consensual sexual relations. The Foy court, however, expressly distinguished a number of cases that involved mental hospitals' failures to protect patients from sexual assault rather than to prevent voluntary sexual relations. Id. at 91. For the reasons described above, any reliance upon Foy is unjustified.

III.

SUPERVISION IS AN OPERATIONAL LEVEL DUTY, AND THUS THE APPELLATE COURT ERRED IN RULING THAT THE PLAINTIFF'S CLAIM FOR NEGLIGENT SUPERVISION IS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY

In support of its holding that the Plaintiffs cause of action is barred by the doctrine of sovereign immunity, the Appellate Court cites this Court's holding in Department of Health and Rehabilitative Services v. B.J.M., Supra. The instant case which involves evidence of negligent supervision by HRS employees is clearly distinguishable from B.J.M., wherein the Plaintiff was challenging a placement decision of HRS and HRS' alleged failure to provide adequate services to an adjudicated delinquent placed in the agency's protective custody. In B.J.M. this Court held that the HRS functions at issue involved discretionary decisions made by HRS which were entitled to sovereign immunity. Id. at 913.

The facts in the B.J.M. decision were distinguished from the actions at issue in Department of Health & Rehabilitative Services v. Whaley, 574 So.2d 100 (Fla. 1991) and Department of Health & Rehabilitative Services v. Yamuni, 529 So.2d 258 (Fla. 1988). As noted, 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. Neither case involved discretionary calls

with regard to the choice of services to children. Noting the decisions in Whaley and Yamuni, this Court in B.J.M. stated that it would "not hesitate to subject the agency to tort liability when its negligently conducted operational level activities expose children to specific foreseeable dangers that result in physical injuries to children." Id at **916.**

The instant case falls squarely within Whaley and Yamuni because the conduct complained of involved the negligent failure to provide for the physical safety of a client within HRS' exclusive care, custody and control. Clearly, negligent supervision by HRS staff workers exposes profoundly retarded clients, such as D. L., to foreseeable dangers that can, and did in this case, result in physical and psychological injuries. As noted in Whaley, "HRS has a duty, while it holds an alleged juvenile delinquent in its custody, to protect that child from potential harm by third persons where the risk of such harm is foreseeable." Id at 104. That duty is equally applicable where HRS has within its custody severely retarded persons who are as much in need of protection as any child.

Sovereign Immunity Analysis

In B.J.M., this Court stated that in Commercial Carrier v. Indian River County, 371 So.2d 1010 (Fla. 1979) and Trianon Park Condominium Associaion v. City of Hialeah, 468 So.2d 912 (Fla. 1985), "we set out a general method of analysis to classify govermnent activities entitled to immunity." B.J.M. at 913. In footnote 7 of B.J.M., this Court referred to the case of Comuntzis v. Pinellas County School Board, 508 So.2d 750, 753 (Fla. 2d DCA 1987) for an illustration of this type of analysis. Comuntzis involved an action brought by a student against the School Board for injuries he sustained at the hands of fellow students during the school lunch hour while on school property. The Plaintiff

alleged that his injuries were sustained due to the negligent supervision of teachers. Because the present case also involves allegations of injury to D. L. due to negligent supervision, Comuntzis provides an excellent illustration of the application of the required sovereign immunity analysis.

The Comuntzis court began its analysis by applying the Trianon categories for analyzing sovereign immunity issues. Recognizing that there is both a common law duty and a statutory duty on the part of a school board to supervise the students given over to its care, the court held that the action or inaction complained of clearly fell under category IV: providing professional, educational and general services, a category for which sovereign immunity has been waived.

Noting that its analysis was not complete, the Court next applied the four-prong Evangelical United Brethren Church v. State, 407 P.2d 440 (Wash. 1965) test. First, does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective ? The Court answered no applying the following analogy: "a school board has the discretionary authority to establish or not establish a particular school and is immune from suit on that discretionary question. However, once the school board decides to operate a particular school, it assumes the common law duty to operate that school safely, just as a private individual is obligated under like circumstances." Id. at 752.

The Court next addressed the second prong of the Evangelical test: is the questioned act, omission or decision essential to the realization or accomplishment of that policy, program or objective as opposed to one which would not change the course or direction of the policy, program or objective? The court answered "no" because it could

not see how providing supervision during unstructured time when large groups of students are congregating in a high school cafeteria would change the course or direction of any of the school board's policies, programs or objectives. Id.

Applying the third prong of the test: does the act, omission or decision require the exercise of basic policy evaluations, judgment and expertise on the part of the governmental agency involved?, the court answered "maybe." The School Board argued, as HRS does in this case, that how and where to disburse the school's limited supervisory personnel is discretionary and should not be actionable. The court noted, however, that the complaint did not challenge where the "limited supervisory personnel" were disbursed, but alleged that no supervisory personnel was present at all. Id. Finally, the court addressed the fourth prong: 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? The court answered yes. Id.

The court noted that since one or more of the Evangelical questions called for a negative answer, "further inquiry is necessary." Id. at 753. The further inquiry is a balancing of three policy considerations set forth in Commercial Carrier at 1021-22. The first policy consideration is the importance to the public of the function involved. Noting that because of mandatory schooling, it is very important to the public that the students be supervised, and that parents have a right to expect that their children will be protected, the court held this policy consideration weighed toward an operational characterization of the "function involved." Id.

The second policy consideration is the extent to which government liability might impair free exercise of the function. Although the School Board argued that the system cannot function properly if subjected to tort liability because its supervisors are not everywhere all the time, the court held that the Board's position was overstated. The Court held that "whether a teacher has breached a duty of care by failing to provide adequate supervision is usually a question for the jury." Id. at 753. Because the court failed to see how governmental liability here might impair the free exercise of the supervision of students, the court held that this policy consideration also weights toward an operational characterization. Id.

The third policy consideration is the availability of remedies other than tort suits for damages to the individuals affected. The court held that if the Plaintiff was to be compensated for the damages alleged in his cause of action, his recourse was through a tort suit. Thus, the court held that this policy consideration also weighed in favor of an operational characterization of the function involved, Id. Upon completion of its review, the court held "that as to the School Board there is a common law and statutory duty to supervise students, that supervision is not protected by sovereign immunity, supervision is operational and not discretionary," Id.

Having established that the action complained of in the present case was HRS' failure to perform its common law duty of care and its failure to comply with established rules promulgated by HRS for the supervision of D. L., Plaintiff will address the sovereign immunity analysis as illustrated in Comuntzis. First, however, Plaintiff will address the assertion by the First District Court of Appeal that "the instant case lacks the

allegations and proof needed to apply this test [the Evangelical Bretheren analysis]. At the risk of being redundant, Plaintiff reiterates that it is not the fact of impregnation of which she complains. The pregnancy was simply one consequence of the sexual abuse D. L. suffered on one or more occasions. The Plaintiff presented proof in the form of testimony by HRS' own employees that on the evening of March 18, 1987, the residents of Sunland-Marianna, were left for more then two hours without proper supervision (contrary to the requirements of Fla. Admin. Code Rule 10D-38.002 (26)). It was also established that an HRS staff member observed another client "fingering" D. L. on this occasion, but failed to ever report the incident as required by Rule 10D-38.023(1)(d) (R 143-144; R 146-147). Additionally, D. L. reported to HRS that two men had "played nasty" with her at the dance. Clearly, in view of D. L.'s severe retardation, the jury was presented with ample evidence from which it could have concluded that D. L. was sexually abused on March 18, 1987. As noted previously, the medical examination of D. L., including a sonogram, revealed that the date of March 18th was consistent with the onset of her pregnancy (R 97-98).

HRS has admitted that it owes a common-law duty of reasonable care to protect those within its custody from harm. Thus, the act of supervising developmentally disabled clients falls into Trianon Category IV conduct for which sovereign immunity has been waived. Applying B.J.M. and Comuntzis, the determination as to whether HRS' duty of supervision constitutes a discretionary act which is immune from tort liability turns on answers to the four-part Evangelical test and the policy considerations set forth in Commercial Carrier.

Evangelical Test

1. Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective?

This question must be answered in the negative. Plaintiff concedes, as the Appellate Court has held, that if she were challenging HRS' policies regarding supervision, rather than any specific operational negligence, such challenge would involve basic governmental policies and objectives. However, HRS' planning level decisions as to the level of supervision is not the challenged act, omission or decision. Rather, the Plaintiff has alleged and presented evidence that HRS was negligent because its employees failed to follow the planning-level decision to provide D. L., in accordance with her individual habilitation plan and existing rules, with continuous 24 hour a day supervision, and because its employees failed to use reasonable care under the circumstances to protect D. L. from abuse. As recognized in Whaley, that allegedly negligent activity must be classified as an operational-level activity, to which sovereign immunity does not attach. See also Dunaaan v. Seely, 533 So.2d 867, 868 (Fla. 1st DCA 1988) (failure to fallow policies already established entails operational level activities and sovereign immunity does not bar a cause of action based upon such failure); and, Bellavance v. State, 390 So.2d 422, 424 (Fla. 1st DCA 1980) (while the State's standards for releasing mental patients may be discretionary and thus immune from review, the subsequent ministerial action of releasing a patient pursuant to those standards does not achieve the status of a "basic policy evaluation.)

2. Is the questioned act, omission or decision essential to the realization or accomplishment of that policy, program or objective as opposed to one which would not change the course or direction of the policy, program or objective?

This question must also be answered in the negative. The ministerial act of following established procedures regarding the supervision of developmentally disabled clients would not change the course or direction of the policy, program or objective. As held by this Court in Yamuni and Whaley, "discretion" in the Commercial Carrier sense refers to discretion at the policy-making level. The acts of staff workers in supervising clients in accordance with a common law duty or established procedures simply cannot be elevated to the level of policy-making or planning.

3. Does the act, omission or decision require the exercise of basic policy evaluations, judgment and expertise on the part of the governmental agency involved?

Again, the answer in this case is no. As in Comuntzis, the complaint did not challenge planning-level decisions as to how or where the supervisory personnel were disbursed, but alleged that no supervisory personnel were present at all when D. L. was sexually abused. This fact cannot be disputed in that HRS staff acknowledged that they were completely unaware that D. L. had had sex until her pregnancy was discovered when she was 18 1/2 weeks pregnant.

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?

The answer is "yes." Clearly, HRS has the requisite authority and duty to supervise developmentally disabled adults. However, HRS is not free to fail to provide supervision under the circumstances of this case.

As noted in Comuntzis, since one or more of the Evangelical questions called for a negative answer, the next step is to conduct a balancing of the three policy considerations set forth in Commercial Carrier.

commercial Carrier Considerations

The first policy consideration is the importance to the public of the function involved. As was noted by HRS in its Supplemental Brief presented to the court below, HRS is the primary means by which society meets its obligation to care for those individuals who cannot, because of mental or physical abilities, care for themselves. When a developmentally disabled person is placed under the exclusive care and custody of HRS, the public has a right to expect that that person will be protected from abuse and neglect. As noted previously, HRS acknowledged at trial that supervision by Sunland staff was the only means of protecting D. L. from foreseeable sexual abuse. Thus, under Comuntzis this policy consideration weighs toward an operational characterization of the "function involved."

The second policy consideration is the extent to which governmental liability might impair free exercise of the function. As in Comuntzis, HRS argued and the Appellate Court agreed, that the normalization principle cannot be achieved if HRS is subjected to tort liability because its supervisors are not "everywhere all the time." As in Comuntzis, this argument must be rejected. The Appellate Court stated that requiring HRS staff to constantly supervise developmentally disabled clients would conflict with HRS' obligation to operate Sunland in accordance with the "normalization" principle set forth in Chapter 393, Fla. Stat. However, the testimony adduced at trial revealed that nothing in Chapter 393 states that clients should not be supervised while enjoying "normal" living conditions consistent with their individual abilities (R 326; R 144; R 171). In fact, it was acknowledged that D. L. should be supervised at all times (R 173).

Whether an HRS staff worker has breached a duty of care by failing to provide adequate supervision is a question of fact for the jury. See Comuntzis, at 753. Because governmental liability here will not impair HRS' ability to operate in accordance with the "normalization principle" this policy consideration weighs toward an operational characterization.

This third policy consideration is the availability of remedies other than tort suits for damages to the individuals affected. As in Comuntzis, if D. L. is to be compensated for the damages she sustained as the result of sexual assault, her recourse is through a tort suit. She has no other remedy or recourse. Thus, this policy consideration also weighs in favor of an operational characterization of the function involved.

The above analysis establishes that the Appellate Court was in error in holding that the Plaintiffs cause of action for breach of both a common law duty and a statutory duty of care to supervise D. L. involves a challenge to HRS' discretionary policies which are immune from liability. The practical ramifications of the decision below should not, indeed must not, be overlooked. If HRS can, with impunity, so completely fail to supervise and protect a client so severely impaired and helpless as D. L. as to allow the existence of numerous occasions both day and evening when she could have been assaulted (R 150), then our society has truly abandoned our retarded citizens, If this Court affirms the holding of the First District Court of Appeal that the Plaintiffs cause of action for negligent supervision is barred because it challenges a discretionary governmental function to which sovereign immunity applies, mentally disabled adults such as D. L. will be left with no

remedies when HRS breaches its common law and statutory duty to protect those clients within its exclusive care, custody, and control from foreseeable harm.

In order to insure the physical protection of developmentally disabled adults, like D. L., who are unable to protect themselves or their own interests, this case should be governed by the holdings in Yamuni and Whaley. Unlike B.J.M., this case does not involve discretionary decisions with regard to choice of services to be provided by HRS. Whether or not to supervise clients who cannot protect themselves and who are allowed to freely interact with persons known to be capable of aggression does not involve a "choice" and cannot be classified as a discretionary function within the Commercial Carrier sense. HRS has admitted that it had a common law duty to supervise D. L. Additionally, the duty to supervise clients such as D. L. is statutorily mandated. When HRS employees are negligent in conducting this operational level function and they expose clients to physical injuries, HRS should be subjected to tort liability.

CONCLUSION

The right of mentally retarded persons to meaningful care and supervision should not be abandoned by vague references to talismanic standards such as principles of normalization. If the concept of "normalization" can be used to justify a lack of meaningful care and supervision for one so helpless and in need of supervision as D. L., then the retarded citizens of this State are completely shorn of protection Such a result should not be approved or condoned in a civilized society.

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the First District Court of Appeal's ruling that her action for negligent supervision is barred under the doctrine of sovereign immunity, and that the case be remanded with instructions that an order be entered affirming the final judgment entered by the trial court below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to LAURA RUSH, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida 32301 and to EDWIN R. HUDSON, Henry, Buchanan, Mick, Hudson & Super, P.A., Post Office Drawer 1049, Tallahassee, Florida 32302, by U. S. Mail this 20th day of February, 1996.

DEAN R. LeBOEUF, ESQ.
Florida Bar No. 0328715
BROOKS, LeBOEUF & BENNETT, P.A.
863 East Park Avenue
Tallahassee, Florida 32301
(904)222-2000

Attorneys for Petitioner

Appendix Part 1

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Appellant/
Cross-Appellee,

vs.

LEVADA LEE, individually and as mother and legal guardian of D. L., incompetent,

Appellee/
Cross-Appellant.

CASES NO. 93-1350 and 93-1411
(consolidated)

O R D E R

On further consideration, the Court directs the parties to submit supplemental briefs on the sole issue of whether HRS is immune from liability in the present case under the doctrine of sovereign immunity. Appellant/Cross-Appellee's initial brief shall be filed within 20 days of this order; Appellee/Cross-Appellant's answer brief within 20 days thereafter; and Appellant/Cross-Appellee's reply brief, if any, within 10 days thereafter, State v. Knopff, 491 So. 2d 1252, 1254 n.1 (Fla. 3d DCA 1986).

By Order of the Court dated this 27th day of April

BOOTH and BARFIELD, JJ., CONCUR; 'ALLEN, J., 'DISSENTS.

A TRUE COPY

ATTEST:

Jon S. Wheeler

JON S. WHEELER, CLERK

By: _____

Deputy Clerk

Copies:

Edwin R. Hudson
Maria Elena Abate
Rhonda S. Bennett

Howard M. Talenfeld
Dean R. LeBoeuf

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Appellant/
Cross-Appellee,

vs.

LEVADA LEE, individually and as mother and legal guardian of D. L., incompetent,

Appellee/
Cross-Appellant.
_____/

CASES NO. 93-1350 and 93-1411
(consolidated)

O R D E R

The parties are directed to include in their supplemental briefs recently ordered by this court discussion of the case of Department of Health and Rehabilitative Services v. B.J.M., 20 Fla. L. Weekly S188 (Fla. April 27, 1995).

By Order of the Court dated this 2nd day of May, 1995.

BOOTH and BENTON, JJ., CONCUR: ALLEN, J., DISSENTS.

A TRUE COPY

ATTEST:
JON S. WHEELER, CLERK

By: _____
Deputy Clerk

DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Copies:

Edwin R. Hudson
Maria Elena Abate
Rhonda S. Bennett

Howard M. Talenfeld
Dean R. LeBoeuf

Appendix Part 2

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Appellant/
Cross-Appellee,

vs.

LEVADA LEE, individually and as mother and legal guardian of D.L., incompetent,

Appellee/
Cross-Appellant.

_____/

NOT FINAL UNTIL TIME EXPIRES FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASES NO. 93-1350 and 93-1411
(consolidated)

Opinion filed December 13, 1995.

An Appeal from the Circuit Court for Leon County.
Terry P. Lewis, Judge.

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, J.

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 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 HRS' negligence relating thereto, but essentially contended that HRS should'have more strictly supervised D.L.[2]

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[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 appropriateness 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." we 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

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,

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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 Thrushin v. State, 425 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 Hiuhwav Safetv & Motor Vehicles v. Kropff, 491 so. 2d 1252, 1254 n.1 (Fla. 3d DCA 1986) (*sovereign* immunity relates to subject matter jurisdiction and may be raised at any time).

[4] Evangelical United Brethren Church v. e, 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 Countv 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 the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program or objective? (3) Does the act, omission, or decision require the exercise of basic policy

the instant case lacks the allegations and proof needed to apply+, this test.'

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 operational negligence. The Florida Supreme Court held in B.J.M., suara at 913:

> [Wle 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 Whalev 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. Citv 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

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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. Citv 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).

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. 1985).

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

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[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.

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.'

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 age and unfortunate circumstances, cannot care for themselves and have no one else to care for them. It 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). 1

The wisdom of the normalization policy, with its attendant benefits and risks, is a discretionary matter involving budgetary

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[7] A similar contention was urged and rejected in ~~Fov v.~~ Greenblott, 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 restrictive" conditions feasible -- the institution should minimize interference with a patient's individual autonomy, including her personal "privacy" and "social interaction." 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.* [(Citations and footnote omitted) .I

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 393.13-.14, FLORIDA STATUTES ("THE BILL OF RIGHTS OF PERSONS WHO ARE DEVELOPMENTALLY DISABLED")?

ALLEN and BENTON, JJ., CONCUR.