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IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,931

DCA Case **No.** 97-01196

FILED
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MAY 13 1998
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SANDRA H. LASKEY, individually, and as personal representative of the estate of GEORGE DOUGLAS LASKEY, III,

Petitioner,

vs.

MARTIN COUNTY SHERIFF'S DEPARTMENT,

Respondent.

/

PETITIONER'S BRIEF AND APPENDIX IN SUPPORT OF JURISDICTION (CONFLICT CERTIORARI)

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CITATIONS

COOK **v.** SHERIFF OF COLLIER COUNTY
573 So. 2d 406 **(Fla. App.** 2d 1991) 1

AUTHORITIES

Section 365.171, Florida Statutes (1985) 1

Section 768.28, Florida Statutes (1995) 4

I.

INTRODUCTION

The **petitioner,** Sandra H. Laskey, individually, and as personal representative of the estate of George Douglas Laskey, **III, for and on behalf of George Douglas Laskey, II and Audrey** Laskey, surviving parents, and the estate of George Douglas Laskey, III, **deceased,** was the plaintiff in the trial court and was the appellant in the District Court of Appeal, Fourth District. The respondent, The Martin County Sheriff's Department, was the defendant/appellee. In this brief of petitioner on jurisdiction the parties will be referred to as the plaintiff and the defendant and, alternatively, by name. The symbol "A" will refer to the rule-required appendix which accompanies this brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

JURISDICTIONAL STATEMENT

The instant cause is in direct and irreconcilable conflict with the Second District's opinion in COOK **v.** SHERIFF OF COLLIER COUNTY, 573 So. 2d 406 (Fla. App. 2d 1991). In COOK the Court, speaking directly about the COUNTY'S 911 plans and Section 365.171, Florida Statutes (1985) stated:

> ". ..The Sheriff had a duty to relay the information... (concerningthe **sign)...because this was** an established procedure contained in the plans... Since Mrs. Cook alleged a duty based upon the plans and we must accept all allegations of the complaint as true, Mrs. Cook stated a cause af action, and we, accordingly, reverse." 573 So. 2d at page 408.

In COOK the Court reversed the final order entered in favor of the defendant. The Court determined that:

> ". ..The Sheriff had a duty to relay the information...because this was an established procedure contained in the plans..." 573 So. 2d at page 408.

In the instant cause the Fourth District stated:

> "We have considered and **reject** appellant's assertion that because a 911 service relays medical emergency calls as well as those regarding fires or violation of law, the 911 emergency service is more closely analogous to a category IV health and welfare service than to a category II function. We find that the operation of a 911 emergency call system is part of the law enforcement and protection of public safety service provided by a sheriff's office and, therefore, falls within category II. Anv **duty** to **relay** calls resardins traffic offenders is a dutv owed the **public** as a whole and not to any third **party** who **may** subsequently be injured by the act of the traffic offender (citations omitted)...Thus, appellant was required to plead a special relationship..." (A. 1, 2)

The Fourth District affirmed the final order entered in favor of the defendant. The Court found, after taking as true the facts alleged in plaintiff's complaint, that no duty was owed by the defendant to the **plaintiff's** decedent.

This Court has jurisdiction and this Court should exercise its discretion to review the merits of this controversy because the Fourth District squarely stated:

> " . **..Although** the trial court here considered this case distinguishable from Cook, the two are sufficiently similar for us to **acknowledge** conflict..." (A. 2)

Conflicts exists!

STATEMENT OF THE CASE AND FACTS

The facts pertinent to the jurisdictional issue may be learned from the opinion herein sought to be reviewed. As pertinent the opinion provides:

* * *

> "We affirm a final order dismissing Appellant's cause of action against the sheriff for negligence in failing to timely forward a 911 call. Appellant's husband was killed in a head-on collision with another vehicle proceeding the wrong way on a limited access interstate highway. Several minutes prior to the accident, an unidentified 911 caller reported that a vehicle was heading south in a northbound lane of that road. Appellant alleged that the sheriff's office, in operating the 911 service, had a duty to 'dispatch' law enforcement personnel in response to the call and breached that duty by not following its own procedures. The trial court dismissed the claim for failure to state a cause of action because the complaint did not allege a duty to a particular individual but rather to the general public. Appellant now contends that she was not required to plead a special relationship between her husband and the sheriff's office because the operation of a 911 response system is a category IV operational function of the government.

* * *

> "We have considered and reject Appellant's assertion that because a 911 service relays medical emergency calls as well as those regarding fires or violations of law, the 911 emergency service is more closely analogous to a category IV health and welfare service than to a category II function. We find that the operation of a 911 emergency call system is part of the law enforcement and protection of public safety service provided by a sheriff's office and therefore falls within category II. Any duty to relay calls regarding traffic offenders is a duty owed the public as a whole and not to any third party who may subsequently be injured by the act of the traffic offender. See generally Everton, 468 So. 2d at 938; St. George v. City of Deerfield Beach, 568 So. 2d 931 (Fla. 4th DCA 1990); Hartley v. Floyd, 512 So. 2d 1022 (Fla. 1st DCA 1987). To hold otherwise would result in liability being imposed in absurd scenarios. This is not to say that there may not be circumstances in

> which liability will be imposed for breach of duty in the operation of a 911 system where, for example, a duty to the caller is created by virtue of the content of the communications. See St. George, 568 So. 2d at 932-33. However, such is not the case here. Thus, Appellant was required to plead a special relationship," (A. 1, 2) * * *

After noting its disagreement with the Second District's opinion in COOK, supra, the Fourth District affirmed the trial court's order and in so doing, acknowledged conflict.

This proceeding followed.

IV.

SUMMARY OF ARGUMENT

The decision herein sought to be reviewed is in direct conflict with the Second District's opinion in COOK v. THE SHERIFF OF COLLIER COUNTY, supra.

The law in the Fourth District is that absent a "special relationship" damages occasioned as a result of a breach of a duty founded upon the "established procedure" contained in a county's 911 plans are not recoverable under Section 768.28, Florida Statutes (1995). The law in the Second District is to the contrary.

The Fourth District has acknowledged that the law in its district is contrary to the law in the Second District. Because the Fourth District could not distinguish the subject case from the Second District's opinion in COOK, supra, it "acknowledged conflict." The conflict is real, express, direct and irreconcilable. Review by this Court is warranted.

V.

ARGUMENT

THE DECISION HEREIN SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH THE SECOND DISTRICT'S OPINION IN COOK v. THE SHERIFF OF COLLIER COUNTY, SUPRA.

In COOK **v. THE SHERIFF OF COLLIER** COUNTY, supra, the Second District, in speaking directly to the duties and obligations owed under a 911 plan authorized pursuant to Section 365.171, Florida Statutes (1985) held:

> ". ..The Sheriff had a duty to relay the information concerning the sign because this was an established procedure contained in the plans...Since Mrs. Cook alleged a duty based upon the plans and we must accept all allegations of the complaint as true, Mrs. Cook stated a cause of action, and we, accordingly, reverse." 573 So. 2d at page 408.

The Second District rejected the defendant's argument that it owed no duty under the circumstances. The Court found significant that the petitioner alleged that the Collier County 911 plans contained an "established procedure" and, hence, the Sheriff:

> ". ..had a duty to relay the information..." 573 So. 2d at page 408.

In this case the Fourth District has opined:

> ". ..We have considered and reject appellant's assertion that because a 911 service relays medical emergency calls as well as those regarding fires or violations of law, the 911 emergency service is more closely analogous to a category IV health and welfare service than to a category II function...Any duty to relay calls regarding traffic offenders is a duty owed the public as a whole and not to any third party who may subsequently be injured by the act of the traffic offender (citation omitted)..,.Thus, appellant was required to plead a special relationship.

APPENDIX

reporting requirement. In order to determine whether a private cause of action should be judicially inferred, the court must look to the legislative intent, ***See Murthy v. N. Sinha Corp., 644 So*** . 2d 983 (Fla. 1994) (holding that regulatory and penal statutes governing the construction industry did not create a private cause of action against an individual qualifying agent). In ***Murthy,*** the Supreme court noted that, in the past, some courts dealing with this issue have looked to whether the statute imposed a duty to benefit a specific class of individuals. ***Id.*** at 985. However, the court further stated that, "we agree that the legislative intent, rather than the duty to benefit a class of individuals, should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one." ***Id.***

We note that in the 1995 amendment to chapter 415, the legislature included a section entitled "Civil Penalties," section 4 15.1111. This section provides that anyone named as a perpetrator in a confirmed report of abuse shall be subject to civil fines. This section also provides victims with a private cause of action against the perpetrator of the abuse. But this section provides no civil penalties against those who merely fail to report an incident. Rather, misdemeanor penalties are provided in section 415.1 I 1 for violation of the mandatory reporting requirements.

It is evident that the legislature considered both civil and criminal penalties under this statute, but subjected only actual perpetrators of abuse to civil penalties. This is strong evidence of a legislative intent not to provide a civil cause of action for victims against those who fail to report the abuse as required by this act. ***See PW Ventures, Inc. v. Nichols, 533 So.*** 2d 281 (Fla. 1988) (express mention of one thing implies the exclusion of another).

Further, the amendments made in 1995 to part 1 of chapter 415, favoring the elderly and disabled, virtually mirror amendments made to part 4 of chapter 415, protecting abused and neglected children. Florida courts have consistently refused to impose civil liability for the failure to report suspected child abuse. ***See J. B. v. Department of Health and Rehab. Servs., 59*** 1 So. 2d 3 17 (Fla. 4th DCA ***199*** 1); ***Freehauf v. School Bd. of Seminole County,*** 623 So. 2d 761 (Fla. ***5th*** DCA 1993); ***Fischer v. Metcalf,*** 543 So. 2d 785 (Fla. 3d DCA 1989).

We have considered ***Department of Health and Rehabilitative Services*** v. *Yamuni,* 529 So. 2d 258 (Fla. 1988), in which the court held that HRS may be sued for negligence where it failed to prevent the further abuse of a child. However, the plaintiff in ***Yamuni*** was not suing for violation of a statute, but for common law negligence.

We recognize that the immunity provision contained in § 415.1036(b)(7) provides civil as well as criminal immunity for one making a report required by the statute. However, this provision more logically appears to provide that those making a report are immune from such causes of action as slander, liable, or providing false information.

Therefore, the order of dismissal is affirmed. (GUNTHER and SHAHOOD, JJ., concur.)

* * *

Wrongful death-Negligence-Sheriffs-Plaintiff whose husband was killed in head-on collision with **another vehicle proceeding** the wrong way on a limited **access interstate highway alleging** negligence on part of sheriff in failing to timely forward **911 call by** unidentified caller who reported that a **vehicle was heading** south in northbound **lane-Sovereign immunity—Operation of 911 emergency call system is part of law enforcement and protection of** public Safety service provided **by sheriff's office—Any duty to relay calls** regarding **traffic offenders is duty owed to public as a** whole **and** not to any **third party who may subsequently be injured by act of traffic offender—Sheriff not liable in** absence Of special **relationship-Conflict acknowledged**

SANDRA H. LASKEY. Individually and as Personal Representative of the Estate of GEORGE DOUGLAS LASKEY, III, Appellants. v. MARTIN COUNTY SHERIFF'S DEPARTMENT, Appellee. 4th District. Case No. 97-1196. Opinion filed April 1, 1998. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Cynthia G. Angelos, Judge; L.T. Case No. 95-897-CA. Counsel: Robert H. Schott, Stuart. for appellants. Alexis M. Yarbrough of Purdy, Jolly & Giuffreda, P.A., Fort Lauderdale, for appellee.

(STONE, C.J.) We affirm a final order dismissing Appellant's cause of action against the sheriff for negligence in failing to timely forward a 911 call. Appellant's husband was killed in a head-on collision with another vehicle proceeding the wrong way on a limited access interstate highway. Several minutes prior to the accident, an unidentified 911 caller reported that a vehicle was heading south in a northbound lane of that road. Appellant alleged that the sheriffs office. in operating the 911 service, had a duty to "dispatch" law enforcement personnel in response to the call and breached that duty by not following its own procedures. The trial court dismissed the claim for failure to state a cause of action because the complaint did not allege a duty to a particular individual but rather to the general public. Appellant now contends that she was not required to plead a special relationship between her husband and the sheriffs office because the operation of a 911 response system is a category IV operational function of the government.

In weighing whether the government may be subject to suit for negligence in performing this function, we apply the standards set forth in ***Trianon Park Condominium Association, Inc. v. City of Hialeah,*** 468 So, 2d 912 (Fla. ***1985). Trianon Park*** divided governmental functions into the following four categories for sovereign immunity purposes: (I) legislative, permitting, licensing, and executive officer functions; (II) enforcement of laws and the protection of the public safety; (III) capital improvements and property control operations; and (IV) provision of professional, educational, and general services for the health and welfare of citizens. ***Id.*** at 919. To impose governmental tort liability, there must first be an underlying common law or statutory duty of care with respect to the negligent conduct. ***Id.*** at 917. Category I and II functions do not have a common law duty of care, and liability may be imposed only where a special relationship exists between the government actor and the tort victim. ***Id.*** at 921; *Everton* **v. *Willard,*** 468 So. 2d 936 (Fla. 1985). As such, law enforcement personnel generally owe no duty to members of the public at large. *Everton,* 468 So. 2d at 938. No common law duty exists, absent a special relationship, for one person to come to the aid of another or to intervene in the misconduct of a third person to prevent the possibility of harm to another. ***See Trianon Park, 468*** So. 2d at 918. Thus, if a 911 service constitutes a category II function, the sheriffs office here owed Appellant's husband no duty unless a special relationship existed. If, however, the 911 service constituted a category IV operational function, the sheriff's office could be liable for its alleged negligent failure to follow its established procedures.

We have considered and reject Appellant's assertion that because a 911 service relays medical emergency calls as well as those regarding fires or violations of law, the 911 emergency service is more closely analogous to a category IV health and welfare service than to a category II function. We find that the operation of a 911 emergency call system is part of the law enforcement and protection of public safety service provided by a sheriff's office and therefore falls within category II. Any duty to relay calls regarding traffic offenders is a duty owed the public as a whole and not to any third party who may subsequently be injured by the act of the traffic offender. *See generally Everton,* 468 So. 2d at 938; St. George *v. City **of** Deerfield Beach, 568 So.* 2d 931 (Fla. 4th DCA 1990); *Hartley v. Floyd,* 512 So. 2d 1022 (Fla. 1st DCA 1987). To hold otherwise would result in liability being imposed in absurd scenarios. This is not to say that there may not be circumstances in which liability will be imposed for breach of duty in the operation of a 9 11 system where, For example, a duty to the caller is created by virtue of the content of the communications. See ***St. George, 568 So.*** 2d at 932-33. However, such is not the case here. Thus, Appellant was required to

A.1

plead a special relationship.

We note that in Cook v. *Sheriff of Collier County, 573 So.* 2d 406 (Fla. 2d DCA 1991), the court determined that the sheriff's failure to act in response to 911 information that a stop sign had been knocked down constituted an actionable breach of a duty of care. Although the trial court here considered this case distinguishable from *Cook*, the two are sufficiently similar for US to acknowledge conflict.

Therefore, the order of dismissal is affirmed. (GUNTHER and SHAHOOD, JJ., concur.)

* * *

Criminal law--Post conviction relief-Newly discovered evidence- **Sworn testimony by codefendant that cocaine which served as basis for defendant's trafficking conviction was codefendant's, that codefendant had lied in telling police that it was defendant's, and that police officer who testified at trial had told codefendant to say that he got cocaine from defendant in order to keep his own prison time to a minimum-Attachments to order denying relief do not establish that newly discovered evidence was not of such nature that it would probably produce acquittal on retrial-Remand for evidentiary hearing or attachment of further record excerpts conclusively refuting claim**

LARRY KENDRICK, Appellant, v. STATE OF FLORIDA, Appellee. 4th District, Case No. 97-3980. Opinion filed April 1, 1998. Appeal of order denying rule 3.850 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Paul L. Backman, Judge: L.T. Case No. 91-2706CF10A. Counsel: Larry Kendrick. Immokalee, pro se. Robert A. Butterworth, Attorney General, Tallahassee, and Jeanine M. Germanowict, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Larry Kendrick appeals the summary denial of his motion for postconviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.850, based on newly discovered evidence. We reverse.

Appellant was found guilty as charged of trafficking in cocame after a jury trial in which he was tried along with a codefendant, his cousin Ralph Kendrick (Ralph), whose defense was to shift all the blame to Appellant.[1] Neither testified at trial. However, two police officers testified for the state that they observed Appellant hand a white sock to Ralph, who ran upon seeing the police, then threw the sock, which was retrieved and contained cocaine. On Appellant's behalf, two defense witnesses testified to observing Ralph to be in possession of the cocaine before he approached Appellant.

Appellant's newly discovered evidence consisted of Ralph's sworn testimony, given for the first time on November 20, 1997, more than six years after their trial, that the cocaine was not Appellant's, but Ralph's, and that he had lied in telling the police that it was Appellant's Ralph further testified that Officer Brown, one of the officers who testified at trial, told him to say that he got the cocaine from Appellant in order to keep his own prison time to a minimum. This testimony appears to qualify as newly discovered evidence because unknown to the trial court, the party, or counsel at the time of trial; because Ralph was unwilling to give it previously; and the defendant or his counsel could not have secured it previously by means of due diligence. *See Hallman* v. *State,* 371 So. 2d 482, 485 (Fla. 1979); *State v. Gomez*, 363 So. 2d 624 (Fla. 3d DCA 1978) (treating as newly discovered evidence the affidavit of defendant's codefendant that he committed the robbery without the defendant's assistance).

A defendant is not automatically entitled to an evidentiary hearing on filing a motion asserting newly discovered evidence. See *Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994) (determination must be made on case-by-case basis); *Hough v. State, 679* So. 2d 1300 (Fla. 5th DCA 1996) (hearing was unnecessary on affidavit stating someone else committed the crime, where appellant had been identified as perpetrator by victim as well as by other codefendant). However, where there is conflicting evidence of the defendant's guilt, it is necessary for the trial court to evaluate the weight of the newly discovered evidence and the evidence which was introduced at the trial to determine whether the new evidence would probably have resulted in an acquittal. See *Jones* v. *State*, 591 So. 2d 911, 915-16 (Fla. 1991). Often, this analysis will require an evidentiary hearing. See *Roberts v. State*, 678 So. 2d 1232, 1235 (Fla. 1996) (finding claim that prosecution witness recanted trial testimony constituted newly discovered evidence, that claim was cognizable on rule 3.850 motion, and that trial court should not have denied claim without an evidentiary hearing). See also Srone v. *State*, 616 So. 2d 1041 (Fla. 4th DCA 1993) (affirming denial of rule 3.850 motion based on newly discovered evidence after hearing in which trial court determined affiant lacked credibility); *Glendening v. State,* 604 So. 2d 839, 841 (Fla. 2d DCA 1992) (denying motion after evidentiary hearing either on finding that witness was not testifying truthfully or on conclusion that appellant did not establish that verdict would have been different), rev. *denied, 613 So.* 2d 4 (Fla. 1992).

The attachments to the order of denial in the instant case—which include a transcript of the testimony of Officer Brown, whose credibility has been attacked, but not the testimony of the other officer-do not establish that the newly discovered evidence was not of such nature that it would probably produce an acquittal on retrial. Therefore, this cause is reversed and remanded for the trial court to hold an evidentiary hearing or for the attachment of further record excerpts conclusively refuting Appellant's claim. (STONE, C.J., DELL and FARMER, JJ., concur.)

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[1]A claim of ineffective assistance based on trial counsel's failure to sever Appellant's trial from Ralph's was raised and denied in a prior motion and is not now before this court.

* * *

Civil procedure-Jurisdiction-Indians-Action by employee of bingo hall alleging employer negligently hired supervisors who harassed, slandered, falsely imprisoned, and maliciously prosecuted plaintiff and violated plaintiff's civil rights-Claims that improper party was sued and that party sued enjoyed sovereign immunity are based on factual matters outside four corners of complaint-Error to grant motion to dismiss--Where plaintiff alleged that tribe expressly consented to suit in its organizational charter or corporate charter, whether sovereign immunity bars complaint is best resolved by summary judgment rather than motion to dismiss

BARRY MANCHER. Appellant, v. SEMINOLE TRIBE OF FLORIDA. INC., a federal corporation, and SEMINOLE MANAGEMENT ASSOCIATES. LTD., a Florida Limited Partnership. Appellees. 4th District. Case No. 96-3889. Opinion tiled April I, 1998. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Leroy H. Moe, Judge; L.T. Case No. 96-2852 CA 13. Counsel: Daniel J. Santaniello of Luks, Koleos & Santaniello. P.A., Fort Lauderdale, for appellant. Edward D. Schuster of Kessler, Massey, Catri, Holton and Kessler. Fort Lauderdale, and Donald A. Orlovsky of Kamen & Orlovsky, P.A.. West Palm Beach, for appellees.

(**RAMIREZ, JUAN,** JR., Associate Judge.) This is an appeal from an order dismissing Plaintiffs complaint against the Seminole Tribe of Florida, Inc., for lack of subject matter jurisdiction. We reverse.

Plaintiff filed a complaint against Seminole Tribe of Florida, Inc. ("Seminole Tribe, Inc.") and its agent, Seminole Management Associates, Ltd., alleging that Seminole Tribe, Inc. employed him at a bingo hall operated by them. Plaintiff claimed that as his employer, Seminole Tribe, Inc. negligently hired supet-visors who harassed him, slandered him, falsely imprisoned him, maliciously prosecuted him, and violated his civil rights. Plaintiff also alleged that Seminole Tribe, Inc. was subject to the jurisdiction of Florida courts as a federal corporation conducting business in the county of Broward which had waived its sovereign immunity for corporate activities.

Seminole **Tribe,** Inc. moved to dismiss the complaint for lack of subject matter jurisdiction. In support of its motion to dismiss, it filed sworn affidavits from key members of the Seminole tribe,

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