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IN THE SUPREME COURT OF FLORIDA

SANDRAH. LASKEY,
Individually and as Personal Representative of the Estate of GEORGE DOUGLAS LASKEY, III,

Petitioner,

vs.

MARTIN COUNTY SHERIFF'S DEPARTMENT,

Respondent.

CASE NO. 92,931

DCACASENO. 97-01196

BRIEF OF RESPONDENT ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

It is hereby certified by undersigned counsel that the type size and style used in this brief is Courier 10cpi, double spaced.

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INTRODUCTION

Respondent concurs with Petitioner's introduction of the parties to the action. In this brief of Respondent on the merits, the parties will be referred to as the Plaintiff and the Defendant and, alternatively, by name. References to the record will be identical to those used by the Petitioner in her brief. References to Plaintiff's Brief on the Merits to this Court will be cited as (Pl's Brief on the Merits at p. ___.). References to Plaintiff's Reply Brief filed before the lower appellate court are cited as (Pl's Reply Brief at p. __.).

STATEMENT OF THE CASE AND FACTS

Defendant concurs with Plaintiff's recitation of the statement of the case and facts.

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendant concurs that the judicial act to be reviewed is whether the trial court properly dismissed Plaintiff's amended complaint. Defendant further agrees that the Fourth District concluded that the operation of a 911 emergency telephone system was a category II function as set forth by this Court in its opinion rendered in Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985). However, Plaintiff's' assertion that the legal issue herein involved is whether the 911 service should be classified as a category IV function is misleading because this question is actually rendered moot by the

non-existence of a common law or statutory duty to render 911 assistance.

Before classifying governmental conduct under Trianon's four categories, the court must first find the existence of a duty of care. Thus, the antecedent question to be answered by this Court is as follows:

> Does a 911 operator have a common law or statutory duty to transfer calls for law enforcement assistance absent the existence of a special relationship?

Since the answer to this question is in the negative, Plaintiff's asserted issue is rendered moot.

SUMMARY OF ARGUMENT

Contrary to Plaintiff's assertion, the trial court properly dismissed Plaintiff's amended complaint for failure to state a cause of action. Furthermore, it was proper for the Fourth District to conclude that the transferring of a 911 call for law enforcement services constituted a category II function under Trianon for which no common law or statutory duty of care is owed. Accordingly, the opinion of the Fourth District should be affirmed.

As a preliminary matter, it should be noted that in the case at bar the 911 call made to the Sheriff regarding a motorist illegally driving southbound in the northbound lanes of 1-95, was made by an unidentified caller, not the Plaintiff, and no assurances were made to Plaintiff that assistance would be provided. Therefore, to state a claim, Plaintiff must allege the existence of a common law or statutory duty of care. However, there is no common law or statutory duty to relay a 911 call from

a third person asking for law enforcement assistance to prevent the misconduct of another third person driving illegally on I-95 for the benefit of Plaintiff.

This Court in Trianon, has held that if there is no common law or statutory duty, absent a special relationship, there can be no liability. The decisions of the Second District in Cook v. Sheriff of Collier County, 573 So.2d 406 (Fla. 2d DCA 1991) and Hoover v. Polk County Sheriff's Dept., 611 so. 2d 1331 (Fla. 2d DCA 1993) found a cause of action could be stated absent a common law or statutory duty. Thus, the decisions in Cook and Hoover conflict with this Court's opinion in Trianon, supra, and were properly not followed by the trial court.

There is not now nor has there ever been a common law duty to enforce the law for the protection of any specific individual member of the public or to prevent the misconduct of third persons. Thus, conduct that amounts to enforcement of the laws or protection of public safety is an immune governmental function to which no liability may attach. The operation of a 911 service is an immune function of a state's police powers to protect the public.

Although there is no common law duty to enforce the laws or protect the public safety, a duty may be created to perform such an activity under two circumstances: one, the legislature may enact a statute specifically mandating an affirmative duty to perform such an act, and two, the governmental entity may take steps or perform some act which creates a special relationship between the governmental entity and a specific individual, such that the

individual is set apart from the general public. Plaintiff fails to cite any authority holding that a duty to relay a 911 call for law enforcement assistance is owed at common law and concedes that no such duty was created here by a special relationship. Rather, Plaintiff incorrectly asserts that Florida Statute §365.171 (1974) somehow imposes an affirmative duty upon Defendant to relay information obtained from a 911 caller to the appropriate emergency services agency.

To create an actionable duty by statute, the legislature must mandate through language or legislative intent the creation of an affirmative duty to perform governmental services. There is no indication in the language of Florida Statute 8365.171, its legislative history, or subsequent revisions to the statute that the legislature intended to create a private cause of action for failure to provide 911 services. Therefore, Florida Statute 8365.171 does not establish a statutory duty to transfer 911 calls to an emergency agency.

Because there is no common law or statutory duty to relay a 911 call, 911 service cannot fall within category IV as set forth in Trianon as it presumes the existence of a duty and therefore no cause of action may lie. Rather, the provision of 911 services, as has been held by other jurisdictions, is a police function involving only a general duty to the public at large, a breach of which does not permit an individual to recover in an action at law.

Finally, as a public policy matter, it is fiscally impossible to impose an affirmative duty upon the operator of a 911 service to

relay each and every call for assistance. To do so would make operators of 911 services insurers of the general public to whom there is owed no duty to receive the emergency services from the agencies to whom the 911 operator transfers the call. Furthermore, in the absence of a common law or statutory duty of care, it is inappropriate for the Court to substitute its own judgment for that of the executive branch and create a duty where none exists. The operation of a 911 service is a policing function not subject to judicial scrutiny.

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED THE DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

The trial court properly dismissed, and the Fourth District properly affirmed the dismissal of, Plaintiff's amended complaint for failure to state a cause of action. The basis for dismissal of the action was Plaintiff's failure to allege a common law or statutory duty to transfer a 911 call from a third person requesting law enforcement services to prevent the misconduct of another third person illegally driving southbound in the northbound lanes on I-95. Plaintiff conceded that there was no duty to deploy or allocate law enforcement officers to prevent the misconduct of the driver who collided with Plaintiff's vehicle. (Pl's Reply Brief at p. 25.) Thus, Plaintiff seeks to recover for failure to transfer a 911 call for law enforcement assistance where the law enforcement agency is under no duty to render assistance. Clearly, no such duty to transfer a 911 call exists.

The first question in any tort action against a governmental entity is whether a duty of care exists. Trianon, supra, at 917. If no duty exists at common law, one may be created by statute, ibid, or by the creation of a special relationship between the governmental entity and a particular individual. Everton v. Willard, 468 So. 2d 936, 938 (Fla. 1985). Thus, analysis of a duty under statute or the special relationship doctrine need only be performed where there is no common law duty of care. Absent a duty at common law or statute or arising from a special relationship, no cause of action exists. Trianon, at 917; Everton, at 938.

A. THE DECISIONS IN COOK AND HOOVER

This cause is presently before this Court for review as it has been held to be in conflict with the Second District's decision in Cook, susra. Plaintiff contends that the decisions in Cook and Hoover control and are not inconsistent with this Court's decision in Trianon.

In Cook, the Plaintiff alleged that according to the State of Florida and the Collier County 911 Plans and §365.171, Florida Statute (1985), the Sheriff had a duty to relay information received from a 911 call that a stop sign was down. Id. at 408. The court in reversing dismissal of the complaint, stated:

> Although we do not find such a duty in §365.171, we cannot determine whether the individual Plans establish such a duty because they are not in the record and apparently were not reviewed by the trial court. Since Ms. Cook alleged a duty based upon the Plans and we must accept all allegations of the complaint as true, Ms. Cook stated a cause of action, and we, accordingly, reverse.

Ibid. Thus, the court in Cook did not address the issue as to whether the Plans or procedures could actually impose a duty upon a governmental entity because the court erroneously accepted all allegations, including legal conclusions, as true.

Subsequent to the decision in Cook, the Second District, in Hoover, held that a duty may be imposed upon a sheriff pursuant to his own internal policies and procedures even though no such duty existed at common law or statute or through the creation of a special relationship. Hoover, supra, at 1332-33. As such, the decisions in Cook and Hoover improperly found a duty could be imposed upon a sheriff where none otherwise exists at common law or statute which directly conflicts with this Court's opinion in Trianon.

Finally, Plaintiff's argument that Cook somehow classified 911 service as a category IV function is erroneous. The Second District in Cook never even cited Trianon, let alone categorized a 911 service as a specific governmental function under Trianon. Thus, the decisions rendered in Cook and Hoover should be disapproved as they are inconsistent with this Court's decision in Trianon that a duty may arise only by common law or statute, and the decision of the Fourth District in affirming dismissal of the present cause should be approved for the reasons explained below.

B. COMMON LAW DUTY

The general rule at common law is that there is no duty to act for the protection of others. Restatement (Second) of Torts, §314

(1964). Restatement (Second) of Torts, §314 cmt. c (1964) states in pertinent part, as follows:

> The rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection . . . . Hence, liability for non-feasance [or inaction1 . . . . is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.

Ibid. Likewise, there is no duty to prevent the misconduct of a third person from causing harm to another unless there is some special relationship which imposes a duty upon the actor to prevent the harm. Restatement (Second) of Torts §315 (1964); Trianon, supra, at 915, 918. Thus, there is no duty to the general public under common law to enforce the law or protect an individual from harm by a third person. Trianon, supra, at 918; Everton, supra, at 938.

Defendant concedes that no Florida Court has specifically stated that there is no common law duty to transfer a 911 call for law enforcement services or that this act constitutes a "category II" function under Trianon. However, the First and Fourth Districts have held inferentially that there is no common law duty to perform 911 services in Hartley v. Floyd, 512 So. 2d 1022 (Fla. 1st DCA 1987) and St. George v. City of Deerfield Beach, 568 So. 2d 931 (Fla. 4th DCA 1990). In each of these cases, the District Courts found that a duty was imposed on the 911 service because of

the existence of a special relationship, an exception to the common law rule.

In Hartley, it should be noted that the plaintiff called the Sheriff directly, not using 911, and requested assistance to search for her missing husband. Hartley, supra, at 1023. The First District found a duty to respond to the plaintiff's call was created when the deputy who took the call made assurances to the caller that assistance would be rendered thereby creating a special relationship. Id. at 1024.

Likewise, in St. George, the Fourth District concluded that the plaintiff stated a claim against the 911 service for failure to transfer her call for assistance because a special relationship had been created between the plaintiff and the 911 service through previous calls wherein assurances were made to provide assistance. St. George, supra, at 931-32. The court noted that it found-o Florida cases that are on all fours" with the issue of a duty owed by 911 services. Id. at 932. Thus, the court looked to other jurisdictions for guidance and found that they analyzed the existence of a duty owed by a 911 operator under the special relationship doctrine. Ibid. (citing Delong v. County of Erie, 60 N.Y.2d 296, 469 N.Y.S.2d 611, 457 N.E.2d 717 (1983); Chambers-Castanes v. King County, 100 Wash. 2d 275, 669 P.2d 451 (1983); Galuszynski v. City of Chicago, 131 Ill. App. 3d SOS, 86 Ill. Dec. 581, 475 N.E.2d 960 (1985)).

In the same year that the Fourth District decided St. George, the District of Columbia also addressed the issue of a duty to

provide 911 services in Wanzer v. District of Columbia, 580 A.2d 127 (D.C. 1990). In Wanzer, the court stated:

> It is generally held that ' [t]he institution of [a publicly operated] emergency ambulance service is . . . a service kindred to the police or fire service. This type of service is incident to the police power of state: i.e., to protect the health, safety, and general welfare of its citizens.'

Id. at 130 (quoting Avala v. Citv of Corpus Christi, 507 S.W.2d 324, 328 (Tex. Ct. App. 1974); citing Thornton v. Shore, 233 Kan. 737, 741, 666 P.2d 655, 659 (1983); Smith v. City of Lexington, 307 S.W.2d 568 (Ky. Ct. App. 1957); Ross v. Consumers Power Co., 420 Mich. 567, 651, 363 N.W.2d 641, 676 (1984); King v. Williams, 5 Ohio St. 3d 137, 449 N.E.2d 452, 455 (1983)). The court, in relying on statutes and decisional authority from 13 different states' cited three reasons for the *almost universal acceptance of [the] principle" that emergency services are considered part of the protection of the public safety. Ibid.

First, the court noted that several state statutes define emergency services as including ambulance, fire protection, and law enforcement protection as one service dedicated to the protection of the public health and safety. Ibid. (citations omitted). Second, the court noted the use of the 911 emergency number is an easy way for a caller to connect with fire, police, and medical services providing an efficient means for summoning one or more of these "vital and integrally related services to the scene of a

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[1] These states include Texas, Kansas, Kentucky, Michigan, Ohio, Alaska, California, Maryland, Minnesota, Alabama, Iowa, Nebraska, and Missouri.

calamity." Ibid. (citations omitted). Finally, the court noted that these three emergency services are so interconnected that they are typically considered in tandem when assessing the effects of municipal annexations on governmental services. Ibid. (citations omitted).

Accordingly, the court in Wanzer held that emergency services including ambulance, police, and fire protection provide a general service to the public upon which a duty will not exist absent the existence of a special relationship between the 911 service and the plaintiff. Ibid. In establishing the existence of a special duty, the court stated:

> A one time call to 911 for help does not establish a special relationship. It is not enough to allege ineptitude, even shameful or inexcusable ineptitude, by a municipal agency in failing to respond adequately to a call for help.

Id. at 132 (citations omitted). Thus, the District of Columbia has concluded that emergency services including medical, fire, and police protection are merely public services provided to the public at large. Hines v. District of Columbia, 580 A.2d 133, 136 (D.C. 1990). As this Court held in Everton, where there is a duty owed to the general public there is no common law duty of care owing to the individual citizen. Everton, supra, at 938; see Beal v. City of Seattle, 134 Wash. 2d 769, 784, 954 P.2d 237, 244 (1998) (citing Taylor v. Stevens County, 111 Wash. 2d 159, 163, 759 P.2d 447 (1988) (holding "a duty owed to all is a duty owed to none)).

It is clear that other jurisdictions have held the operation of a 911 service to be a police power to which only a general duty

is owed to the public and that no duty is owed to an individual absent a special relationship. The courts' analyses of 911 services under the special relationship doctrine also infers that there is no common law duty of care since a common law duty would obviate the need to find a special relationship. As such, the amended complaint in the case at bar failed to allege the existence of a common law duty.

C. STATUTORY DUTY

Absent a common law duty of care, the plaintiff must allege that a statutory duty exists. In Plaintiff's brief on the merits, she argues that Florida Statute §365.171 creates an affirmative duty for a 911 operator to relay a request for law enforcement services to the appropriate law enforcement agency because the legislative history and revisions to 8365.171 permit 911 services to be operated by agencies other than law enforcement. (See Pl's Brief on the Merits at p. 18-21.) According to Plaintiff, because the statute permits agencies other than the Sheriff to operate 911 services, the act of operating 911 is somehow removed from the sphere of immune law enforcement and protection of the public activity. (Pl's Brief on the Merits at p. 21.) Plaintiff's argument is flawed since it is not the actor performing the act which determines whether the act is a function of state police powers for the protection of the public, but the nature of the act performed that is dispositive. Trianon, supra, at 918. As argued in part A of this brief, the performance of 911 service is a police function regardless of who administers the operation of the call.

Not only does Plaintiff fail to distinguish the operation of a 911 service from the police powers of the state to protect the public, she also fails to show in the statute that it creates an affirmative duty to provide 911 service, a breach of which would create a private cause of action. There is no decisional authority which holds a duty exists under §365.171 to transfer every 911 call for law enforcement assistance. To the contrary, the Second District in Cook, the case which Plaintiff seeks to be approved by this Court, held there is no duty under 8365.171 to provide 911 services. Id. at 408.

Legislative enactments for the benefit of the general public do not automatically create an independent duty to either individual citizens or a specific class of citizens. Restatement (Second) of Torts, 8288, cmt. b (1964); Trianon, supra, at 917. To determine whether a statute imposes an actionable duty, this Court has held that the legislative intent behind the statute should be the primary factor considered in determining whether a cause of action exists when the statute does not expressly provide for one. Murthy v. N. Sinha Corp., 644 So. 2d 983, 985 (Fla. 1994). The intent to create an actionable duty must be demonstrated in the language of the statute or the legislative history before it can be judicially inferred. Ibid; Johnson v. Walgreen Co., 675 So. 2d 1036, 1038 (Fla. 1st DCA 1996). The Court also should consider subsequent revisions to a statute to interpret legislative intent. Murthy, supra, at 986. Thus, to infer a duty, either the language in 8365.171 or the legislative history must provide clear evidence

that the legislature intended to create a private cause of action where a 911 call requesting law enforcement assistance is not relayed to the law enforcement agency.

Nowhere in 8365.171 is there a provision for civil remedies for failure to relay a 911 call for law enforcement services. Plaintiff summarily states that 52, Ch. 74-357 Laws of Florida mandates that information received pursuant to a 911 call "must" be relayed and that there is no discretion with the operation of the system. (Pl's Brief on the Merits at p. 11.) Section 2, Ch. 74-357 Laws of Florida does not state that 911 calls "must" be relayed to the appropriate emergency agency. Rather, the legislative intent, as expressed in the legislative history quoted by Plaintiff in her brief, expresses the legislature's desire to provide more efficient means of communication to obtain emergency services for the general public.

In light of the common law rule that a duty owed to the general public is not actionable, had the legislature intended to create a private cause of action or impose an affirmative duty to perform such services for the general public, one would expect a clear mandate from the legislature to deviate from the common law rule. Furthermore, the legislature has revisited the statute since its enactment in 1974 and failed to add any language connoting its intent to create an actionable duty. Because of the legislature's steadfast refusal to include express language in the statute or the legislative history indicating its intent to create a private cause

of action, it is improper for this Court to infer that such a cause of action exists.

D. DUTY PURSUANT TO A SPECIAL RELATIONSHIP

Defendant concedes that a duty to perform 911 services may be created under the existence of a special relationship between the 911 operator and the Plaintiff. However, the Plaintiff here does not allege the existence of a special relationship and therefore any duty owed by Defendant because of the existence of a special relationship need not be addressed.

E. CATEGORY II VS. CATEGORY IV GOVERNMENTAL FUNCTIONS

Plaintiff summarily argues that the transferring of 911 calls to the appropriate emergency agency, in this case a law enforcement agency, constitutes a category IV function as defined by this Court in Trianon as providing professional, educational, and general services because agencies other than law enforcement agencies are permitted to operate 911 services. However, Plaintiff concedes that had the call been transferred to a law enforcement agency, the decision to deploy or allocate law enforcement officers would be a discretionary immune decision. (Pl's Reply Brief at p. 5.) Thus, Plaintiff'5 argument, once distilled, is that a duty is owed under category IV to transfer a 911 call for assistance to a law enforcement agency, but once it is transferred, the law enforcement agency is under no duty to respond to the scene because that decision is a category II function for which no duty exists. Not only does this argument raise questions about legal causation for failure to transfer a call, it also presumes the operation of 911

is not interconnected with the operation of the law enforcement agency itself.

Here, a 911 call was received by Defendant Sheriff, the constitutionally elected law enforcement officer for Martin County, requesting law enforcement assistance to enforce the laws as against a traffic violator travelling southbound in a northbound lane on 1-95. Plaintiff's argument that a duty exists to transfer the 911 call to a law enforcement agency would require the Sheriff to call himself and tell himself to render law enforcement assistance to the area, a request which he has the discretion to refuse. However, according to the Plaintiff, if the Sheriff fails to call himself to request law enforcement assistance from himself, then the Sheriff should be liable for failure to request a service that there is no duty to provide. Obviously, such a scenario would create liability in absurd situations. Thus, the more logical approach, and that followed by other jurisdictions, is to classify the operation of 911 services as a police function for the protection of the public, which, under Trianon, is a category II function.

F. PRACTICAL RAMIFICATIONS AND FISCAL IMPOSSIBILITY

Not only is Plaintiff's position legally erroneous, it calls into question serious public policy concerns about the taxpayers' ability to support a 911 service that must relay each and every call for help. For example, under Plaintiff's theory, if a hurricane or other natural disaster were to occur whereby each and every member of the county called 911 for assistance, the 911

So. 2d 708, 711 (Fla. 1981). Accordingly, the conduct alleged in Plaintiff's amended complaint which names the Martin County Sheriff's Department as the Defendant fails to state a claim.

CONCLUSION

Defendant respectfully requests this Honorable Court to approve the opinion herein sought to be reviewed, disapprove the decisions rendered by the Second District in Cook, supra, and Hoover, supra, and affirm the final order of dismissal.

Respectfully submitted,

By: _____
Alexis M. Yarbrough
Attorneys for Respondent
Martin County Sheriff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished via U.S. mail to **ROBERT H. SCHOTT, ESQUIRE,** Attorney for Petitioner, 872 S.W. Colorado Avenue, Stuart, Florida 34994 and **ARNOLD GINSBERG, ESQUIRE,** Attorney for Petitioner, Ginsberg & Schwartz, 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130, on this 4th day of September, 1998.

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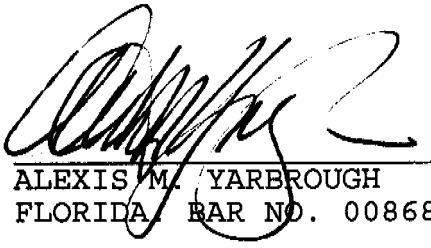
By: 
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