OA 1-4-99

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,931

District Court Case No. 97-01196

Fla. Bar No. 137172

SANDRA LASISEY, etc.,

Petitioner,

vs.

MARTIN COUNTY SHERIFF'S DEPARTMENT,

Respondent.

BRIEF AND APPENDIX OF PETITIONER ON THE MERITS

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This brief is typed in Times New Roman 14 cpi type size.

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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, Martin County Sheriffs Department, was the defendant/appellee. In this brief of petitioner on the merits the parties will be referred to as the plaintiff and the defendant and, alternatively, by name. The symbols "R" and "A" will refer to the record on appeal and the appendix accompanying this brief, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

The occurrences leading to this proceeding, being neither complex nor lengthy, may be stated as follows:

A. On December 21, 1993, a motorist driving south on Interstate 95 used a cellular phone and made a 9 11 call reporting that a vehicle was speeding southbound on I-95 in the northbound lane (R. 65-7 1, at paragraph 3).

B. The 9 11 service (allegedly), administered and operated by defendant, Martin County Sheriffs Department, received the call but failed to relay the message, to wit: failed to dispatch appropriate emergency personnel (R. 65-7 1, at paragraph 4).

C. The "wrong way vehicle" (later identified as one being driven by Hazel G Stevenson, now deceased) continued to speed southbound in the northbound lane of 1-95. Some nine minutes after the 911 call the Stevenson vehicle crashed head-on into a vehicle then being driven by plaintiffs decedent, George D. Laskey, III, who died as a result of the impact (R.65-71, at paragraphs 6 and 7).

D. As a consequence of the death of George Laskey plaintiff instituted this lawsuit and in her amended complaint alleged in essence and pertinent part:

* * *

> "2. Defendant, MARTIN COUNTY SHERIFF'S DEPARTMENT, administered and operated a '9 11' telephone and emergency dispatch service pursuant to the provisions of Florida Statute 365.17 1. In administering and operating that '9 11' service, MARTIN COUNTY SHERIFF'S DEPARTMENT had a common law duty to use due diligence in discharging its duties, particularly where rights of individuals may be jeopardized by their neglect. This duty is ministerial in that it is positively imposed by law and the duty to perform is not dependent upon the DEPARTMENT's employee's judgment or discretion.
>
> "3. On December 2 1, 1993, a motorist driving south on I-95 near the Gatlin Boulevard entrance rarnp used acellular phone and made a 911 call reporting that a vehicle driven by the late Hazel G

Stevenson was speeding southward on I-95 in the northbound lane.

"4. The 911 service administered and operated by MARTIN COUNTY SHERIFF'S DEPARTMENT received the call, but negligently failed to dispatch appropriate emergency personnel, including law enforcement personnel, to respond to the emergency situation.

"5. In failing to dispatch appropriate emergency personnel, as described in the preceding paragraph, MARTIN COUNTY SHERIFF'S DEPARTMENT breached its duty to follow established procedure contained in the State of Florida's and other controlling Plans promulgated pursuant to Florida Statute 365.17 1.

"6. Because of the negligent failure of Defendant, MARTIN COUNTY SHERIFF'S DEPARTMENT's, 911 personnel to respond appropriately to the emergency, the vehicle driven by the late Hazel Stevenson continued to speed southbound in I-95's northbound lanes. Nine minutes after the call, the Stevenson vehicle foreseeably crashed head-on with the vehicle being driven by the late GEORGE D. LASKEY, III, who was lawfully proceeding northbound on 1-95.

"7. As a result of the negligence of Defendant, MARTIN COUNTY SHERIFF'S DEPARTMENT's, 911 service described in the preceding paragraphs, GEORGE D. LASKEY, III, was killed. Had the 911 service acted appropriately, law enforcement personnel who were in the area could have prevented occurrence of the head-on collision." (R. 65-7 1)

* * *

E. The defendant moved to dismiss plaintiffs amended complaint (R. 72) and filed a memorandum of law in support of its position (R. 82-87). Suffice it to say at this juncture the defendant argued it owed no duty to the plaintiffs decedent, the events which led to the death of plaintiffs decedent were not actionable under the

doctrine of sovereign imrnunity in the absence of a "special duty" and that no such "special duty" existed under the facts and circumstances of this case.

F. After hearing, the trial court granted the defendant's motion to dismiss (R. 88, 89), denied plaintiffs motion for rehearing and entered its fmal order of dismissal (R. 96).

G. On plaintiffs appeal to the Fourth District, that court affirmed (A. 1-3). In an opinion now reported, see: LASKEY v. MARTIN COUNTY SHERIFF'S DEPARTMENT, 708 So. 2d 1013 (Fla. App. 4th 1998), the court, after stating the facts (as it viewed them from plaintiffs amended complaint), after setting out the contentions of the parties and after noting well settled principles of Florida law (generally) applicable to causes of action brought pursuant to Section 768.28, Florida Statutes, concluded:

* * *

> "We have considered and reject Appellant's assertion that because a 92 1 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 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 sheriffs 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 Ever-ton, 468 So. 2d at page 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 a932-33. However, such is not the case here. Thus, Appellant was required to plead a special relationship.

"We note that in Cook v. Sheriff of Collier County, 573 So. 2d 406 (Fla. 2d DCA 199 1), the court determined that the sheriffs 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." 708 So. 2d at pages 1014, 1015.

* * *

H. This proceeding followed.

The plaintiff reserves the right to argue the significance of the above facts in the argument portion of this brief.

III.

POINT INVOLVED ON APPEAL

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

The above identifies the precise judicial act herein complained of. It does not, however, identify the "issue" involved in this proceeding. In affirming the trial court the Fourth District concluded that the operation of a 911 emergency telephone

system falls within the "category II" classification rather-than the "category IV" classification delineated in this Court's opinion in TRIANON PARK CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, 468 So. 2d 912 (Fla. 1985). The plaintiff believes such activity falls squarely within "category IV." As such the legal issue herein involved concerns an analysis of the following:

> WHETHER A LOCAL 911 EMERGENCY TELEPHONE SYSTEM, CREATED PURSUANT TO THE ENABLING LEGISLATION FOUND IN SECTION 365.17 1, FLORIDA STATUTES (1974) AND OPERATING UNDER A BODY OF REGULATIONS ENACTED BY THE FLORIDA DEPARTMENT OF GENERAL SERVICES IS ONE OF THE NUMEROUS "GENERAL SERVICES" CONTEMPLATED IN TRIANON, SUPRA, SUCH THAT IT MAY BE CLASSIFIED AS A "CATEGORY IV" ENDEAVOR-- ENACTED FOR THE HEALTH AND WELFARE OF FLORIDA CITIZENS-SO THAT ANY BREACH OF A MINISTERIAL (NON-DISCRETIONARY) OBLIGATION IMPOSED UPON THE SERVICING ORGANIZATION BY THE PROCEDURES OF THE REGULATORY BODY WOULD RENDER THE LOCAL SERVICING ORGANIZATION LIABLE IN TORT.

IV

General Service

IV

SUMMARY OF ARGUMENT

The plaintiff would suggest to this Court that the trial court committed reversible error in granting the defendant's motion to dismiss plaintiffs amended complaint. Likewise, the Fourth District erred as a matter of law in concluding that the state 911 system falls within a TRIANON "category II" activity. For the reasons

which follow, the opinion herein sought to be reviewed should be quashed and the final order of dismissal appealed should be reversed with directions to the trial court to reinstate plaintiffs amended complaint.

A.

At the outset, it is important to remind that this case is before this Court upon dismissal of the plaintiffs amended complaint. The complaint was filed by the personal representative of the estate of the decedent against an agency of the sovereign for wrongful death damages occasioned as a result of the alleged (negligent) failure of the agency to perform a ministerial duty, to wit: to relay to the appropriate service organization information regarding the existence of a known danger, a vehicle speeding southbound in a northbound lane of 1-95.

The circumstances of this case implicate Section 768.28, Florida Statutes (1993) and perforce involve application of this Court's opinion in TRIANON PARK CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, supra, to the facts of this case which, under the procedural posture herein existing, must be viewed as true.

In TRIANON this Court, inter alia, clarified the concept of governmental tort liability and noted that it would be appropriate to place governmental functions and activities into four categories. Of the four categories created, the pertinent issues

herein involve the scope and meaning of the second and fourth classifications, to wit: "(II) enforcement of laws and the protection of the public safety" and "(IV) providing professional, educational, and general services for the health and welfare of the citizens."

B.

Prior to the opinion rendered in this case there existed no case directly holding under what category a local 911 system would fall for purposes of tort liability. In this case (without any discussion) the Fourth District concluded that the operation of a 9 11 emergency telephone system is part of law enforcement and falls within the public safety service provided by a sheriffs office. The Fourth District rejected the plaintiffs arguments that the 911 emergency telephone system should be placed within a category IV classification.

C.

The history of the EMERGENCY TELEPHONE ACT, Section 365.17 1, F.S. (1974) ["THE ACT"] is pertinent to the issues before this Court. It reflects legislative intent that it is in the public interest to shorten the time required for a citizen to request and receive emergency aid. The Legislature stated:

"...It is the intent of the Legislature to...provide citizens with rapid direct access to public safety agencies...with the objective of

reducing the response time to situations requiring law enforcement, fire, medical, rescue, and other emergency services." Section 2, Ch. 74-357, Laws of Florida.

The plaintiff would suggest to this Court there exists nothing in the enabling statute (or in the body of the law itself) to suggest, even remotely, that THE ACT sought to intrude upon the planning, discretionary, or judgmental activities of the various sovereign agencies THE ACT provides a mechanism for citizens to communicate. It is, and was, the intent of the Legislature that THE ACT provide citizens access to "other services."

In passing THE ACT the Legislature specifically directed that the Department of General Services would be the state agency charged with the responsibility of implementing the stated intent and that within said department the division of communications "shall develop" a statewide emergency telephone number 911 system plan. The "system" was not designed to operate solely within the sphere of "law enforcement" nor to exist unconnected with the private sector. The system, contemplated as it was to operate within the Department of General Services, guided by the director of the division of communications, was set up to provide rapid access for the citizens of the State of Florida to all services including those

services "otherwise provided' and to allow coordination with "private agencies."

There exists nothing in the enabling legislation to suggest the system operate within any of the departments of law enforcement (state or local) or that the system itself be operated with any "discretionary" decision making at the operational level no matter who the system operator might be! Although the statute was revisited on numerous occasions, legislative intent remained constant,

D.

The Fourth District was legally in error in rejecting plaintiffs contentions that the 911 system falls within a "category IV" classification as envisioned and defined in TRIANON, supra.

First, and foremost, the system was specifically enacted to provide citizens with rapid direct access to public safety agencies with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue, and other emergency services. The Legislature saw fit to place such system within the Department of General Services. While the sheriffs department (of any county) may be an agency charged with the responsibility for maintaining a particular local system, it does not necessarily follow that the system (as perceived and implemented) is part of "law enforcement" as the Fourth District concluded.

Second, the 911 system was not designed to be governed, controlled, directed

or affected by local entities or agencies. It was the legislative intent that there be a system in place to allow communication with law enforcement, fire fighting, emergency medical services and other emergency services such as poison control, suicide prevention and civil defense services. See: Section 4, "State Plan," Ch. 74-357, Laws of Florida.

Third, there exists no discretion associated with the operation of the system. The information received by all operatives must be relayed, dispatched to the appropriate law enforcement, fire, medical, rescue and other emergency service. See: Section 2, Ch. 74-357, Laws of Florida. 7

Where, as here, ministerial duties exist, there can be no collision between this case, COOK v. THE SHERIFF OF COLLIER COUNTY, 573 So. 2d 406 (Fla. App. 2d 1991), HOOVER v. POLK COUNTY SHERIFF'S DEPARTMENT, 611 So. 2d 133 1 (Fla. App. 2d 1993) and TRIANON, supra. The nature of the conduct herein complained of is the failure of 911 personnel to comply with a ministerial duty (to relay information) in place for the health and safety of the citizens of this state.

Accepting the allegations of the plaintiffs complaint as true, a cause of action was stated. The Fourth District in the instant cause bypassed all analysis, ignored the allegations of the plaintiffs amended complaint and merely concluded that a 911

plan fell within a category II classification [which necessitated a "special duty" in order for a person injured as a consequence of a breach of that duty to maintain an action against a sovereign agency]. The opinion should be quashed.

V.

ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE DEFENDANT'S MOTION TO DISMISS PLAINTIFF' S AMENDED COMPLAINT.

The plaintiff would suggest to this Court that the trial court committed reversible error in granting the defendant's motion to dismiss plaintiffs amended complaint. Likewise, the Fourth District erred as a matter of law in concluding that the 911 system falls within a TRIANON "category II" activity. For the reasons which follow, the opinion herein sought to be reviewed should be quashed, the opinion in COOK v. SHERIFF OF COLLIER COUNTY, 573 So. 2d 406 (Fla. App. 2d 1991) should be approved as to the result reached therein, and the final order of dismissal appealed should be reversed with directions to the trial court to reinstate plaintiffs amended complaint.

A.

As a preliminary matter and, as basic as it may first seem, it is important to remind that this case is before this Court upon dismissal of the plaintiffs amended

complaint. The complaint was filed by the personal representative of the estate of the decedent against an agency of the sovereign for wrongful death damages occasioned as a result of the alleged (negligent) failure of the agency to perform a ministerial duty, to wit: to relay to the appropriate service organization information regarding the existence of, a known danger, a vehicle speeding southbound in the northbound lane of 1-95.

The circumstances of this case implicate Section 768.28, Florida Statutes (1993) and perforce involve application of this Court's opinion in TRIANON PARK CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, 468 So. 2d 912, supra, to the facts of this case which, under the procedural posture herein existing, must be viewed as true. See: HAMMONDS v. BUCKEYE CELLULOSE CORP., 285 So. 2d 7 (Fla. 1973) and PIZZI v. CENTRAL BANK & TRUST CO., 250 So. 2d 895 (Fla. 1971).

In TRIANON PARK CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, supra, this Court answered a certified question, asking:

> WHETHER A GOVERNMENTAL ENTITY MAY BE LIABLE IN TORT TO INDIVIDUAL PROPERTY OWNERS FOR THE NEGLIGENT ACTIONS OF ITS BUILDING INSPECTORS IN ENFORCING PROVISIONS OF A BUILDING CODE ENACTED PURSUANT TO THE POLICE POWERS VESTED IN THAT GOVERNMENTAL ENTITY.

This Court answered the question in the negative and quashed the decision of the District Court of Appeal. In rendering its opinion this Court emphasized that Section 768.28, Florida Statutes (1975), which waived sovereign immunity, created no new causes of action, but merely eliminated the immunity which prevented recovery for existing common law torts, committed by the government. Having resolved the certified question (as restated), this Court attempted to clarify the law regarding governmental tort liability. This Court stated:

> "First, for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the negligent conduct. For certain basic judgmental or discretionary governmental functions, there has never been an applicable duty of care (citation omitted). Further, 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 (citation omitted)." 468 So. 2d at page 917.

Cognizant of the fact that the courts and the Bar of this state were having difficulty interpreting the purpose of Section 768.28 as construed in prior opinions of this Court, this Court stated in TRIANON, supra, 468 So. 2d 9 19:

> "To better clarify the concept of governmental tort liability, it is appropriate to place governmental functions and activities into the following four categories: (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) providing professional, educational, and general services for the health and welfare of the citizens." 468 So. 2d at page 919.

Resolution of the issues presented by the instant cause should not implicate either (I) or (III). The pertinent issues involve the scope and meaning of (II) enforcement of laws and the protection of the public safety and (IV) providing professional, educational, and general services for the health and welfare of the citizens.

As to (II) enforcement of laws and protection of the public safety, this Court, in TRIANON, supra, stated:

> "How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there has never been a common law duty of care. This discretionary power to enforce compliance with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors, arresting officers, and other law enforcement officials, as well as the discretionary authority given fire protection agencies to suppress fires. This same discretionary power to enforce compliance with the law is given to regulatory officials such as building inspectors, fire department inspectors, health department inspectors, elevator inspectors, hotel inspectors, environmental inspectors and marine patrol officers. A 'discretionary function exception', within which these types of activities fall, was expressly recognized in the Federal Tort Claims Act and has also been recognized as inherent in the act of governing by this Court and a majority of the other jurisdictions that have addressed this issue (citations omitted).
>
> "'The lack of a common law duty for exercising a discretionary police power function must, however, be distinguished from existing common law-applicable to the same officials or employees in the operation of motor vehicles or the handling of

firearms during the course of their employment to enforce compliance with the law. In these latter circumstances there always has been a common law duty of care and the waiver of sovereign immunity now allows actions against all governmental entities for violations of those duties of care (citations omitted)." 468 So. 2d at pages 919 and 920.

Regarding (IV) providing professional, educational, and general services, this Court in TRIANON, supra, stated:

"Providing professional, educational, and general services for the health and welfare of citizens is distinguishable from the discretionary power to enforce compliance with laws passed under the police power of this state. These service activities, such as medical and educational services, are performed by private persons as well as governmental entities. and common law duties of care clearly exist. Whether there are sufficient doctors provided to a state medical facility may be a discretionary judgmental decision for which the governmental entity would not be subject to tort liability. Malpractice in the rendering of specific medical services, however, would clearly breach existing common law duties and would render the governmental entity liable in tort..." 468 So. 2d at page 921.

B.

Given the guidelines as set out by this Court in TRIANON, it is interesting to note that prior to the opinion rendered in this case there existed no case directly holding under what category a local 911 system would fall for purposes of tort liability. In this case (without extensive discussion) the Fourth District concluded:

"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. (Citations omitted). 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 w 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...However, such is not the case here. Thus, appellant was required to plead a special relationship. .." 708 So. 2d at page 1014.

In its briefings and papers filed to date the defendant has suggested:

"...A direct and express conflict exists between the Fourth District's opinion in the present action and the Second District's opinion in Hoover [v. Polk County Sheriffs Department, 611 So. 2d 133 1 (Fla. App. 2d 1993)]. The Fourth District in the present action, and this Court's opinion in Trianon Park Condominium Association v. City of Hialeah, 468 So. 2d 912 (Fla. 1995), correctly hold that a duty may not be imposed against the sheriff except by common law or statute absent a special relationship. The Second District's opinion in Hoover, supra, held that a duty may be imposed upon a sheriff by policies and procedures promulgated by the sheriff where none otherwise exists under common law or statute. Thus, the decision in Hoover directly conflicts with this Court's decision in Trianon Park, supra, and the Fourth District's decision in the present cause." See: respondent's amended answer brief on the issue of jurisdiction at pages 2 and 3.

The plaintiff would suggest to this Court that the jurisdictional conflict existing lies squarely between the instant cause and COOK, supra, and not between COOK, HOOVER and TRIANON. This is so because TRIANON established categories and did not itself deal with the 9 11 system. If this Court holds as plaintiff requests, that the 911 system set up as it is to operate within the framework of the

Department of General Services is a "category IV" activity enacted to provide general services for the health and welfare of citizens, then the result in COOK v. SHERIFF OF COLLIER COUNTY, supra, would be consistent with both TRIANON and the opinion of this Court in this case. It is to this analysis that plaintiff will now turn.

C.

A fair reading of the history of the EMERGENCY TELEPHONE ACT, Section 365.171, F.S. (1974) ["THE ACT"], see also: Ch. 74-357, Laws of Florida; 911 EMERGENCY TELEPHONE SYSTEM, Ch. 90-305, Laws of Florida; and Section 365.171, F.S. (Supp. 1992) as it is pertinent to the issue(s) before this Court reflect legislative intent:

> "...That it is in the public interest to shorten the time required for a citizen to request and receive emergency aid. There currently exist thousands of different emergency phone numbers throughout the state. Provision for a single, primary three-digit emergency number through which emergency services can be quickly and efficiently obtained would provide a significant contribution to law enforcement and other public service efforts by making it easier to notify public safety personnel. Such a simplified means of procuring emergency services will result in the saving of life, a reduction in the destruction of property, and quicker apprehension of criminals. It is the intent of the Legislature to establish and implement a cohesive statewide emergency telephone number '9 11' plan which will provide citizens with rapid direct access to public safety agencies by dialing the telephone number '911', with the objective of reducing the response time to situations requiring law enforcement, fire, medical. rescue, and other emergency

services." Section 2, Ch. 74-357, Laws of Florida.

There exists nothing in the legislative intention of the enabling statute (or in the body of the law itself) to suggest, even remotely, that THE ACT sought to intrude upon the planning, discretionary, or judgmental activities of the various sovereign agencies. THE ACT, as contemplated, served:

> ". . to establish and implement a cohesive statewide emergency telephone number '9 11' plan which will provide citizens with rapid direct access to public safety agencies...with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue, and other emergency services." Section 2, Ch. 74-357, Laws of Florida.

THE ACT provides a mechanism for citizens to communicate. It is, and was, the intent of the Legislature to provide citizens access to other services.

The Legislature specifically directed that the Department of General Services would be the state agency charged with the responsibility of implementing the stated intent and that within said department the division of communications "shall develop" a statewide emergency telephone number '911 system plan' [see: Ch. 74-357, Sections 3 and 4] which would provide for:

* * *

> "(1) The establishment of the public agency emergency telephone communications requirements for each entity of local government in the state;
>
> "(2) A system to meet specific local government requirements.

Such system shall include law enforcement. fire fighting, and emergency medical services. and may include other emergency services such as poison control, suicide prevention. and civil defense services;

"(3) Identification of the mutual aid agreements necessary to obtain an effective ' 9 11' system;

"(4) A funding provision which shall identify the cost necessary to implement the ' 9 11' system; and

"(5) A firm implementation schedule, which shall include the installation of the ' 9 11' system in a local community within twenty-four (24) months after the designated agency of the local government gives a firm order to the telephone utility of a '9 11' system. The public agency designated in the plan shall order such system within six (6) months after publication date of the plan."

* * *

The Legislature further directed that the division of communications:

". . .shall be responsible for the implementation and coordination of such plan. The division shall promulgate any necessary rules, regulations, and schedules relating to public agencies for implementing and coordinating such plan, pursuant to Chapter 120, Florida Statutes." See: Section 4, "State Plan," Ch. 74-357, supra.

It is important to note at this juncture that the Legislature, see: Section 5, 'System Director," Ch. 74-357, supra, further mandated:

"The director of the division of communications is designated as the director of the statewide emergency telephone number '911' system and, for the purpose of carrying out the provisions of this Act, is authorized to coordinate the activities of the system with state, county, local. and private agencies.. ."

The "system" within the contemplation of the Legislature was not designed to operate solely within the sphere of "law enforcement" nor, in any narrow sense/to remain unconnected with the private sector. The system, contemplated as it was to operate within the Department of General Services, guided by the director of the division of communications, was set up to provide rapid access for the citizens of the State of Florida to all services including those "otherwise provided" and to allow co-ordination with "private agencies."

The plaintiff would again emphasize that the Legislature directed that there be created a plan, that the plan be implemented and that operation of same remain under the auspices and control of the bepartment of General Services to:

> "...provide citizens with rapid direct access to public safety agencies by dialing the telephone number '911', with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue and other emergency services..." Section 2, Ch. 74-357, supra.

There exists nothing in the enabling legislation to suggest the system operate within any of the departments of law enforcement (state or local) or that the system itself be operated with any "discretionary" decision making at the operational level no matter who the system operator might be!

D.

In 1990 the Florida Legislature revisited the subject matter, see: Ch. 90-305,

Laws of Florida, and again, directing that control of the (now operational) system remain within the Department of General Services created:

> "...within the Department of General Services an interim task force committee on '911' to be known as the '911' emergency telephone system committee. The committee shall be charged with reviewing and evaluating the '9 11' telephone system with regard to its implementation and accessibility to the general population of Florida.." See: Section 1, Ch. 90-305, supra.

The task force was created because, among other reasons, the Legislature saw a need:

> "...to review and evaluate the current '9 11' emergency telephone system to determine if the current structure adequately addresses the needs of Florida's growing population.." See: Preamble, Ch. 90-305, supra.

The Legislature appropriated from the general revenue fund some $50,000 to be given to the Department of General Services to implement the provisions of the bill. See: Section 4, Ch. 90-305, supra.

Ultimately the task force activities were concluded, see: Section 365.171, F.S. (1992, Supp.), and Ch. 93-171, Laws of Florida and the "improved" system was implemented. At Section 6 of Ch. 93-171, supra, the Legislature expressed its (further) intent:

> "...The '911' fee authorized by this section to be imposed by counties will not necessarily provide the total funding required for establishing or providing the '9 11' service..The '9 11' fee revenues

> shall not be used to pay for any item not listed, including, but not limited to, any capital or operational costs for emergency responses which occur after the call transfer to the responding public safetv entity and the costs for constructing buildings, leasing buildings, maintaining buildings, or renovating buildings, except for those building modifications necessary to maintain the security and environmental integrity of the PSAP and ' 9 11' equipment rooms.. ."

The legislative mandate was again made clear. The 911 plan was developed, enacted, set up and rendered operational to accomplish one specific objective, to wit: (to create)

> ". . .a cohesive statewide emergency telephone number '9 11' plan.. .with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue. and other emergency services..." See: Section 2, Ch. 74-357, supra.

The revised statute kept certain revenues out of the hands of local service organizations and kept control of same within the Department of General Services. The Legislature noted the funds were necessary to keep the system operational and , hence, would not be available to the service organizations themselves.

There exists nothing in the stated legislative intents, either before implementation or after revision, to suggest that the 911 system was to operate within the framework of "law enforcement" or that it was legislatively mandated that:

> ". . .The operation of a 9 11 emergency call system is part of the law enforcement and protection of public safety service provided by a

sheriffs office.. .” See: LASKEY v. MARTIN COUNTY SHERIFF’S DEPARTMENT, supra, 708 So. 2d at page 1014.

The above quoted statement of the Fourth District reflects a mere conclusion of the court and is unsupported by legislative history or intent. The conclusion exists as support for itself and finds no foundation elsewhere in Florida law

Parenthetically, it should be noted here that when other Florida courts have found the existence of a duty (involving the same subject matter), they have founded the existence of the duty upon a special relationship. In those instances the courts, under the facts presented, had no reason to address the subject issue. See, for example: ST. GEORGE v. CITY OF DEERFIELD BEACH, 568 So. 2d 931 (Fla. App. 4th 1990). The cases do not support an argument that the courts have already classified the subject activity

In plaintiffs amended complaint, taken as true, see: PIZZI v. CENTRAL BANK & TRUST CO., supra, it is alleged:

* * *

“2. Defendant, MARTIN COUNTY SHERIFF’S DEPARTMENT, administered and operated a ‘911’ telephone and emergency dispatch service pursuant to the provisions of Florida Statute 365.17 1. In administering and operating that ‘9 11’ service, MARTIN COUNTY SHERIFF’S DEPARTMENT had a common law duty to use due diligence in discharging its duties, particularly where rights of individuals may be jeopardized by their neglect. This duty is ministerial in that it is positively imposed by law and the duty to perform is not dependent upon the DEPARTMENT’s employee’s

judgment or discretion." (R. 65, 66)

***

Under well settled principles of Florida law, see: FIRST NATIONAL BANK OF KEY WEST v. FILER, 145 So. 204 (Fla. 1933):

> "... a duty is to be regarded as ministerial when it is a duty that has been positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated; the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion (citations omitted). . ." 145 So. at page 207.

To suggest that the defendant had any duty other than to immediately relay the information to the appropriate emergency service entity ignores the clear terms of the subject statute(s) and the allegations of plaintiffs amended complaint! The system as implemented, is purely operational. The duties imposed, strictly ministerial.

E.

The plaintiff would suggest to this Court that the Fourth District was legally in error in rejecting plaintiffs contentions that the 911 system, as it presently operates, falls within a "category IV" classification as envisioned and defined in TRIANON, supra.

First, and foremost, the system was specifically enacted to provide citizens with rapid direct access to public safety agencies with the objective of reducing the

response time to situations requiring law enforcement, fire, medical, rescue, and other emergency services. The Legislature saw fit to place such system within the Department of General Services, division of communications. See: Ch. 74-357, supra. That the Sheriffs Department (of any county) may be an agency charged with the responsibility for maintaining a particular local system does not mean that the system (as perceived and implemented) is part of "law enforcement" as the Fourth District concluded. In point of fact not all activities of law enforcement are immune. See: TRIANON, supra, and WHITE v. CITY OF WALDO, 659 So. 2d 707 (Fla. App. 1"' 1995).

Second, the 911 system as it was initially contemplated operated under the Department of General Services specifically under the division of communications. Legislative intent is clear. The plan was not designed to be governed, controlled, directed or affected by local entities or agencies but that there ultimately be a system to include:

> ". . law enforcement, fire fighting, and emergency medical services, and may include other emergency services such as poison control, suicide prevention, and civil defense services..." See: Section 4, "State Plan," Ch. 74-357, Laws of Florida.

The "Rules and Regulations of the Department of General Services, division of communications, State of Florida, 9-1-1 emergency telephone number plan"

effective March 24, 1992, as initially implemented, upon review, leads to the inescapable conclusion that the operational activities of the plan do not fall within a category II-TRIANON-designation, but that said plan deserves a category IV classification as it is one of the numerous "general services" enacted:

> "...for the health and welfare of citizens..." See: TRIANON, supra, 468 So. 2d at page 921.

Third, there exists no discretion associated with the operation of the system. The information received by all operatives must be relayed, dispatched to the appropriate:

> "...law enforcement, fire, medical, rescue and other emergency services.. ." See: Section 2, Ch. 74-357, Laws of Florida.

See also: plaintiffs amended complaint, paragraph 2 (R. 65-7 1) and FIRST NATIONAL BANK OF KEY WEST v. FILER, supra.

Lastly, and contrary to the arguments so far advanced by the present defendant, the results reached in COOK v. THE SHERIFF OF COLLIER COUNTY, 573 So. 2d 406 (Fla. App. 2d 1991), and HOOVER v. POLK COUNTY SHERIFF'S DEPARTMENT, 611 So. 2d 133 1 (Fla. App. 2d 1993) do not collide with TRIANON, supra. Where, as there (and here), ministerial duties exist and they exist as created under a plan legislatively directed to be operated by the Department of General Services for the benefit of Florida citizens, there can be no collision with

TRIANON. As this Court stated in TRIANON, supra, there may be substantial governmental liability under category IV:

> "This result follows because there is a common law duty of care regarding how.. .general services are performed.. ." 468 So. 2d at page 921.

The nature of the conduct herein complained of is the failure of 911 personnel to comply with the ministerial duty (to relay information) in place for the health and safety of the citizens of this state. As stated by the Court in COOK v. THE SHERIFF OF COLLIER COUNTY, supra:

> "Mrs. Cook alleged, however, in her second amended complaint that according to the State of Florida and the Collier County 911 plans and Section 365.171, Florida Statutes (1985), the sheriff had a duty to relay the information concerning the sign because this was an established procedure contained in the plans. Although we do not find such a duty in Section 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 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.

In COOK, supra, the Court took the allegations of the plaintiffs complaint as true. The Fourth District in the instant cause bypassed any particular analysis, ignored the allegations of the plaintiffs amended complaint, and simply concluded that a 911 plan fell within a category II classification [which necessitated a "special duty" in order for a person injured as a consequence of a breach of that duty to maintain an

action against a sovereign agency]. The District Court of Appeal, Fourth District's opinion in the instant cause is erroneous and should be quashed.

The plaintiff would respectfully request that this Court:

1. Quash the opinion herein sought to be reviewed;

2. Hold that the state 9 11 plan as enacted, implemented and operated is a category IV activity under TRIANON, supra;

3. Hold that COOK v. THE SHERIFF OF COLLIER COUNTY, supra, was correctly decided; and

4. Reinstate plaintiffs amended complaint and remand for further proceedings as they may be warranted under the opinion of this Court as written.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the plaintiff would respectfully urge this Honorable Court to quash the opinion herein sought to be reviewed, to approve the decision rendered by the Second District in COOK, supra, and to reverse the final order of dismissal appealed.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that true copy of the foregoing Brief of Petitioner and attached Appendix was mailed to the following counsel of record this 17th day of August, 1.998.

ALEXIS M. YARBROUGH, ESQ.
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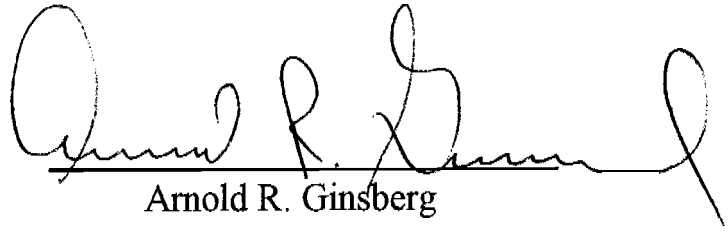

Arnold R. Ginsberg

APPENDIX

script 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., and DELL and FARMER, JJ., concur.

Sandra H. LASKEY, Individually and as **Personal Representative of the Estate of George Douglas Laskey, III, Appellants,**

v.

MARTIN COUNTY SHERIFF'S DEPARTMENT, Appellee.

No. 97-1196.

District Court of Appeal of Florida, Fourth District.

April 1, 1998.

Widow of driver killed in collision with vehicle proceeding the wrong way on interstate highway brought negligence claim against sheriffs department, alleging that sheriff had duty to dispatch law enforcement personnel in response to 911 call reporting vehicle. The Circuit Court, Martin County, Cynthia G. Angelos, J., dismissed cause of action. Widow appealed. The District Court of Appeal, Stone, C.J., held that operation of 911 emergency call system was part of law enforcement service provided by sheriff's office and therefore required special relationship to impose liability.

Affirmed.

1. Municipal Corporations ⇐723

To impose governmental tort liability, there must first be underlying common law or statutory duty of' care with respect to negligent conduct.

2. Municipal Corporations ⇐724

Governmental functions involving legislative, permitting, licensing, and executive officer functions and enforcement of laws and protection of public safety do not have common-law duty of care, and liability may be imposed only where special relationship exists between government actor and tort victim.

3. Municipal Corporations ⇐747(3)

Law enforcement personnel generally owe no duty to members of the public at large.

4. Negligence ⇐2

No common-law duty exists, absent special relationship, for one person to come to aid of another or to intervene in misconduct of third person to prevent possibility of harm to another.

5. Sheriffs and Constables ⇐99

Operation of 911 emergency call system was part of law enforcement and protection of public safety service provided by sheriffs office and therefore was "category II" function requiring special relationship before sheriff could be liable for failing to dispatch law enforcement personnel in response to report that vehicle was heading the wrong way on limited-access interstate highway.

6. **'Sheriffs and Constables ⇐99**

Any duty by sheriff to relay 911 emergency calls regarding traffic offenders is duty owed public as a whole and not to any third party who may subsequently be injured by act of traffic offender.

Robert H. Schott, Stuart, for appellants.

Alexis M. Yarbrough of Purdy, Jolly & Giuffreda, P.A., Fort Lauderdale, for appellee.

A-1

STONE, Chief Judge.

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 sheriffs office because the operation of a 911 response system is a category IV operational function of the government.

[1–4] 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 *Condominiurn 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 sheriff's 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.

[5, 6] 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 sheriffs 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.

We note #at in Cook v. *Sheriff of Collier County,* 573 So.2d 406 (Fla. 2d DCA 1991), the court determined that the sheriffs 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

A.2

case distinguishable from *Cook* the two are sufficiently similar for us to acknowledge [illegible]

Therefore, the order of dismissal is affirmed.

GUNTHER and SHAHOOD, JJ., concur.

Phillip WALDOWSKI, Appellant,

STATE of Florida, Appellee.

No. **97–0227.**

District Court of Appeal of Florida, Fourth District.

April 1, 1998.

Defendant was convicted in the Circuit Court, Broward County, Geoffrey D. Cohen, J., of stalking estranged mother of his children. Defendant appealed. The District Court of Appeal, Farmer, J., held that admission of anonymous complaints of child abuse against mother's new boyfriend was reversible error.

Reversed and remanded for new trial.

Criminal Law ⇐369.1, 1169.11

In prosecution for aggravated **stalking** for harassing estranged mother of defendant's children, admission of anonymous complaints of child abuse against mother's new boyfriend, which were found to be unsubstantiated and which were not shown to be made by defendant, was reversible error, where evidence **of defendant's conversation with mother's sister-in-law about new boyfriend and alleged conversion of $900 check** was also erroneously admitted, West's **F.S.A. § 90.404(2)(a).**

Richard L. Jorandby, Public Defender, and Ian Seldin, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellee.

FARMER, Judge.

We reverse a conviction and sentence for stalking and remand for a new trial upon a conclusion that the trial court erroneously admitted irrelevant evidence that we are unable to find harmless.

Defendant was charged with aggravated stalking for harassing the estranged mother of his children after [illegible] domestic violence had been issued. The state sought to adduce evidence of anonymous complaints of child abuse against her new boyfriend, made after defendant and the mother had separated. HRS investigated the complaints and found them unsubstantiated. There was no evidence that defendant made the anonymous complaints, and the jury was therefore invited to speculate that it was he who had done so. Moreover, these complaints had no logical relationship to "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *See* § 90.404(2)(a) Fla. Stat. (1997).

It was also error to admit evidence of the defendant's conversation with the mother's sister-in-law about the new boyfriend. The comment in opening statement was not a sufficient predicate for the state to adduce this otherwise inadmissible evidence. Similarly the alleged conversion of the $900 check was irrelevant to the charges.

This case was essentially a swearing match between defendant and the victim. Defendant **has convinced us that the admission of this evidence was not harmless error; these errors in the trial court "harmfully affected the judgment" *See* § 924.051(1)(a) and (7), Fla. Stat. (1997) (defendant has burden-of demonstrating** that a prejudicial error occurred in trial court, prejudicial **error** is one **that harmfully affects judgment or sentence).**

A. 3.