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IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,931

District Court Case No. 97-0 1196

Fla. Bar No. 137172

SANDRA LASKEY, etc.,

Petitioner,

vs.

MARTIN COUNTY SHERIFF'S DEPARTMENT,

Respondent.

REPLY BRIEF OF PETITIONER

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

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I.

INTRODUCTION

In this reply brief of petitioner 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 which accompanied plaintiffs initial brief, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

REPLY ARGUMENT

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 PARK CONDOMINIUM ASSOCIATION, INC. v. CITY OF HIALEAH, 468 So. 2d 912 (Fla. 1985) 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.

At page 16 of its brief the defendant suggests:

> ". . .Plaintiff' s argument that a duty exists to transfer the 9 11 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 the 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."

If any illogic exists, it is found in the defendant's suggestion that the 911 operator has the right to not pass on the information it receives! One does not know, as one cannot know from this record [or from the record before the court in COOK v. SHERIFF OF COLLIER COUNTY, 573 So. 2d 406 (Fla. App. 2d 1991)] what the actual operation entails. What one does know, as it is clear from the legislative enactments that authorize such operation in the first place, is that the Legislature directed that there be created a 911 plan, that the plan be implemented and that operation of the plan remain under the auspices and control of the Department of General Services to:

> ". . .provide citizens with rapid direct access to public safety agencies by dialing the telephone number '9 1 1 ', with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue and other emergency services..." See: Section 2, Chapter 74-357, Laws of Florida.

Hence, it may be stated that the defendant argues with itself when it erroneously concludes that plaintiffs argument is illogical in that the defendant had the right to not pass on the information "to itself." To suggest that the plan would allow the 911 operator to both receive the call and to make the decision to deploy or not deploy is itself illogical given both the purpose of the plan and plaintiffs amended complaint. See: PIZZI v. CENTRAL BANK & TRUST CO., 250 So. 2d 895 (Fla. 1971). The entire point of this matter is that a system be in place to provide citizens:

> "...with rapid direct access to public safety agencies by dialing the telephone number '9 1 1', with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue and other emergency services.. ." See: Section 2, Chapter 74-357, supra.

The defendant's suggestion that it had the right to both receive the call and in the same breath "to act on the call" is inconsistent with legislative intent. At Section 6 of Chapter 93-17 1, Laws of Florida, the Legislature discussed the funding required for establishing or providing the "911" service. At Section 6 of Chapter 93-17 1, supra, the Legislature stated:

> "...The '911' fee revenues shall not be used to pay.. .for emergency responses which occur after the call transfer to the responding public safety entity..."

When one reads the enabling legislation in para materia, it becomes abundantly clear that it was not within the intent of the Legislature that the local servicing

organization also possess the authority to "dispatch" or "not to dispatch." The duty imposed: to receive information and to relay it to the appropriate servicing organization!

As plaintiff stated in her initial brief, 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! Any suggestion that the system operator is possessed of the right to receive the call and to decide whether or not "to deploy" begs the dispositive question. The threshold question relates to whether or not the subject activity falls within the category II or category IV classification as found in TRIANON. That the legislation imposes a duty upon the recipient of the phone call to pass on the information cannot be disputed!

Assuming the defendant's argument is not itself illogical and is not necessarily inconsistent with Section 6, Chapter 93-171, supra, it must still be rejected for the reason initially noted, to wit: one does not know what the basic operational setup is, given the trial court's decision to dismiss plaintiffs amended complaint. We simply do not know how the system was set up herein or whether the system as set up followed legislative guidelines (or its own protocols). Any attempt

to justify the result reached by relying on matters not "of record" should not be allowed. See: PIZZI , supra.

At page 13 of its brief the defendant, suggesting the absence of any duty (owed) states:

> "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 identify in the statute she cites an affn-mative duty to provide 911 service, a breach of which would create a private cause of action. There is no decisional authoritv which holds a duty exists under Section 365.17 1 to transfer even, 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 Section 365.17 1 to provide 9 11 services.. ."

First, and perhaps foremost, plaintiff noted at page 18 of her initial brief that it was the result in COOK v. SHERIFF OF COLLIER COUNTY, supra, which plaintiff sought to have approved. Plaintiff sought (and seeks) such result because if this Court holds as plaintiff requests, that the 911 system was set up to operate within the framework of the Department of General Services as a "category IV" activity (enacted to provide one more general service for the health and welfare of citizens), then the result in COOK would be consistent with both TRIANON, supra, and the opinion of this Court in this case. There was nothing in the plaintiffs initial brief to suggest that plaintiff sought to have the rationale of COOK "approved by this Court."

Second, the defendant is correct in one aspect of its assertions. There is no "decisional authority" which holds a duty exists under Section 365.17 1 to transfer every 911 call for law enforcement assistance. However, and conversely, there is no case suggesting no such duty exists. In point of fact recent decisions from this Court such as McCAIN v. FLORIDA POWER CORP., 593 So. 2d 500 (Fla. 1992) would appear to support the plaintiffs contention that such a duty does exist. Given the subject legislative enactments, one would think such duty does exist and that the 911 operator does not have the right to refuse to pass on the information received. See: Section 6, Chapter 93-17 1, supra.

Regarding the defendant's statement that plaintiff fails "to distinguish the operation of a 911 service from the police powers of the state to protect the public.. ." plaintiff would note that argument is found at pages 18-25 of her initial brief. As stated in part there-the 911 system 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 and to allow coordination with "private agencies." It would appear the defendant fails to discern the significance of the argument plaintiff

advances. There is simply nothing in the enabling legislation to suggest that the system was designed to operate solely within the sphere of "law enforcement" or as a function of the police power of the state. In fact, the opposite would appear to be true.

Lastly, plaintiff would comment briefly on the defendant's reliance upon the out-of-state cases cited in its brief. As a matter of general information, perhaps without legal significance, most of the cited cases are collected in ANNOTATION: LIABILITY FOR FAILURE OF POLICE RESPONSE TO EMERGENCY CALL, 39 A.L.R. 4th 691. The annotation itself collects those cases where the issue involved was the purported liability of the sovereign for the failure of the police to respond to an emergency call. The annotation does not deal with the threshold issue of what happens when a ministerial duty (imposed by statute) is not performed.

In reviewing the cases cited by the defendant it becomes apparent that the case of WANZER v. DISTRICT OF COLUMBIA, 580 A. 2d 127 (D.C. App. 1990) is somewhat on point here. However, although closely on point, the case distinguishes itself as the court considered the transcript of the conversation between the plaintiff and the 911 dispatcher, local procedures, protocols, manuals, etc. in its disposition of the case. While the case reached the appellate court upon a dismissal of the plaintiffs complaint, there is nothing in that case to suggest either

the trial court or the reviewing court was limited to the four corners of the complaint as filed. In point of fact the court decided the case after a consideration of the record facts developed to that point. This is something that has not occurred here. Further, and more to the point, there is no discussion in WANZER, supra, regarding the enabling legislation. Given the statutory scheme involved here, it may be concluded that WANZER, supra, is distinguishable from the instant cause.

The arguments advanced by the defendant to support the result reached by both the trial court and the Fourth District are without merit. The EMERGENCY TELEPHONE ACT, SECTION 365.171, F. S. (1974) ["THE ACT"] provides a mechanism for citizens to communicate. A fair reading of THE ACT indicates that it is, and was, the intent of the Legislature to provide citizens access to other services. The system, as contemplated, enacted and implemented was not designed to operate solely within the sphere of law enforcement nor to remain unconnected with the private sector. Guided by the Director of the Division of Communications, the system was set up to allow coordination with private agencies so as to provide rapid access for the citizens of the State of Florida to all services! Neither the Fourth District Court of Appeal in the opinion herein sought to be reviewed nor the

defendant in its brief to this Court has provided this Court with any authority to support a contention that the subject activity should be classified "category II" as envisioned under TRIANON, supra. As a matter of fact the Fourth District ignored the legislative history of THE ACT. The defendant disagrees with the plaintiff concerning the plain meaning of the words chosen by the Legislature. 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 itself falls within the classification of "law enforcement" as contemplated in TRIANON, supra. It should be concluded that the 911 plan is but one of numerous "general services" enacted for the health and welfare of the citizens of the State of Florida. See: TRIANON, supra, 468 So. 2d at page 921. Given this conclusion the opinion herein sought to be reviewed should be quashed.

III.

CONCLUSION

Based upon the reasons and citations of authority contained in this brief as well as those found in plaintiffs initial brief on the merits, the plaintiff would respectfully urge this Honorable Court to quash the opinion herein sought to be

reviewed and to reverse the final order of dismissal appealed.

Respectfully submitted,

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I DO HEREBY CERTIFY that true copy of the foregoing Reply Brief of Petitioner was mailed to the following counsel of record this 29th day of September, 1998.

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